International Criminal Justice and State Sovereignty: An African Perspective

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ABSTRACT

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This study argues that their history of colonization has made the African states protective of their sovereignty and inclined to support a strong position on nonintervention. Furthermore, that shared understanding has fueled African leaders’ opposition to the rulings of the International Criminal Court (ICC) and the perceived abuse of the principle of universal jurisdiction. Through a constructivist approach and an interpretive method of inquiry, this study found that the African leaders have relied upon the African Union to present a common front in responding to this perceived legal imperialism. The concept of sovereignty has evolved in Africa from its perception at the single state level to a more unified notion a collective sovereignty at the continental level. Additionally, the implication of the ICC in the African continent often obstructs the resolution of conflicts and impedes on the peace processes through the means of diplomacy, power-sharing, and local forms of justice. Finally, the African states have considered the ICC and universal jurisdiction efforts to lack legitimacy and have sought to de-legitimize them accordingly.

Approved: ______________________________________________________

Andrew A.G. Ross

Assistant Professor of Political Science
To the memory of my father Kalidou Saidou Ba,

To my mother Aissatou Nazirou Ly, an everyday blueswoman

To my aunt Néné Couro, who sold her cow, to help me pay for my trip to the U.S.
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CHAPTER 1: INTRODUCTION

Antonio Cassesse, the first President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in his comments about state sovereignty and international criminal law said, “either one supports the rule of law, or one supports state sovereignty; the two are not compatible” (Cryer, 2005, p.980). This assertion illustrates how much has changed since sovereignty was first viewed not as opposed to international law, but as its most important norm. Obviously, how one defines these two concepts depends on where one stands within the continuum because state sovereignty and international criminal law are not rigid and abstract concepts. It is indeed important to note the similarities and differences in the approaches to sovereignty. One must also reiterate the fact the international law and sovereignty are not two opposite notions. In fact, state sovereignty is part of international law, and is embodied in the UN Charter, especially in its Article 51.

One theoretical approach to sovereignty is to perceive it as a pre-legal concept that is monolithic and constant (Cryer, 2005). Such a conception would most likely make states less inclined to engage in commitments that would erode their sovereignty. However, this rigid approach to sovereignty is not how most states and scholars conceive it, despite the fact that international lawyers are often wrongly accused of doing so (Kennedy, 1996).

The second approach to notions of sovereignty holds it as a more flexible concept, one governed by the international legal order that also defines the basic rights and duties of states. This view of sovereignty emanates from Hans Kelsen and is widely
adopted by most scholars and practitioners of international criminal law (Cryer, 2005).
Indeed, viewing sovereignty as an absolute and unchangeable attribute that states have tend to make any prospects of international criminal law unrealistic.

Different people hold different views as what state sovereignty means. Moreover, the rule that there should be no interference in state sovereignty begs this question: what are the rights and the duties associated with state sovereignty (Lattimer & Sands, 2003)? This question has not only surfaced with the rapid evolution of the globalizing world over the past few decades; the debate about the transformation of international law has been going on for a long time. As Cryer (2005) noted, Wolfgang Friedman asserted in the 1960s the international legal system was moving from an international law of coexistence to an international law of cooperation. Sovereignty should be understood as a changing continuum that adjusts to the evolving nature of international law.

The single most important milestone in the process of implementation of international criminal law in the recent years has been the creation of the International Criminal Court (ICC). Its emergence brings up interesting questions about the relationship of the ICC to the concept of state sovereignty. Cherif Bassiouni, a leading expert on international law, argues that the ICC “is not a supranational body, but an international body similar to existing ones… The ICC does no more than what each and every state can do under existing international law… The ICC is therefore an extension of national criminal jurisdiction… Consequently, the ICC does not infringe on national sovereignty” (Lattimer & Sands, 2003, p.181). This assertion is questionable and there is
a sizeable amount of literature debating this issue. The counterargument posits that the ICC does infringe on state sovereignty.

Scholars disagree about the extent to which the ICC poses a challenge to the concept of state sovereignty. This means that there are disagreements about the need to appraise the nature of international law and how to make it more compatible with state sovereignty. In the African context, the balancing act between international criminal justice and state sovereignty is even more delicate. This study does not uphold the rigid view of state sovereignty, one that does not permit outside intervention, even in instances where a state is unable or unwilling to enforce the rule of law. It does not either totally absolve the idea of permitted intervention, which would be allowed under a more flexible view of state sovereignty. I propose a third understanding of state sovereignty. This study argues that sovereignty is not immutable and it evolves in different directions at different times. As such, the meaning of sovereignty is always bound to be subject to political contestation.

Literature Review

As Cryer (2005) puts it, state sovereignty is the “bête noire” of the international criminal lawyer (p. 981). Bassiouni (2001) asserts that the ICC does nothing more than what any one state could do under existing international law, which means that the ICC is not a threat to state sovereignty. Sadat (2002) also applauds the Rome Statute but goes a step further in asserting that the ICC represents an important shift in the structure of international law that include the international civil society, in addition to the nation-
states. Lattimer and Sands (2003) argue that sovereign equality is more a legal concept than an empirical reality.

At the other end of the spectrum, is an extensive scholarship portraying the ICC and universal jurisdiction as pitfalls (Kissinger, 2001). Given the fact the ICC depends on states for cooperation, prosecution, and enforcement, power politics will still pose a challenge for international criminal justice (Roach, 2009). The extensive publications related to the ICC and its implications on state sovereignty are much skewed towards the United States’ stance on the issue, including the hegemonic opposition (Smith & Smith, 2009). When the scholars write about international criminal justice and state sovereignty, the debate is more likely to focus on the relation between those two concepts from the prism of the great powers. Mamdani (2009) has addressed the consequences of the implication of the ICC on the conflict in Darfur, but there is not a substantive appraisal of the effects on state sovereignty at the continental level in Africa. There is thus a lack of scholarship on the effect of international criminal justice on state sovereignty in Africa.

**The Problem**

The idea of a strong version of state sovereignty has been a critical part of the contemporary political process in Africa. Emerging from the colonial era, African countries have been particularly sensitive about their sovereignty and about the principles of non-intervention, except in select cases where close ties between the former colonial power and the newly independent countries were preserved. Among the African political elite, there was an emphasis on a “strong, pre-World War II version of sovereignty, that the Organization of African Unity (OAU) developed a markedly modest institutional
capacity to forge distinctively African concepts of continental legal obligation as limitations on African sovereignty” (Nagan & Hammer, 2004). This unique norm of sovereignty reflected African states’ concerns regarding a return to new forms of colonialism during the post-independence era.

However, Africa remained at the periphery of the new dynamics of international criminal law post-World War II era and during the Cold War. The Nuremberg trials seriously curtailed the absolutist idea of state sovereignty and consecrated the notion of individual responsibility for war crimes, which opened a new era in the administration of international law. Nuremberg established the possibility of state officials facing justice for crimes against humanity regardless of where they occurred. The end of the Cold War marked an unprecedented rise in the number of ethnic conflicts accompanied by massive human rights violations in Africa and elsewhere around the world. This led to the creation of two ad hoc tribunals for Rwanda and the former Yugoslavia to bring to justice individuals accused of having committed crimes as per international law. The Rome Statute entered into force on July 1st 2002, establishing the ICC, which opened a new era in the balance between state sovereignty and international law.

Some great powers showed their hostility towards the implementation of the ICC from the beginning of the process. However, “smaller states that had much to gain from a working international rule of law concept, including the protections of their political independence and territorial sovereignty given by law, began exercising jurisdiction within their domestic legal processes over criminal conduct by foreign leaders deemed to be subject to universal jurisdiction” (Nagan & Hammer 2004, p.29). In that regard, the
African countries supported the idea of the implementation of the permanent court because of the benefits they would gain from the strengthening of an international body of laws. At the same time, countries such as Belgium went a step further into implementing the principle of universal jurisdiction.

From the beginning, the relationship between Africa and the ICC has been one of mutual support. Africa’s support for the ICC is based not on the false assumption that it has the monopoly of the atrocities about which the ICC has competency but, as Moghalu has noted, on the fact that it happens to have some of the weakest states in the international society (2006). Thus, Africa and Europe have the largest number of states that ratified the Rome Statute although it is very unlikely that European officials would face the ICC prosecutors. Asia, despite being a developing region, is economically more powerful than Africa, and therefore, better able to resist “the hegemonic pressures” that the ICC represents (Moghalu, 2006).

The records of the ICC have proven that the court has so far been inclined to prosecute Africans more than any other members of the international community. The indictment of President Omar al Bashir of Sudan has sent waves of disapproval and defiance throughout the continent and, as such, the issue of state sovereignty returns to the forefront of the debate. The case of Sudan raises the question about the extent to which the ICC is violating the sovereignty of the African nations. Furthermore, there is a sense of unfairness in the ways in which the ICC prosecutors wield their power under international law.
Given this empirical record, it is important to investigate the means by which African states are countering the actions of the ICC and the rule of international criminal law. The invocation of state sovereignty has largely been the basis for disapproval or hostility towards the international justice apparatus across the various continents. In Africa, however, this hostility did not manifest itself until the ICC began charging African governments and its political officials of crimes. The ICC is as much a political symbol as a legal one, and it has made many controversial decisions. The ways in which African states are dealing with the rulings of the ICC will impact the future balance between state sovereignty and international criminal law.

**Summary of Argument**

The purpose of this study is to understand the ways in which international criminal law affects state sovereignty in Africa and the responses it generates. Actions by the ICC and ad hoc tribunals have resulted in an erosion of African state sovereignty. This gradual breakdown in sovereignty will be investigated through analysis and interpretation of the discourse and actions of African political elites. This study will investigate to what extent these perceptions are manifest and how African states respond to this perception. Furthermore, this study will reflect on the implications of such countervailing actions and discuss the future of the international law norms in the African context.

This project examines the following questions:

1. How and why has African support for the ICC shifted?
2. Is there a collective sense of sovereignty at the continental level in Africa that attempts to counter the ICC and the “abuse of the principle of universal jurisdiction”?

Answering these questions requires first understanding the nature of state sovereignty and historical debates about what it is and how it has changed. This study argues that their history of colonization has made the African states protective of their sovereignty and inclined to support a strong position on nonintervention. This shared understanding of sovereignty constitutes and shapes African states’ collective identity. Furthermore, that shared understanding has fueled African leaders’ opposition to the rulings of the ICC and the perceived abuse of the principle of universal jurisdiction. The African leaders have relied upon the African Union to present a common front in responding to this perceived legal imperialism. The concept of sovereignty has evolved in Africa from its perception at the single state level to a more unified notion a collective sovereignty at the continental level.

Additionally, the implication of the ICC in the African continent often obstructs the resolution of conflicts and impedes on the peace processes through the means of diplomacy, power-sharing, and local forms of justice. Finally, the African states have considered the ICC and universal jurisdiction efforts to lack legitimacy and have sought to de-legitimize them accordingly.

**Methodology**

Studies about state sovereignty and international criminal justice have rarely focused on the African context. One of reasons for this is the comparatively short history
of the African state. In the rare instances where research does include Africa, most studies focus on how politics on the international level affect Africa. There are, however, critical phenomena that emanate from African elites meant to counter the ICC while preserving their own interests that are important and should be studied on their own merits. Such strategies have not been thoroughly investigated, and the goal of this study is to fill that gap.

In order to develop a deeper understanding of the dynamics of international criminal law and state sovereignty in Africa, I aim to use a multidisciplinary approach by analyzing multiple concepts through different prisms. To that end, I will use a qualitative research method supported by textual analysis and in-depth case study. Qualitative research methods can be defined as “methods for examining social research data without converting them to a numerical format” (Maxwell, 1996). This study, whose goal is to better understand human social experiences through constructed social realities, is best suited by a qualitative research method of social inquiry. Indeed, qualitative research denotes a form of scholarly inquiry that can supplement and/or challenge the findings of quantitative methods.

My methodological choice is guided by the subject matter. This study examines social phenomena, human behavior, and political outcomes associated with international criminal law and their attendant repercussions on perceptions of state sovereignty by African political elites. It does not intend to produce any objective and generalizable causal relations between these variables. Instead of establishing a causal relation, the focus of this study lays in developing a deeper understanding a social phenomenon.
According to Adri Labuschagne (2003), “a method of qualitative research design, when broadly defined, will include action research, case study research, life histories, hermeneutics, and general narrative inquiry, and participant observer researches, among others” (Labuschagne, 2003). However, given that this is a preliminary investigation, this study will privilege desk-based research over fieldwork or participant observation. It is assumed that social reality, within which this study of political actions and interactions originates, fits in general patterns of subjective human behavior. Therefore, using a qualitative research approach in this study allows me to attain a realistic view of the social phenomenon that is the subject of this inquiry.

In this study, I am interested in understanding the institutional and legal framework of the relations between international criminal law and state sovereignty in the African context. Given the fact that in the study of social sciences, human subjectivity is often shaped by individual perceptions or those of the social group, I rely on constructivist and interpretive approaches in the social sciences to analyze the discourse and actions of the African political elites in order to get a better grasp on how such actors consider the ICC to be impinging on state sovereignty in Africa.

**Chapter Outline**

The current chapter serves as an introduction to the thesis and lays the foundation for my research. Chapter Two consists of a critical literature review, a definition of key concepts of this study, and an articulation of its theoretical approach. It examines the various literature related to the origins and development of the concept of the state sovereignty, and what sovereignty has meant in the African context.
The first case study concerns the judicial proceedings against Hissène Habré, which precipitated the opening of a case against the government of Senegal in the International Court of Justice by the Belgian government. Chapter Three focuses on the Habré case and its political and judicial implications. It discusses also the issues of sovereignty at stake for Senegal and the African Union on one hand, and Belgium on the other, with a particular attention paid to what many Africans view as the abuse of the principle of universal jurisdiction (African Union, 2010).

In Chapter Four, I discuss briefly the history and evolution of the ICC before providing an avenue for the study of the complex relations between Africa and the ICC. I explore further the ways in which African political elites and the African Union have reacted to what they view as a violation of sovereignty and judicial imperialism. Furthermore, I also investigate the consequences of ICC involvement in Africa in the peace processes on the continent.

Drawing from the empirical arguments put forth in the previous chapters, I argue in Chapter Five that the process of de-legitimization of the ICC and universal jurisdiction is a response of what Africa perceives as judicial imperialism. However, African states are not violating norms of international law or defecting from international regimes, they are rather establishing alternative norms rooted in their distinct historical contexts.
CHAPTER 2: RESEARCH CONTEXT AND THEORETICAL APPROACH

Virtually all the land on planet Earth (and part of the Oceans) is divided into areas delimited by borders. Typically, within those borders, the highest political authority emanates from a single source that could be a liberal constitution, a theocracy, an autocracy or some other kind of political regime. The rule within borders by a single authority comprises the idea of sovereignty. The concept of sovereignty can be traced back to the sixteenth and seventeenth centuries, but it was not until the middle of the seventeenth century that it became a reality across the European continent. State sovereignty spread across the globe after World War II as the European colonial empires collapsed and gave way to independence and nascent states in Africa and Asia.

However, the relative strength of sovereignty is now the subject of much debate within international relations. Both intervention and integration pose serious challenges to the supremacy of the state’s sovereignty over its territory; and the evolution of the theory and the practice of sovereignty throughout history has been precipitated by what Daniel Philpott has called “revolutions in sovereignty” (2001). For examples of challenges to sovereignty, consider that during the past two decades, the United Nations has authorized military and or humanitarian intervention in countries such as Haiti, Rwanda, Somalia, Iraq, Afghanistan, Bosnia, Cambodia, and Liberia. Also, processes of integration are transpiring with the advent of the European Union (EU). To this date, twenty-seven states are members of the EU, with sixteen of them sharing the same currency, continuing a process of integration that began in 1950 with the founding of the European Coal and Steel Community.
The field of international criminal justice represents an important area in which the status of sovereignty is changing. In order to understand the reaction of African leaders to international criminal justice by appealing to strong norms of nonintervention, it is important to revisit the history of the concept of sovereignty. A perception of possible violations of sovereignty through the abuse of universal jurisdiction is at the heart of the debate surrounding the prosecution of Hissène Habré. African states argue that the ICC is infringing on their sovereignty because it is unfairly targeting only Africa. A consequence is that the ICC on its current course is viewed by the African political elite with ever decreasing legitimacy.

This chapter begins by revisiting the standard argument that places the origins of state sovereignty in the Peace of Westphalia. That concept is developed here because it represents the commonly understood narrative, although as it will be shown later, this study does not endorse that concept of the "Westphalian commonsense." I will also argue against the discourse that presents African countries as “quasi-states.” Finally, I will argue that the predominant assertions in both sets of discourses lack rigor because they only see Africa as part of the periphery and, in this context, the Westphalian approach does not make much sense (Grovogui, 2002). The remnants of that alienation and subordination, and the denial of state sovereignty that the Europeans enjoy, are still visible in the discourse and actions of the African political elite. Decolonization did not give the former colonies the full benefits of authority coupled with sovereignty, in part because African states continued to perceive that their former colonizers kept them subordinate.
The use of the principle of universal jurisdiction is an exemplary way to assess the implications of international criminal justice on state sovereignty. It is in this context that one must understand why the involvement of Belgium in the Hissène Habré case has created such uproar on the Africa continent. One of the key arguments in Chapter Three is that Belgium has exercised selective judgment on the meaning of state sovereignty in its pursuit of “justice” for human rights violations. That chapter compares how the principle of universal jurisdiction was used to prosecute Donald Rumsfeld and Ariel Sharon, in which both cases were dismissed, and the prosecution of Hissène Habré, which the Belgian Parliament allowed to continue. We cannot understand the development of a legal case as this one without some understanding of sovereignty as a concept and its history.

The Peace of Westphalia

Philpott contends that the sovereign states system is the result of revolutions of ideas at the international level (2001). In other words, there is a causal relation between revolutions in ideas and change in the ways that state sovereignty is theorized and practiced. Although revolutions have so far only been analyzed at the domestic level, the notion of international revolutions is pertinent to better understand the two major shifts that occurred in the world at Westphalia and after World War II. The first one is what John Ruggie calls, “the most important contextual change in international politics in the millennium,” which was the shift from the medieval system in Europe to the modern system that was sanctioned in 1648 (Ruggie, 1986).
During the late phase of the medieval era in Europe, the Protestant Reformation led to a century of wars across Europe that culminated with the Thirty Years War (1618–1648). The Peace of Westphalia that marked the end of that war opened a new era of state sovereignty. Three centuries later, discourses on nationalism and racial equality helped shape new ideas and led to protests, revolts, and wars over colonialism. The subsequent independence movement of the former European colonies in Africa and elsewhere reshaped the dynamics of international politics when the Westphalian concept of state sovereignty spread across the world, and resulted in the second international revolution (Philpott, 2001).

It is not within the scope of this study to provide a detailed account of the Peace of Westphalia and its consequences in the making of the modern system of international politics. However, this brief summary will show how important was the Peace of Westphalia for the evolution of the concept of state sovereignty, as it is currently understood and it is still relevant to the discussion of state sovereignty in Africa.

As Philpott contends, with the Peace of Westphalia, princes and kings had become trustees or tyrants of a unitary state, a single body with corporate interests (2001). This did not mean that states did not have reasons to fear each other any more. Surely, there were still threats that states might attempt to seize each other’s territory, defeat their army, or just ruin their economy, but the interesting thing related to the Peace of Westphalia is that it reduced the threat of interfering with other states’ internal affairs.

The significance of the Peace of Westphalia as the origin of the new international order was the point made by the international lawyer Leo Gross, who called it “the
majestic portal which leads from the old world into the new world” (Philpott. 2001, p.76). Hans Morgenthau has followed up with the same argument (Morgenthau, 1985). However, the fact that the Peace of Westphalia did not change the world system ex nihilo needs to be stressed. In fact, the Peace of Westphalia was the outcome of many events that stretched back to centuries of war and rivalries across Europe.

The breakthrough achievement of Westphalia was the fact that it was a comprehensive understanding that was designed to apply across all of Europe. However, nowhere in the treaties was sovereignty or a system of sovereign states declared, although crucial elements of sovereignty appear in it (Steiger, 1998). The delegations viewed themselves as parties of a larger system of unitary entities and it is behavioral change that followed Westphalia that made this settlement so crucial to the emergence of the modern international system. Westphalia embodied the triumph of the State over the Empire. States became the unitary constitutional entities in Europe, not facing any threats from the Holy Roman Empire. However, the Empire was also a signatory to the treaties and did not disappear until 1806. Therefore, the triumph of the State over the Empire unfolded progressively for more than a century in Europe. The driving force during the negotiations that led to the Peace of Westphalia was state autonomy, a concept that ultimately extended to the states within the Holy Roman Empire and that replaced the medieval notion of subordination.

After all, it was in practice that sovereignty became a reality after Westphalia and as Steiger concluded, “sovereignty – as a form of external and internal independence and self-determination in relation to every other power – became the fundamental principle of
the European order. Thus, a horizontally conceived order of powers developed, in which all powers, including Emperor and Pope, were legally placed side by side” (1998, p.440).

**Defining State Sovereignty within International Relations**

The fact that the modern international system is divided into sovereign states is a basic assumption on which there is consensus between the relevant schools of thought. There is also an agreement on the definition of sovereignty as, “the institutionalization of public authority within mutually exclusive jurisdictional domains” (Ruggie, 1986, p.143). Whereas Morgenthau views sovereignty in terms of its legal definition as the state’s authority to create and enforce laws within a defined territory, Waltz is concerned about whether or not states are independent (1985; 1979). Gilpin states that, “within the territory it encompasses, the state exercises a monopoly of the legitimate use of force and it embodies the idea that everyone in the territory is subject to the same law or set of rules” (1981, p.17) Notwithstanding similarities, there are differences among the major traditions.

While attempting to summarize the current state of knowledge about state sovereignty, it is necessary to explore the main theoretical and analytical issues related to the research on sovereignty, and the state because there is a wide-ranging literature and various arguments from international relations theorists on sovereignty. As Janice Thomson has argued, the intense debate among the different schools of thought has, “rescued the concept of sovereignty from its abstract and sterile treatment in the field of international law and political philosophy (1995). The notion of sovereignty has
therefore gained a new theoretical meaning and has become more relevant in the study of international politics (Walker, 1988).

From a realist perspective, the essence of sovereignty is understood by the state’s ability to make authoritative decisions within its territory, including the decision to wage war. Liberal interdependence theorists define sovereignty in terms of the state’s ability to control actors and activities within and across its borders (Thomson, 1995). In order to figure out whether sovereignty has been eroded or consolidated, there needs to be a clear assessment of what sovereignty is; and the concept of sovereignty must be operationalized into measurable and quantifiable indicators. Both the realist and the liberal interdependence perspectives on sovereignty have a unitary view of the nation-state. Departing from this reductionist approach the “non-realist theory of sovereignty” emphasizes the international dimension of sovereignty (Rosenberg, 1990). Indeed, international relations among states plays a role in defining the sovereign state as important, as do the relations between the states and their societies.

The Defining Paradigm in International Relations

The debate within International Relations has been dominated by state-centric theories that assume that states are, by definition, sovereign. However, beginning in the 1970s, liberal interdependence theorists challenged the state-centric approach to world politics (Cooper, 1972; Keohane & Nye, 1972; Keohane & Nye, 1977). They argued that state sovereignty was eroded by the interdependence of the global economy and the emergence of new technologies. Modern technology enabled sub-states and non-states actors more control over the flow of goods, people, information, and ideas across borders.
Along with that, scientific and military technologies have resulted in the production of weapons of mass destruction that made states less capable of protecting their citizens and territory (Rosecrance, 1986).

However, critics of the liberal interdependence theory of international relations have challenged the argument that state sovereignty has eroded. They contend that there is no empirical evidence that suggests that interdependence has increased and that sovereignty has decreased. Furthermore, they argue that the current ratios of international to national flow of people, information, and capital are not very different from what they were during the nineteenth century. Therefore, if these ratios are a good basis for the measurement of the evolution of interdependence, the empirical data suggests that interdependence has not increased, and that it has not eroded sovereignty (Thomson & Krasner, 1989; K. Waltz, 1970).

Constructivists and critical theorists have argued that sovereignty is not a timeless attribute of the state; rather it is a feature of the modern western state and that world politics during the medieval era were not based on sovereignty but on heteronomy (Ashley, 1984; Ruggie, 1983). Speaking of Europe, Ruggie describes the medieval heteronymous system as one in which, “the feudal ruling class was able to travel and to assume governance from one end of the continent to the other without hesitation or difficulty because public territories formed a continuum with private estates” (Ruggie, 1983, p.274). Ruggie argues further that, “the transition from heteronomy to sovereignty has been the most important contextual change in international politics in the millennium” (Ruggie, 1983, p.274).
Sovereignty does not just entitle an entity the power to make claims about territory; it is also, what makes a territorial entity, “eligible to participate in international relations” (James, 1986, p.92). However, those criteria are not immutable, they have evolved over time. In definition, sovereignty is “a product of intersubjective consensus among state leaders, it is what some collective of state leaders say it is” (Thomson, 1995, p.218).

In order to imbue the notion of sovereignty with empirical indicators, it is useful to define sovereignty with general characteristics that foster a basic understanding of what it entails across different fields of study. To that end, sovereignty can be defined as, “the recognition by internal actors that the state has the exclusive authority to intervene coercively in activities within its territory” (Thomson, 1995, p.219). One might add to that the need also of recognition from external actors. The key notions in this definition are recognition, the state, authority, coercion, and territory. The recognition criterion of sovereignty raises an empirical question: whose recognition is required? Ashley argues that recognition is important to the definition of sovereignty to the extent that sovereignty is not an attribute of the state, but it is rather attributed to the state by other states (1984). States do indeed depend on other states for their authority. Some scholars posit that the Great Powers make up the regime of sovereignty recognition, but it is still unclear who must do the recognizing: the great powers, all states, the United Nations, or the hegemonic power (Ashley, 1984)?

It is generally assumed in international relations that sovereignty is exercised at the level of the state, despite the fact that it is not clear what exactly constitutes the state.
Halliday argues that the state is the same as a country as a whole, including territory, government, people, and society (1987). Neoliberals are more sensitive to the distinction between state and country (Keohane & Nye, 1972). In sum, the state can be viewed as a bureaucratic apparatus that has control over a territory and claims monopoly on the use of coercive forces (Weber, 1964, p.154).

Although states can and do delegate their authority to other actors or institutions, they are the sole claimants and are recognized as having the authority to define the political and what is subject to state coercion (Wolfe, 1989). In the Weberian tradition, the state monopolizes the organized use of forces or violence, however, rebels, criminal organizations, militias, terrorists, have persistently challenged the state’s monopoly on coercion, without necessarily at the same time fostering questions about state sovereignty. While it is plausible to define sovereignty in terms of the state’s monopoly on the use of violence, empirical evidence suggests otherwise (Thomson, 1995).

Another important component of the definition of state sovereignty is territory. Territory is a geographic space limited by defined physical borders. The territorial dimension of sovereignty entails the defense of the geographic boundaries and the linkages between the state and the people.

**State versus National Sovereignty**

The purely legal definition of the concept of sovereignty makes it a fixed and immutable attribute whereas its institutional feature addresses the legitimation of the nation-state as well (Barkin & Cronin, 1994,). The political legitimation of the nation-state changes over time, so the notion of sovereignty becomes a variable itself. Barkin
and Cronin argue further that, “there has been a historical tension between state sovereignty, which stresses the link between state authority and a defined territory, and national sovereignty, which emphasizes a link between sovereign authority and a defined population” (1994, p.108).

The historical process of the norms in international relations is not a linear one. The international community often privileges norms of states’ rights specific groups within the state. At other times, the balance tilts in favor of the rights of groups of people against the rights of established states. The shift between the prevalence of state sovereignty against national sovereignty or vice-versa occurs after systemic crises, such as world wars or large political events when these events are thought to have been the cause of the crisis (Barkin & Cronin, 1994). State sovereignty and national sovereignty are viewed in the international system as being mutually exclusive, which leads to a shift in the dominance of one over the other.

**Sovereignty as a variable, or a constant**

From the realist perspective, sovereignty is the most critical assumption upon which the notion of anarchy is based; therefore sovereignty must be a constant. Stephen Krasner argues that the, “historical legacy of the development of the state system has left a powerful institutional structure (sovereignty), one that will not be dislodged easily, regardless of changed circumstances in the material environment” (Krasner, 2009, p.90).

A realist perspective would stress the fact that the anarchic feature of the international system allows every state to be the sole arbiter of its own interests, but it also requires that each state have the means to attain them. Yet diplomatic recognition
and legitimacy are prerequisites for participation in the system as a full member.

Therefore, a sub-national group would be viewed as terrorist if it engaged in a military
operation to protect a territory or its people whereas a state would be viewed as doing its
legal obligations if it did the same.

In international relations, sovereignty refers to two different entities: states and
nations, although the two are often confused. States are defined in terms of, “the
territories over which institutional authorities exercise legitimate control” (Barkin &
Cronin1994, p.111). A nation can be defined as, “a community of sentiment which
would adequately manifest itself in a state of its own; hence, a nation is a community
which normally tends to produce a state of its won” (Weber, 1964, p.176). “State” and
“nation” are viewed as two close, but different, sources of legitimacy for political action
within a defined territory. There is a continuum between the statist and the national
legitimation of sovereignty and along that continuum, the nation-state has characteristics
of both.

The development of the concept of nation occurred about a century after the
emergence of the modern understanding of the state and the main feature of nationalism
is the claim that nations are politically entitled to self-determination and that national
solidarity should serve as the criterion that defines the nation (Barkin & Cronin, 1994).
Thus, unlike the legitimacy of state sovereignty, the legitimacy of national sovereignty
does not stem from the boundaries, but from the aspirations of the community of
sentiment. It is through such a prism that one must understand how African states have
been able to withdraw part of their unitary sovereignty and instead invest it in a collective
sense of sovereignty. Constructivism is the theory of international relations that offers the best understanding of sovereignty for the purpose of this study. In fact, the “community” that is sovereign is a historically variable thing. Whereas Barkin (1994) speaks of nations and states, it is possible to extrapolate from that paradigm and apply it to the idea of Africa as a community of states. The African Union embodies that idea of Africa as a community of states, sharing a joint and cooperative form of sovereignty.

**Sovereignty in the African Context**

It is useful to review briefly the normative framework that upholds the notion of sovereignty and statehood in Africa. The emergence of African independent states from colonial possessions that occurred during the twentieth century, especially after World War II, offered the opportunity to consider the notion of Westphalian sovereignty in a new light. Robert Jackson refers to the older structure of sovereignty that emerged in Europe, expressed through imperialism and colonialism, as “positive sovereignty” and he contrasts that with a new regime in the Third World as “negative sovereignty” (Jackson, 1990). The newly independent states that are supported under this more recent normative framework are referred to as, “quasi-states to call attention to the fact that they lack many of the marks and merits of empirical statehood postulated by positive sovereignty” (Jackson, 1990, p.1). From this perspective, the adjectives “negative” and “positive” should not be understood as value judgments of the sovereignty of these “quasi-states.” Negative sovereignty denotes the newly acquired rights of freedom from nonintervention, whereas positive sovereignty is linked to the capabilities that a given state possesses to deter and or to engage in such interventions. The process of decolonization thus resulted
in a new set of parameters for sovereignty in the international system where all states, to some extent, possess these freedoms though at different levels.

From the Peace of Westphalia through the time of World War II, there was a progressive sense of the entitlement of Europeans and people of European descent to the right of sovereignty, and to the legitimacy of statehood. This was in sharp contrast however with what people in the other parts of the world expected. Newly independent African states were not deemed qualified by the international community to exercise this concept of sovereignty or statehood. The burden of proof was upon them. The postwar international legal framework entitled all peoples to be sovereign and independent regardless of their race, culture, wealth, or level of education. The system of dependency created through colonialism has been replaced by a system of equal sovereignty, though in some respects only in the legal aspect of the notion, because in many cases, a more subtle form of domination had replaced colonization.

**African States as Quasi-States?**

Political and economic capabilities and institutional authority are important features in the process of achieving statehood and in the preservation of state sovereignty. Jackson refers to the African states as quasi-states because their, “empirical statehood in large measure still remains to be built” (Jackson, 1990, p.21). With independence from former colonial powers, came not only the rights of, but also the responsibilities for being new sovereign states. Juridical statehood of African countries was immediately established upon independence, but the institutional features of sovereign states had to be built over time. The outcome of these processes had resulted in differing levels of
success that have occurred at different rates across the continent. Jackson argues that the decades that followed the independence years saw many African countries enjoying juridical statehood but lacking in the features necessary to build and sustain a sense a community and nation (1990).

The recognition of sovereignty of African states had to be expressed outside the paradigms of power politics and the classical view of realism in international politics. Otherwise, Jackson (1990) posits that the process of decolonization would have had to be postponed until objective and empirical conditions were met for the newly independent states to be able to defend their independence in an anarchic world. In the decade following the end of World War II, there were unprecedented steps taken in international law that sought to recognize the principle of self-determination as a basic human right for everyone that had lived under colonial rule. That principle made it possible for every colony that desired it to become independent, which also provided the basis for making statehood juridical, despite that fact that the features of empirical statehood might not have been present.

**Positive Sovereignty and Negative Sovereignty**

The concepts of positive and negative sovereignty have been influenced by ideas of positive and negative liberty, initially developed by Isaiah Berlin (Jackson, 1990). In his conception, liberty is the purview of individuals, whereas sovereignty applies to collective entities. Negative liberty entails the possibility of acting without obstruction from others. By analogy, negative sovereignty can be defined as freedom from external forces, and it is seen as a legal condition. This is the classic view of the law of nations
and the sphere of exclusive legal jurisdiction of states within their own territory. Therefore, nonintervention and independence becomes the legal framework upon which negative sovereignty operates within a society of independent and equal states. Jackson argues that African states thus became part of these new dynamics of the international system, qualifying only for negative sovereignty (1990).

Likewise, Jackson wrote that Isaiah Berlin posited that positive liberty entails the freedom to define, choose, and pursue one’s own goals. This of course implies that though a state could desire something, it also lack the material resources necessary to obtain it. Therefore, “positive sovereignty presupposes capabilities which enable governments to be their own masters: it is a substantive, rather than a formal condition” (Jackson, 1990, p.29). In addition to the right of being immune from nonintervention, a positively sovereign government possesses also the capabilities to provide for its own citizens and can fully take advantage of its independence. Therefore, positive sovereignty is more likely to be a feature of a developed state and less so of African states.

Jackson and Rosberg (1982) note that “Black” African states experience intermittent political instability as indicated by coups, plots, internal wars and that the national governments often lose control of large parts of their territory or populations. Yet, the puzzling aspect of this phenomenon is that “in spite of the weakness of their national governments, none of the Black African states have been destroyed or even significantly changed” (1982, p.1). The authors make the point that the empirical weakness of the African state has not led to its jurisdictional reconfiguration; and “by
Weber’s definition, a few of Africa’s governments would not qualify as states … because they cannot always effectively claim to have a monopoly of force throughout their territorial jurisdictions” (p.2-3). Although this is a valid statement, one can note that it does not pertain only to the African state. Therefore, arguing that some African states would not qualify as states if the empirical conditionality is taken into consideration does not necessarily indicate the specific trajectory of the African state.

Given that the empirical definition of a state requires a “stable community” as noted by Brownlie, Jackson and Rosberg (1982) posit that few African states posses that attribute. The authors argue that Brownlie’s notion of “an effective government” and Weber’s “compulsory jurisdiction” are Eurocentric realms because “in contemporary Africa, governments do not necessarily govern by legislation; personal rulers often operate in an arbitrary and autocratic manner by means of command, edicts, decrees, and so forth” (1982, p.6). The authors contend that the statehood in Africa is primarily autocratic because constitutional and institutional features have not taken hold. This argument certainly had some empirical merit when it was made three decades ago. However, African states have since had different trajectories and experienced different levels of success into implementing legislative processes and democratic institutions. Whereas empirical statehood is measured with domestic variables, juridical statehood is an international attribute. Jackson and Rosberg (1982) note that “the juridical state in Black Africa is a novel and arbitrary political unit; the territorial boundaries, legal identities, and often even the names of the states are contrivances of colonial rule” (p.14). Even the most profound socioeconomic inadequacies of some countries are not
considered to be a barrier to their membership in the international community of states: all former colonies and dependencies have the right to belong if they wish. The authors argue that juridical statehood in Africa was created and maintained by the international community. This discourse that portrays African states as “quasi-states” that lack positive sovereignty is problematic because, as will be discussed below, Grovogui presents a compelling argument more suited to understanding the different regimes of sovereignty, rather than just using the Eurocentric Westphalian notion of sovereignty as the model and thus portraying all other different concepts as failure (2002).

**Sovereignty in Africa**

Sovereignty in international relations means being constitutionally independent of other states and, as Alan James suggests, “Constitutional independence means … that a state’s constitution is not part of a larger constitutional arrangement” (1986, p.25). As an example, Senegal becoming a sovereign state did not just mean being constitutionally independent from France, it also meant that Senegal was no longer part of l’Afrique Occidentale Francaise (French West Africa), which was an administrative system of French colonial possessions in West Africa. James further states that sovereignty, “is a legal, absolute, and unitary condition” (James, 1986, p.32). This means that the newly sovereign African states legally became equal to other sovereign states. The absolute character of sovereignty relates to the fact that a state is either sovereign or it is not, there is no legal position halfway or in between.

In the late nineteenth and early twentieth centuries, the continent of Africa was portioned into entities such as colonies, protectorates, mandates, or a combination of
these three. For example, the Gold Coast that belonged to the British Empire, “was a multiple dependency consisting of a settled colony (Gold Coast Colony), a conquered colony (Ashanti), a protectorate (Northern Territories), and a trust territory (British Togoland)” (Jackson, 1990, p.33). Now, however, state sovereignty is virtually the only kind of international status that exists.

The process by which most African states became sovereign rested on the principle that made self-determination a right for people from the former European colonies. The United Nations Charter proclaims the right of self-determination in its first Chapter. It also consecrated the borders into which colonial Africa was divided. These borders were devastatingly artificial often colliding with natural delimitations of nationalities, ethnic groups, or political entities. The Organization of the African Unity (OAU), created in 1963, and later replaced by the African Union (AU), adopted the dogma of the immutability of those borders and thus gave them increased political legitimacy (Mbembe, 2000).

The issue of who are “the people” mentioned in the UN Charter on self-determination as well as the decision to preserve inherited borders are at the heart of a current debate on the question of sovereignty in Africa, which is closely related to the one of who, specifically, is entitled to self-determination. As Jackson states, claims for independence and self-determination in Africa (and elsewhere for that matter) have been denied (1990). This phenomenon continues to the present day. This raises the issue of fairness in the rules of the international community in matters of self-determination and state sovereignty. The process by which Eritrea became independent from Ethiopia is an
interesting case although some scholars would point to Biafrans in Nigeria, Tigreans in Ethiopia, and Ewes in Ghana as other ethno-nationalities currently being barred from self-determination. The fact that they are often labeled as separatists, secessionists, or irredentists is a clear sign that the international community is not ready to consider them as “people” entitled to self-determination. This also is an indication that sovereignty has various meanings for different peoples throughout the African continent.

**Deconstructing the “Westphalian Commonsense”**

The overwhelming majority of discussion on the origin and evolution of state sovereignty is Eurocentric. As Walker has noted, the story of state sovereignty usually, “begins with tribes; progresses to the Greek city-states; becomes complicated with the age of empires; becomes muddied with the strange geography of European feudalism; flairs into life with the emergence the Renaissance” (1993 p.167). One might add that, at the point of the colonial encounter, the principle of state sovereignty beyond the frontiers of Europe to conquer the rest of the world by encompassing the newly independent African, Latin American and Asian states through the process of decolonization. Walker further argues that this story, although conventional, is nonetheless controversial because it is western centered, and statist, focusing only on the “polis” (1993).

In reality, the evolution of the concept of sovereignty was not linear and did not follow a Eurocentric path. The Peace of 1648, which is often cited as the birth-date of both the principle of state sovereignty and the nation-state as it is commonly understood, could be just one of many other occurrences in a rather diffuse system, which led to the current state of affairs in the international community. Anghie argues that the
Westphalian model was implemented in order to resolve the conflicts between European communities and that colonialism was the cornerstone of the constitution of international law and the doctrine of sovereignty (2004).

This means that the Europeans did not transpose the principle of state sovereignty to Africa during the colonial era. Sovereignty was a racialized concept. In the words of Anghie, “the interaction between European and non-European societies in the colonial encounter was not an interaction between equal sovereign states but between sovereign European states and non-European states denied sovereignty” (2004, p.101). The de facto exclusion of the African and Asian states from the concert of nations just prolonged the colonial narrative that established the dichotomy between “civilized” and “non-civilized” nations, and the difference between “modern” and “barbaric” populations. Anghie further asserts that, in the eyes of Europeans, “sovereignty for the non-European world is alienation and subordination, rather than empowerment” (2004, p.105).

In this regard, Grovogui posits that there are different regimes of sovereignty and that, “the insufficiency of the Westphalian common sense becomes apparent when one considers the effects of the historical coordinates of sovereignty” (2002, p.315). Grovogui uses the examples of Belgium, Switzerland, and the Congo to demonstrate that, “there has never been a uniform international system of sovereignty across space and time” (p.316). Whereas African states are often seen as deviating from certain norms of morality, which would explain their failure, Grovogui argues against any idea of an African deviation because there was no Westphalian commonsense from the beginning.
In fact, Grovogui suggests that different “regimes of sovereignty converged to produce congruent modulations of power, interest, and identity that continue to favor European entities at the expense of African ones” (2002, p.316). This view makes sense and supports the arguments that will be developed in this study. These regimes of sovereignty allowed the creation and support of European “quasi-states” like Belgium and Switzerland while bankrupting the Democratic Republic of Congo first through the Belgian colonization, later through the Swiss banking system (Grovogui, 2002).

**The Erosion of Sovereignty and African Responses**

This new history of sovereignty provides the framework through which one can understand the reaction of the African states when faced by the international criminal justice apparatus. Africa has experienced a different trajectory and thus holds a different understanding of state sovereignty from that of the West, which explains why the African leaders have made decisions that counter the influence and effectiveness of the ICC and the principle of universal jurisdiction across the continent. African states have rallied around the African Union and delegated their power to it in order to speak with one voice and make it clear that they would not abide by what they view as a violation of their sovereignty. Instead, African leaders have engaged in a process of de-legitimization of the ICC and the principle of universal jurisdiction. These steps are being taken not by individual leaders or countries but as a coordinated policy at the continental level.

Writing about Africa as a realm is a challenge because it is a complex task to define it. Studying Africa involves generalizing and identifying patterns of about 54 independent countries that do not necessarily share common, historical trajectories, or
political, economic, and social dynamics. What similarities can one find between Nigeria and Seychelles? How does one draw conclusions from decisions or actions made by Morocco and South Africa? Yet, Africa is the continent that is the most subject to naive generalizations, part of it because geography has made it a uniform massive bloc of land surrounded by oceans. As Richard Dowden has rightfully noted, “Even if you divide Africa in three: Africa North of Sahara, South of Sahara and its orbit, and the zone in between, there are few common factors within these regions. What is Africa then” (2009, p.10)?

However, whereas Dowden thinks that it is coherent to speak of Africa South of Sahara, in this study, Africa refers to all the 54 independent countries. I do not make a distinction between North Africa and Sub-Saharan Africa. The subject of this study being at the intersection between international criminal law and state sovereignty, it makes sense to include in the study all people that would identify themselves as Africans because their perceptions and actions as Africans are important here. Therefore, in this study, Africa is as much a territory as an idea, and a concept through its people.

Conclusion

The most prominent feature of the international system is the nation-state and theoretically, they have exclusive legal authority over their own territory. The idea of state sovereignty is mostly associated with its emergence in Europe before having been unevenly transposed to the rest of the world. However, as it has been argued above, that narrative lacks consistency when one considers that the concept of sovereignty was fully incorporated in the colonial discourse. Non-western peoples were denied the exercise of
the Westphalian sovereignty, because as Grovogui argues, “there has never been a
uniform international system of sovereignty across space and time” (2002, p.316).
African states have not that understanding of state sovereignty due to the unique
historical context in which they became members of the international community.

The concept of sovereignty is thus a multi-layered one in which the discourse
and actions of African political elites echoes a sentiment of frustration as the decades
that followed the independence years were filled with neo-colonial (or post-colonial )
domination. African states still often perceive international action as a violation of their
sovereignty, and are thus still trying to protect their autonomy and independence and the
African Union has emerged as the key collective institution to lead the charge to protect
individual African states from this particular type of external intervention. The next
chapter shows how, for many African states, the Hissène Habré case has evolved from
being one about bringing a former dictator to justice to becoming instead about Belgian
abuse of the principle of universal jurisdiction.
CHAPTER 3: THE HISSENE HABRE CASE AND AFRICA’S RESPONSE TO THE “ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION”

The proceedings to bring Hissène Habré, the former President of the Republic of Chad, to justice started in 2000 in Senegal, where he has been living since he was removed from power a decade earlier. To this present day, ten years later, his trial has still not begun. This justice imbroglio involves the Senegalese government and its domestic courts, the Belgian government, the International Court of Justice, the African Union, Habré’s victims, and Human Rights groups. It is still unlikely that Habré will ever have his day in court because of the unwillingness to speed up the process of his trial, and due to the African Union’s reluctance to set up a precedent in transnational justice involving a former head of state.

This chapter will try to uncover the reasons that have made Habré’s prosecution an impasse ten years after it had started. The first part of this chapter argues that the government of Senegal is unwilling to prosecute him due to internal political dynamics and pressure from the civil society, which are the reasons that led to the first dismissal of the charges against him in 2001. The decision by the government of Senegal to refer the Habré case to the African Union following the demand of extradition presented by Belgium was another attempt at refusing to hand him over by invoking issues of sovereignty, which are reflected in the African Union’s decision to have him prosecuted in Senegal “in the name of Africa”. The fact that the African Union has decided to have Habré brought to justice in the name of Africa is a blow against the Belgian involvement in the case and a stand against the perceived abuse of universal jurisdiction. Furthermore,
the African Union has issued resolutions claiming that “small” European judges are using the alibi of the principle of universal jurisdiction to target African leaders and thus, view it as another tool of jurisdictionary imperialism (AU, 2009; AU 2010). That argument and a discussion of the challenges posed by universal jurisdiction, and its perception as a potential tool for jurisdictionary imperialism in Africa, and the reactions that it engendered are the subject of this chapter. The Hissène Habré case provides the empirical evidence of the arguments presented in this chapter.

**Hissène Habré’s Rule of Chad**

Habré came to power in 1982 in Chad through a military coup that overthrew Goukoumi Wedeye. The United States and France helped him take power and rule the country as a way to counter Libyan President Khadaffi (Brody, 2001). In the words of Alexander Haig, the Secretary of State under President Ronald Reagan, the United States helped Habré with covert CIA operations in order to “bloody Khadaffi’s nose” (Woodward, 1988). During an era where one-party regimes were common in many African countries, Habré’s rule was particularly marked with widespread abuses. He “periodically targeted various ethnic groups such as Sara, Hadjerai, and the Zaghawa, killing and arresting group members en masse” (Brody, 2001). While ruling Chad, he gave preference to the Anakaza clan and the Gorane ethnic group to which he belonged (Marks, 2004).

Having come to power through a coup and facing multiple threats, Habré established the infamous *Direction de la Documentation et de la Sécurité* (DDS) through a Presidential decree on January 26, 1983 and “made it directly responsible to the
Presidency of the Republic, due to the confidential nature of its activities” (Stevens, 2009, p.22). The four persons that served as directors of the DDS are all from the Habré’s Gorane ethnic group; and according to the Human Right Watch (HRW), the organization grew substantially, including 584 elite soldiers that formed the Special Rapid Action Brigade “which was reportedly responsible for all the dirty deeds such as arrests, torture, murder, and large-scale massacres” (HRW, 2005). Under Habré, the prisoners of the DDS were subjected to electric shocks, asphyxia, cigarette burns, and torture by sticks, starvation, and malnutrition. In the prisons run by the DDS, “the mortality rate per 1000 people was 36.91 in 1986, compared to 2.29 in the general population in the same year (Stevens, 2009). The personal responsibility of Habré is said to have been engaged in these deeds because of a memo found in the DDS archives signed by the DDS director that states that the DDS is “the eyes and ears of the President of the Republic, whose control it is under and to whom it reports on its activities (HRW, 2005).

After eight years of a dictatorial rule, Habré was deposed by his former Minister of Defense and Military Chief-of-Staff Idriss Deby Itno, who is currently the President of Chad. Habré’s regime is the alleged author of “tens of thousands of political murders and systematic torture”, according to a report published by a Truth Commission put in place by Deby Itno to investigate the crimes that occurred under Habré (Commission D’Enquête Nationale du Ministère Tchadien de la Justice, 1993, p.29). Habré’s political police, the DDS, is the service that carried out “all the dirty deeds such as arrest, torture, assassinations and large-scale massacres”, according to the Truth Commission. The Truth Commission called for the “immediate prosecution of those responsible for this
horrible genocide, guilty of crimes against humanity” (Ministère Tchadien de la Justice, 1993). However, with many Chadian dignitaries of the new regime, including the current President Deby Itno himself, involved with Habré’s crimes, the Chadian government did not initiate any court trials or request Habré’s extradition from Senegal. Thus, Habré lived under the radar in Senegal and disappeared from public life until Augusto Pinochet was brought to justice. The “Pinochet effect” would turn out to have a big repercussion on the judicial proceedings of his case (Brody, 2001).

The Case against Habré in Senegal: Indictment and Dismissal

Senegal’s democratic rule and somewhat independent justice system has been hailed as the country has taken many steps that polished its image in the international community. In fact, Senegal was the first country in the world that ratified the treaty that established the International Criminal Court (ICC), and it has ratified the United Nations Torture Convention and all related human rights treaties. Such developments made it highly probable that the Senegalese authorities would diligently take the necessary steps to bring Habré to justice with a free and fair trial. Or at least, the early development in the proceedings pointed to that direction.

A Senegalese court indicted the exiled Hissène Habré on torture charges and placed him under house of arrest in February 2000. It was the first time in history that a national court in Africa had indicted a citizen of a foreign country on those charges. However, six months later, those charges were dismissed by an appeals court in Senegal. That signaled a long and complicated process that is still ongoing.
Following the fall of the Habré regime, the Chadian Association of Victims of Political Repression and Crime (AVPRC) put together files of 792 victims with the hope to bring him to justice. However, the lack of support from the new Chadian regime made their efforts unfruitful, and the hope to bring Habré to justice started vanishing until the indictment of Augusto Pinochet offered a new opportunity for the Chadian victims (Brody, 2001). With the arrest of Augusto Pinochet setting a precedent in the prosecution of former heads of states in foreign courts, in 1999, Delphine Djiraibe, President of the Chadian Association for the Promotion and Defense requested Human Rights Watch’s assistance in bringing Habré justice to Senegal (Brody, 2001). Following the Pinochet effect, Human Rights Watch activists visited Chad and organized a “coalition of Chadian, Senegalese, and NGOs to support the complaint, as well as a group of Senegalese lawyers to represent the victims” (Brody, 2001, p.324). On January 26, 2000, seven Chadian individuals and the AVPRC filed a complaint in Dakar Regional Court (Tribunal regional hors-class de Dakar), accusing Habré of torture, barbarous acts, and crimes against humanity. Five months later, another fifty-three Chadians joined the original plaintiffs (Brody, 2001). In the filing, the plaintiffs referred to a Senegalese statute related to the torture charges and the barbarous acts and to the 1984 United Nations Convention against Torture, which Senegal had ratified in 1986.

“In the court papers presented to Juge d’Instruction (Investigative Judge) Demba Kandji, the groups provided details from the AVPRC files of 97 political killings, 142 cases of torture, 100 disappearances, and 736 arbitrary arrests, most carried out by the DDS” (Brody, 2001, p.325). Some documents that were included in the filing also show
how Habré hired his close friends to run the DDS and report directly to him. On February 3, 2000, Judge Kandji indicted Habré on “complicité d’actes de torture” (accomplice to torture). He also opened an investigation against persons to be named (information judiciaire contre X) for crimes against humanity, disappearances, and barbarous acts (HRW, 2005).

However, two weeks later, Habré’s defense team filed a motion to dismiss the case before the Court of Appeals of the Chambre D’Accusation (Indicting Chamber) of Dakar. On May 16 2000, Habré’s lawyers presented their arguments to the three judges of the Dakar’s Indicting Chamber. They argued that Senegalese courts were not competent over crimes committed by Chadians in Chad under article 669 of the Senegalese Criminal Procedure Code (Code de Procédure Pénale). Indeed, that article states that Senegal’s extra-territorial competence over foreigners is limited to crimes against national security, and counterfeiting of the national seal or currency. The second argument for Habré was that Senegal ratified the 1984 UN Convention Against Torture in 1986 but did not implement its legislation until 1996, much later after the alleged crimes occurred. Thus, those provisions could not be applied retroactively. Moreover, the 1996 legislation did not give Senegalese courts competence over crimes committed abroad. A third line of defense argued that the case should be dismissed on the grounds of a three-year statute of limitations (Cour D’Appel, 2000)

**The Dismissal of the Case: The role of Senegal’s domestic politics**

The presidential elections of February 2000 marked a pivotal point in the political history of Senegal. The incumbent President Abdou Diouf who was at the helm
of the country for 19 years, lost the elections after a run-off to his challenger Abdoulaye Wade who led a coalition of the most significant opposition political parties. Wade’s victory marked an end of the Parti Socialiste (PS) rule that had lasted over 40 years. The proceedings of the Habré case came at a period when the new regime was still getting installed and initiating a vast campaign of auditing the actions of the former regime.

Moreover, Wade’s personal lawyer and longtime friend Madicke Niang was also the head of Habré’s legal defense team. President Wade appointed Niang as his special adviser for judicial matters while he was still defending Habré, and later reappointed him as a consultant for the government after the Senegalese Bar Association complained about Niang’s dual role. President Wade appointed Niang as Minister of Justice on April 14, 2008. Currently, Niang is the Foreign Minister of Senegal. Moreover, the Chambre d’Accusation listed Souleymane Ndene Ndiaye as being a member of the Habré defense team. Ndiaye is currently the Prime Minister of Senegal. Habré’s third lawyer, El Hadj Diouf is a Deputy and member of the PDS parliamentary caucus, which is the one for Wade’s political party. These examples suggest that Habré’s legal defense team is embedded within the Senegalese current government. Although it is not clear if these lawyers are still officially working for Habré, the development of the Habré case proves that it has been influenced by the connection between the legal proceedings and the domestic politics.

Senegal’s domestic politics played a prominent role in the dismissal of the case in 2000. On May 2000, only a month after Wade’s investiture as the President of Senegal, a change in the government’s attitude towards the prosecution of Habré came “when the
The prosecutor’s office gave its advice on the motion to dismiss” the case (Brody, 2001, p.328). The judgment of the Indicting Chamber was set to be delivered on June 15, 2000, and then postponed to June 20, and then postponed again until July 4. In the meantime, the Superior Council of the Magistracy (Conseil Superieur de la Magistrature) presided by President Wade himself transferred Judge Kandji and thus removed him from the investigation of the Habré case. On July 4, 2000, the three judges of the Chamber dismissed the case, ruling that, despite Senegal’s ratification of the Convention Against Torture, Senegalese courts had no competence over acts of torture committed by a foreigner outside of Senegalese territory, regardless of the nationality of the victims (Cour D’Appel, 2000). The court also asserted that Senegal’s positive law contains no rulings over crimes of humanity and therefore could not rule on such charges. In the meantime, Habré’s restrictions of movement were lifted.

This ruling by the Senegalese court was interpreted by the victims’ lawyers and the human rights activists as being influenced by the politics. Sidiki Kaba, as a member of the victims’ lawyers asserted that “when politics enters the courthouse door, law goes out the window” (Brody, 2001, p.331). The Cour de Cassation upheld the Court of Appeals dismissal of the indictment on March 20, 2001, thus closing definitively this first chapter of the Habré case in Senegal.

Another less discussed societal entity that influenced Senegal’s reluctance into judging Habré is the Muslim brotherhoods. Senegalese society is mostly constituted of powerful Sufi brotherhoods that influence and guide all aspects of public life in Senegal. Habré is a member of the Tidjanya brotherhood that is derived from the Maliki Islamic
school of thought. The Tidjanya stemmed from Northern Africa two centuries ago and have reached most parts of West and Central Africa.

The Muslim brotherhoods are present in all aspects of public life in Senegal and at the scales of the society. In fact, they can be considered as being the most powerful dynamics of the civil society (Vengroff & Magala, 2001). The two brotherhoods that exert the most influence are the Tidjanya to which 37% of the population belongs, and the Muridiya who account for 16%. The Parti Socialiste (PS) that ruled Senegal and won every election from 1960 until 2000 has benefitted from the support of the brotherhoods when the chief clerics had often openly called their disciples to vote in its favor. Vengroff and Magala wrote that “the Brotherhoods’ step-by-step disengagement from the PS has played a significant role in the democratic transition in Senegal”, which made possible the victory of the Parti Democratique Senegalais (PDS) led by Abdoulaye Wade in the 2000 presidential elections (Vengroff & Magala, 2001).

While living in exile in Senegal, Habré reinvented himself with the outlook of “a pious and grandfatherly Muslim cleric and sought to lead a peaceful life among the Senegalese upper class, forgotten by history and the world” (Pillay, 2002, p.166). Habré was also able to establish a close relationship with the establishment of the Tijanya Brotherhood because he is adherent of that Sufi branch of Islam. Alioune Tine, head of the Rencontre Africaine des Droits de l’Homme (RADDHO), has said that “the only reason Habré has not yet stood trial is because he is benefiting from the protection of the ‘lobbies maraboutiques’” (the brotherhoods lobby) (Stevens, 2009, p.39). Stevens
concludes that the political clout of the Brotherhoods justified in part the protection that Habré received from the government of Senegal.

Following the first steps that led to his indictment and placement on house arrest, the government of Senegal that was established after the February 2000 elections decided to backtrack from prosecuting Habré. Senegalese domestic politics, especially the connections between the new officials at high levels of the administration and Habré himself, played a key role in the first dismissal of the case. However, social and sociological facts must not be ignored. The following steps in the development of the Habré case would integrate international actors, universal jurisdiction, and state sovereignty. After the dismissal of the Habré indictment in Senegal, Belgium became involved in the proceedings. Having refused to extradite Habré to Belgium, the government of Senegal decided to refer the case to the African Union that, in turn, asked Senegal to prosecute Habré “in the name of Africa.”

Following the dismissal of the indictment in Senegal, Senegalese President Abdoulaye Wade asked Habré to leave the country on April 7, 2001. Determined to prevent that move, the victims brought a complaint against Senegal to the United Nations Committee Against Torture (CAT) for violation of the United Nations Convention Against Torture. The CAT issued a ruling on April 23, 2001, calling on Senegal not to allow Habré to leave the country. President Wade told the Swiss newspaper Le Temps on September 27, 2001 that he would hold Habré in Senegal, pending an extradition request. At that time, it was clear that Senegal was ready to hand over Habré to any country that would formulate the request.
In the meantime, the victims had brought charges against Habré in the Belgian domestic courts under their Universal Jurisdiction principle. Investigative Judge Fransen of the Brussels district court visited Chad along with a Belgian state prosecutor and four police officers. After the Belgian Parliament voted on April 2003 that Belgian Universal Jurisdiction only apply to cases that cannot be filed elsewhere, the Belgian Minister of Justice wrote on June 5, 2003 that the Hissène Habré case could proceed since neither Chad nor Senegal would try the case. Under the pressure from the U.S government and due to the link with a case against Ariel Sharon, the Belgian Parliament repealed the universal jurisdiction law after cases were filed against U.S officials. However, “a transitory clause allows the Habré case to move forward” (HRW, 2005).

On September 19, 2005, Judge Fransen issued an international arrest warrant for Habré, charging him with genocide, crimes against humanity, war crimes, torture, and serious violations of international humanitarian law. Belgium also made an extradition request to Senegal. The Senegalese authorities arrested Habré on November 15 2005 and placed him in custody. On November 24, 2005, the state prosecutor recommended that the Indicting Chamber of the Court of Appeals declare itself incompetent to rule about the extradition request. The following day, the court followed that recommendation and declared itself without jurisdiction to rule on the extradition request; therefore, Habré was released again (HRW, 2005).

At this point, the Hissène Habré case moved beyond Senegal. The Interior Minister of Senegal issued an order on November 26, 2005, placing Habré “at the disposition of the President of the African Union” and suggested that Habré would be
extradited to Nigeria within 48 hours. A day later, Senegalese Foreign Minister Cheikh Tidiane Gadio stated that Habré would remain in Senegal pending a decision by the African Union Summit on the “jurisdiction which is competent to try this matter” (HRW, 2007, p.7)

The government of Senegal asked the African Union to decide what institutions had the competence to try Habré. In January 2006, the African Union formed a Committee of Eminent African Jurists referred to as “the Habré Committee” to discuss the available options. The Habré Committee issued its final report in May 2006 and recommended that Habré be prosecuted in an African court, giving priority to an “African mechanism” (Committee of Eminent African Jurists, 2006). The Committee also stated that Senegal was “the best county suited to try Habré as it is bound by International Law to perform its obligations” (p.4). The African Union therefore decided that Senegal should “prosecute and ensure that Hissène Habré is tried on behalf of Africa, by a competent Senegalese court with guaranties for a fair trial” (Assembly of African Union Ordinary Session, 2006). Subsequently, Senegal changed its law, giving its domestic court jurisdiction over grave violations of international law such as genocide, war crimes, crimes against humanity and torture. In other words, Senegal passed a law that gave its national court universal jurisdiction.

**Origins and Evolution of Universal Jurisdiction**

As Moghalu (2006) writes, “The concept of universal jurisdiction is closely related to the principle of *jus cogens*, [which] is a norm of international law from which no derogation is permitted, not even a treaty” (p.78). Judge Navenethem Pillay states,
“Universal jurisdiction is premised on the concept that certain crimes are so serious that all of humanity has reason to bring the perpetrators to justice, regardless of the place of the offence or of the nationalities of the offenders or the victims” (Pillay, 2002). The horrors committed during the Holocaust and World War II led to the implementation of the International Military Tribunals at Nuremberg and Tokyo to deal with those unprecedented heinous crimes. However, the laws were not in force when the crimes were committed, which made some scholars question the legality of those tribunals and portray the rulings as victor’s justice.

The claim of universal jurisdiction over some vicious crimes has subsequently been explored by some domestic courts until the breakthrough case of Pinochet occurred. A Spanish magistrate claimed universal jurisdiction when seeking extradition of General Augusto Pinochet in October 1998 while he was visited England. The Law Lords in England ruled that Pinochet could not claim immunity because the acts of torture of which he was accused of did not constitute official acts linked to his title as head of state at the moment they occurred (Pillay, 2002). Although Spain is not directly concerned with any of the charges against Pinochet, the rationale behind the invocation of universal jurisdiction is in the basis of universal interest linked with the prosecution of the alleged acts of torture (Bassiouni, 2001).

As Madeleine Morris notes, universal jurisdiction evolved from a customary law doctrine during the eighteenth and nineteenth centuries from the idea that perpetrators of certain crimes were enemies of all humankind (Morris, 2001). The first universal crime was therefore piracy, “later joined by slavery, slave-related practices and trafficking in
women and children” (Pillay, 2002, p.3). The list of the crimes subject to universal jurisdiction has now grown to include war crimes, crimes against humanity, and genocide. Cherif Bassioumi argues that other crimes such as “apartheid, torture, forced disappearance, sale of obscene material, counterfeiting, serving as a mercenary, hijacking, terrorism, and drug trafficking may also be subject to universal jurisdiction, but may be enforceable only if the prosecuting nation is a signatory to an existing, relevant treaty and has incorporated the treaty into its domestic law” (Bassioumi, 2001).

Belgium is without any doubt a pioneer in the enforcement mechanism of universal jurisdiction. Its Universal Jurisdiction Act of 1993 allowed the prosecution of head of states even if they are currently in office. The International Court of Justice invalidated the arrest warrant issued by a Belgium judge against Abdoulaye Yerodia Ndombasi, then Foreign minister of the Democratic Republic of Congo (ICJ, 2002). Furthermore, a spike in cases brought against Ariel Sharon, Yasser Arafat, George W. Bush, and Donald Rumsfeld led the Belgian Parliament to reconsider the mechanisms of the 1993 Universal Jurisdiction Act. Belgium repealed its Universal Jurisdiction Act on August 2003 and replaced it by a new law on Extraterritorial Jurisdiction but an exceptional provision allowed the Hissène Habré case to continue to be prosecuted under the former law.

Universal Jurisdiction is controversial in many instances. For example, it does not satisfactorily address the issue immunity for government officials. It also fails to address the amnesty given to defendants by the Truth and Reconciliation Commissions of their countries. Furthermore, it is obvious that the playfield is not even for all the actors
in the international community. Judge Pillay (2006) asked: “If Pinochet can be arrested in
Britain, could Mrs. Thatcher be arrested while visiting a developing country, to answer
allegations arising out of the Falklands War? Could Henry Kissinger be arrested and
tried for his conduct of the Vietnam War? Could former United States President be
arrested for the deaths of thousands of civilians in the Gulf War?” This issue leads to the
questioning of universal jurisdiction as a tool for jurisdictional imperialism.

Universal Jurisdiction or Jurisdictional Imperialism?

The complaints filed against Donald Rumsfeld in Germany, Henry Kissinger and
Ariel Sharon in Belgium has drawn outrage in the western world. As Kissinger himself
writes, “The danger lies in pushing the effort of prosecuting international crimes to
extremes that risk substituting the tyranny of judges for that of governments; historically,
the dictatorship of the virtuous has often led to inquisitions and even witch-
hunts”(Kissinger, 2001). It is particularly striking that, as Moghalu (2006) noted, “it
emerged from a declassified telephone conversation between Kissinger and President
Richard Nixon that Kissinger (...) actively supported the overthrow of Salvador Allende,
a democratically elected president of the Latin American nation of Chile by General
Augusto Pinochet in 1973” (p.77). The pattern of the implementation of Universal
Jurisdiction is that it is generally applied by countries from the “global North” and it
targets leaders from the “global South”. As Tanaz Moghadam (2008) noted, with the
exception of Senegal, all the countries that have exercised Universal Jurisdiction are from
the “North”: Austria, Canada, Denmark, France, Germany, the Netherlands, Spain,
Switzerland, and the UK. Moreover, before Germany dismantled its Universal
Jurisdiction statute, all the leaders that it has tried are from the “south”: Chad, Cuba, Iraq, Iran, the DRC, Cote d’Ivoire, and the Palestinian Authority, the cases against the American and Israeli leaders never moved beyond their preliminary phases (Moghadam, 2008).

The African Union and the Habré case: An argument for collective sovereignty

On February 19, 2009, the Kingdom of Belgium opened a complaint before the International Court of Justice (ICJ) against the Republic of Senegal “regarding Senegal’s compliance with its obligations to prosecute” Hissène Habré or “to extradite him to Belgium for the purposes of criminal proceedings” (ICJ, 2009). In its application before the ICJ, Belgium recalled that following the dismissal of the Habré case in Senegal in 2001, “a Belgian national of Chadian origin and Chadian nationals filed similar complaints in the Belgian courts.” Despite the fact that Senegal has amended its penal code and code of criminal procedure so as to include in them the offenses of genocide, war crimes, and crimes against humanity, Belgium contends that Senegal has cited financial difficulties preventing it from bringing Habré to trial (ICJ, 2009, p.1).

Belgium also argued that, by failing to prosecute or extradite Habré, Senegal is in violation of conventional international law, especially the UN Convention against Torture. Furthermore, Belgium adds in its complaint before the ICJ that “under international customary law, Senegal’s failure to prosecute Mr. Habré, or to extradite him to Belgium to answer for the crimes against humanity which are alleged against him, violates the general obligation to punish crimes against international humanitarian law” (ICJ, 2009,p. 2).
Both Belgium and Senegal are signatories of the 1984 UN *Convention Against Torture*, since 25 June 1999 and 21 August 1986, respectively. Article 30 of the Convention states that any disputes between the parties about the interpretation of application of the Convention that could not be settled through negotiation or arbitration may be submitted to the ICJ. Belgium contended that the negotiations between the two parties have been unsuccessful since 2005 and that they failed on 20 June 2006. Belgium specifically asked the ICJ to rule that “the Republic of Senegal is obliged to bring criminal proceedings against Mr. H. Habré for acts including crimes of torture and crimes against humanity which are alleged against him as author, co-author or accomplice” and that ‘failing the prosecution of Mr. H. Habré, the Republic of Senegal is obliged to extradite him to the kingdom of Belgium so that he can answer for his crimes before the Belgian courts” (ICJ, 2009, p.2)

After Senegal received a mandate from the African Union to prosecute Habré “in the name of Africa,” the government started putting together the framework that would allow the prosecution to proceed. Nearly after a year since it received the mandate, Senegal was being accused by human rights activists of dragging its feet. Initially, Senegal's Justice Ministry proposed an $88 million budget for the trial that would include the building of a new courthouse and the hiring of a panel of 15 judges. Senegal’s Foreign Minister first said that it could take up to three years before the Habré trial begins. On 12 June 2007, he said that his words were misconstrued and stated that "If with international cooperation we arrive at a budget acceptable to everyone, and the African Union mobilizes resources, we are determined to bring this case to an end”
(Flynn, 2007). The words of Minister Gadio clearly indicate that, from the beginning, Senegal has perceived the budget for the trial to be a contentious issue that would take some time to be addressed and settled.

The government of Senegal has officially declared that it will carry the mandate of the African Union but it will not move forward with the trial until it receives full funding for all the costs of the trial. Senegal's estimate of €27.4 million (approximately US $37 million) and that the full amount must be deposited in a bank account opened at the Banque Centrale des États de l’Afrique de l’Ouest (BCEAO) before the proceedings start.

Demba Kandji, who was the Investigative Judge when the case against Habré was first brought before a Senegalese court in 2000, and who now serves as the Director of Criminal Affairs at the Senegal’s Ministry of Justice said on February 12, 2010 that “everything is ready except for the funds. We have made an estimation of the budget and we are now waiting for the opinions of the other parties. And we are optimistic because Senegal has done everything it was supposed to do. Now, we are just waiting for the funds to become available before we start the trial” (RFI, 2010). Chad has offered €3 million as an "initial" contribution. In December 2009, a joint team from the European Union and the AU visited Senegal and will propose a revised budget for finally bringing Habré to trial (RFI, 2010).

It makes sense to argue that Senegal has raised the bar so high in order to delay the start of the trial, as the Kingdom of Belgium has argued in its complaint before the International Court of Justice. In fact, Senegal’s President Wade has faced pressure not to
extradite Habré to Belgium due to the identity and colonial history of that country. Extraditing an African leader to face justice in a European country does not sit well in the public opinion. Wade has said that "Africans must be judged in Africa [and] that is why I refused to extradite Hissène Habré to Belgium" (Polgreen, 2006).

When taking into account the identity of the two players in this issue, meaning Belgium and Senegal, it is obvious that Senegal viewed its refusal to accede to Belgium’s demand of extradition in the name of sovereignty. Belgium’s colonial past and its history of atrocities committed in the Congo are vivid in the memory of the African elite and populations. Moreover, the arrest warrant issued for then-DRC’s Minister of Foreign Affairs Abdoulaye Yerodia Ndombasi, which was subsequently declared unlawful by the ICJ in the ruling of the case Congo v. Belgium proved to many Africans that Belgium had trespassed the limits of what is acceptable when dealing with African citizens and the African continent when it comes to applying the principle of universal jurisdiction (Moghalu, 2006). The issue of sovereignty played out even more precisely with the referral of the Hissène Habré case to the African Union and the decisions that ensued.

By asking the government of Senegal to “prosecute and ensure that Hissène Habré is tried on behalf of Africa, by a competent Senegalese court with guaranties for a fair trial”, it became evident that the African Union portrayed itself as the entity that carried out the final decision within the international community about how the proceedings of the Habré case would go (AU, 2006). The African Union (AU) has decided that Habré should be tried “in the name of Africa”, meaning that it has decided to own this matter, rather than delegating that prerogative to any other sovereign political entity.
The AU succeeded the Organization of African Unity (OAU) in 2002 and operated a rupture from its predecessor that was created during the independence years. The African Union’s goals include promoting unity, democracy, and growth throughout the continent. The new African Union is much more ambitious than the former OAU and does also include a pan-African Parliament, and a Peace and Security Council. The African Union has also plans to create a Court of Justice, a peer review mechanism, a central bank and monetary fund, an African economic community with a single currency by the year 2003 (AU Charter).

Indeed, the African Union is made up of states presided over by presidents, and Habré himself being a former head of state, it is interesting to study how the current heads of state are dealing with this matter. Their attempt to curtail Belgium’s pretentions to use its universal jurisdiction and prosecute leaders from the south is a way to reaffirm the sovereignty of their states, and more generally, the sovereignty of Africa as a political and geographical entity that allows itself to establish its own mechanisms on jurisdictional and legal matters.

During its Eleventh Ordinary Session 30 June-1 July 2008, the Assembly of the African Union issued a Decision on the Report of the Commission on the Abuse of the Principle Universal Jurisdiction which “recognizes that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice” (AU, 2008). The assembly issued a resolution noting that “the abuse of the Principle of Universal Jurisdiction is a development that
could endanger international law, order, and security” and that “the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States” (AU, 2008). It is clear that the African Union views these “abuses” of universal jurisdiction as being politically motivated. Because they are exclusively targeting African leaders, they constitute violation of the sovereignty of the African states.

The African Union Assembly further asserts that “the abuse and misuse of indictments against African leaders have a destabilizing effect” and that “those warrants should not be executed in African Union member States.” The African Union is therefore calling its members to protect the sovereignty of its member states by ignoring the warrants for the arrest of African leaders that result in the abuse of the principle of universal jurisdiction. It calls for the establishment of an international regulatory body “to handle complaints or appeals arising out the abuse of the principle of universal jurisdiction” and mandated its Chairperson to take the matter before the UN Security Council and General Assembly. The African Union also requested “all UN Member States, in particular the EU states, to impose a moratorium on the execution of those warrants until all the legal and political issues have been exhaustively discussed between the African Union, the European Union and the Union Nations” (AU, 2008). It appears from this declaration, the African Union is responding to what it views as threats to its sovereignty from member states of the European Union, and the response is to formally
refuse to enforce those arrest warrants and take the matter to the UN that must act upon the abuse of the principle of universal jurisdiction.

During the Thirteenth Ordinary Session of the African Union Assembly in Sirte, Libya on 3 July 2009, it issued a Decision on the Abuse of the Principle of Universal Jurisdiction. In that report, the Assembly “reiterates its appeal to the Chairperson of the African Union to follow-up on [the matter of the abuse of universal jurisdiction] adopted in February 2009” (AU, 2009). It further reiterates its previous position to the effect that there has been blatant abuse of the principle of universal jurisdiction, in particular by some non-African States, and expresses its deep concern that indictments have continued to be issued in some European states against African leaders and personalities. To this end, it calls for immediate termination of all pending indictments. It also called on all states to respect international law and particularly its provisions regarding the immunity of states officials.

These declarations are testimony that the African Union is positioning itself as a unique voice speaking collectively for the African states. It is therefore a construction of a collective identity for the emergence of a single political entity that views its sovereignty being derogated by the European Union.

**Conclusion**

The concept of sovereignty has evolved in Africa from its perception at the single state level to a more unified notion a collective sovereignty at the continental level. The African Union has thus become the voice of the African states in the international arena in face of what they view as threats to their sovereignty that derived from the abuse of the
principles of universal jurisdiction. Furthermore, the African Union has positioned itself as the sole owner of the judicial matters that occur in the continent as shown by its decision to mandate the government of Senegal to ensure that Habré is prosecuted and tried “in the name of Africa”. It is also in the name of sovereignty towards the former colonial power Belgium that made the government of Senegal and the general public decides that it would be inappropriate to extradite Habré and have him face justice in a European court. However, the willingness of the government of Senegal, and that of the African Union as well, to bring Habré to justice is questioned. It is as if there is a deliberate attempt to drag the process as long as possible because it will be without any doubt, a landmark trial if Habré would face justice some day.
CHAPTER 4: THE INTERNATIONAL CRIMINAL COURT AND AFRICA:
THE POLITICS OF SELECTIVE JUSTICE

African states have generally supported the implementation of an international permanent court that would be in charge of prosecuting the types of crimes that had until then only been prosecuted by ad hoc tribunals like the Nuremberg and Tokyo courts, the International Tribunal Court for Rwanda (ICTR), and the International Criminal Tribunal for the former Yugoslavia (ICTY), to name a few. Nonetheless, despite this initial support, the relations between Africa and the International Criminal Court (ICC) have suffered many setbacks due to what is perceived in the continent as selective justice.

This chapter explores the conflicted relations between the ICC and African states. The argument will be made that in Africa, much like most of the developing world, the signature of the Rome Statute and the implementation of the ICC was viewed as a milestone in the road of creating a more just international system. However, there is now a widespread belief that Africa has become a victim of the international justice apparatus. The first part of this chapter will provide a very brief introduction to the ICC and the process that led to its implementation from Nuremberg to Rome. The text will then explore the relations between the ICC and Africa. Lastly, an analysis will be made regarding the arguments brought forward and used to support opinions that Africa is a target of judicial imperialism.

The International Criminal Court: the long road from Nuremberg to Rome

The creation of the ICC is the result of a very long process. A record number of 120 states signed the treaty that established the ICC at a conference in Rome in 1998.
The Nuremberg and Tokyo trials during the late 1940s offered glimpse of hope for the establishment of an international legal apparatus that was to be later reinforced by the adoption of the *United Nations Genocide Convention* in 1948. However, the establishment of a permanent international criminal court was delayed due to the Cold War politics that took the world hostage during that era. In 1947, the United Nations set up the International Law Commission (ILC), which was a group of eminent jurists tasked to develop and codify a body of international law texts. The ILC argued that the establishment of a permanent international court was both desirable and possible (Moghalu, 2006). Moghalu (2006) also states that the ILC “adopted a Draft Code of Offenses against the Peace and Security of Mankind in 1954, but the UN General Assembly had by then transferred the question of a permanent court to enforce the Code to a committee of experts, the Committee on International Criminal Jurisdiction” (p.127). In August 1951, the Committee met in Geneva and prepared the first draft for the implementation of such a court. However, that effort was cut short by political debates due to divergent interpretations of the criminality of apartheid, the legality of the use of force by states in the context defining crimes against peace (Moghalu, 2006, p.127).

The will for the implementation of a permanent court inspired by the Nuremberg and Tokyo trials started to wind down. France was the only major power that fully supported the establishment of such a court. Great Britain, the United States and the Soviet Union rejected the arguments of the ILC in favor of the implementation of a permanent court (Sadaat, 2002). Therefore, it took almost half a century before those
arguments were revived again to establish a supranational judicial authority that would prosecute crimes that offended the conscience of humankind.

The implementation of a permanent court became again a possibility as the Cold War reached its end. In 1989, a group of Caribbean states proposed during the UN General Assembly that the International Law Commission reopen the discussion for the possibility of creating an international criminal court in an attempt to combat the international drug trafficking. Ironically, drug trafficking was not included in the Rome Statute, and the focus instead returned to the violations of international humanitarian law (Moghalu, 2006). The Gulf War and the establishment of the ICTY led some great powers to reconsider their position regarding the creation of a permanent court. In 1994, the ILC submitted a draft statute of the permanent court to be discussed by the UN General Assembly that subsequently established a Preparatory Committee on the Establishment of an International Criminal Court. Over the next few years, the Committee prepared the treaty that was on the agenda of the Rome conference in 1998.

From June 15 to July 17, 1998, the Rome conference convened 160 states and numerous international organizations and civil society groups. 120 states voted for the adoption of the Rome Statute for the establishment of the ICC. Seven states voted against the Rome Statute and 21 others abstained (Moghalu, 2006). The United States, China, India, Iraq, Israel, Libya, Qatar and Yemen voted against the Statute. An African country, Senegal, was the first to ratify the Rome Statute (on 2 February 1999), which went into effect on July 1, 2002. The 18 judges of the court were chosen and sworn in on
March 11, 2003, with the Argentine lawyer Luis Moreno Ocampo currently serving as the court’s Prosecutor.

It can be argued that amongst the reasons that favored the implementation of a permanent court was the ‘tribunal fatigue’. Cassesse posits that “the logistics of setting up the ad hoc tribunals for the former Yugoslavia and Rwanda has strained the capabilities and resources of the United Nations and consumed the Security Council’s time” (Cassese, 2002, p.18). Moreover, from the African states’ viewpoint, the absence of a permanent court constitutes a weak deterrent to potential crime perpetrators, especially when considering the mass atrocities that occurred in the many conflicts that plagued various areas of the continent for so long. However, the very structure of the ICC made the international community dependent on the political will of the members of the UN Security Council.

**The Politics of the ICC**

The ICC is located in The Hague, and its jurisdiction is limited to crimes committed since the entry in force of the Rome Statute. It is important to note that the ICC can investigate and prosecute only the most serious crimes that are of concern for the international community: genocide, crimes against humanity, war crimes, and crimes of aggression, when defined. Article 12 of the Rome Statute provides that the court may exercise jurisdiction if the state where the crime occurred is a party to the Statute, or if the accused is a national of a state that is party to the Statute. Article 14 states that any state may refer a situation to the Court if the jurisdiction requirements are met. The
prosecutor is also allowed to initiate independent investigations if the preconditions set by the article 12 are met.

As Moghalu (2006) puts it clearly, “the ICC is the product of a major ideological and conceptual battle in international relations between visions of cosmopolitan world society and those in international society that favor international cooperation, but one predicated on sovereignty” (p.129). Whereas many non-governmental organizations lobbied for a global governance apparatus that would put the preservation of human life and dignity at the forefront of the agenda, the governments on the other hand were still holding on to the notion of their Westphalian sovereignty that give them legal authority over their territory. Antonio Cassesse (2002) expected the ICC to become “the central pillar in the world community for upholding the fundamental dictates of humanity” (p.18). Layla Nadya Sadat (2002) has argued that international governance cannot be the answer to international order especially when state sovereignty is often blamed for many of the upheaval in world affairs. This means that the ICC was to operate as just a supplement to national jurisdictions or could supplant them only if the state parties were unable or unwilling to prosecute the crimes committed in their territory. In a more pragmatic tone, Moghalu asserts that the ICC “has the potential to fill the gap left by the reality that although credible national prosecutions are to be preferred to top-down, international approaches, in some cases, national jurisdictions are unable or unwilling to investigate or prosecute mass atrocities” (Moghalu, 2006, p.130).

At the Rome conference, states denied the ICC enforcement powers and its intrusion in their sovereignty, despite the push from the civil society groups. The
complementarity principle of the ICC restricts its jurisdictional powers to investigating and prosecuting cases in the state on whose territory the crime occurred only if that state is “unwilling or unable to genuinely carry out the investigation or prosecution.”

However, the paradox of the ICC is that it was created to render human justice in a world made of sovereign states. From its inception, there was no doubt that the Office of the Prosecutor would be a political tool at the hands of the states. In other words, the ICC would be what the governments wanted it to be. The fact that the Assembly of States Parties is the organ that elects the judges, the prosecutor, and approves the budget, is a testament that the ICC will always be under the influence of the states who ultimately would more or less guide its policy. Furthermore, states that are not signatories to the Rome Statute, including the United States, deny the ICC the universality it seeks. As Broomhall has noted, the Rome Statute has incited states to amend their national law to prevent the ICC from having jurisdiction over their territory. As examples, Broomhall (2003) cited the “Crimes Against Humanity and War Crimes Act passed by the Canadian parliament in 2000.” The United Kingdom and New Zealand have also passed similar legislation and South Africa introduced an International Criminal Court Bill in 2001. This speaks to states engaging in strategies that would shield them from what they viewed as intrusion of the ICC in their own matters. The Bush administration objected to the Court on various grounds among which “the Court’s assertion of jurisdiction over citizens including military personnel of countries that are not party to the treaty, the perceived lack of checks and balances on the powers of the ICC’s prosecutor and judges, the perceived dilution of the role of the UN Security Council in maintaining peace and
security, and the ICC’s potentially chilling effect on America’s willingness to project power in the defense of its interests” (CRS, 2009, p.4).

**Africa and the ICC: The open cases of selective justice**

Since its establishment in 2002, all the cases in which the ICC has initiated investigations are located in Africa. It has thus far opened cases against 16 individuals for alleged crimes; five cases in Northern Uganda, four cases in the Democratic Republic of Congo (DRC), one case the Central African Republic (CAR), and one the Darfur region of Sudan (CRS, 2009). Four suspects, all Africans are currently in the ICC custody: Jean Pierre Bemba, Thomas Lubanga, Germain Katanga, and Mathieu Ngudjolo. In addition, the ICC prosecutor is currently analyzing situations in Kenya, Cote D’Ivoire, Chad, and Guinea. There are also current calls for the ICC to initiate investigations in Zimbabwe.

With all fairness, the ICC first represented an opportunity for African states to advance the rule of law in the continent. However, it is important not to go too far in the portrayal of the African continent as a lawless land where the ICC would help bring some sense of justice and fairness. In that regard, the conclusion of Max Du Plessis, is very problematic. He states: “The act of punishing particular individuals (whether leaders, or generals, or foot soldiers of Africa) becomes an instrument through which individual accountability for massive human rights violations is increasingly internalized as part of the fabric of the African continent, and indeed the international society. At the same time, it is a method by which African citizens put a stop to the culture of impunity that has taken hold at the international level, and which has made a mockery of justice within
Africa for far too long.” (Du Plessis, 2003, p.12). Indeed, addressing the so-called culture of impunity in the African continent requires the taking into account of individual responsibility, especially in a time of conflict. However, to what extent is a culture of impunity the exclusive fabric of the African continent?

In the DRC, the ICC prosecutor manifested his interest in the conflict that originally covered the Ituri and atrocities committed in 2002, encouraging its referral to him. The ICC later extended the investigation to the whole country. In March 2006, the leader of the Union of Congolese Patriots, Thomas Lubanga, became the first man to be arrested by the ICC and charged with the crimes of enlisting child soldiers. Prior to that, the President of Uganda Yoweri Museveni had referred a case to the ICC against the Lord’s Resistance Army (LRA), a rebel group that has fought the Ugandan government for more than two decades in Northern Uganda. That referral happens to be the ICC’s first case and the first step in an aggressive agenda of the ICC prosecutor in the African continent. In October 2005, the ICC issued arrest warrants for LRA leader Joseph Kony and LRA commanders Okot Odhiambo, Vincent Otti, Dominic Ongwen, and Raska Lukwiya (CRS, 2009). However, the local populations fear that the ICC investigations will make the conflict worse and view the ICC as just trying to show its usefulness by taking up that case, and as a way for President Museveni to gain international help to fight the LRA (Moghalu, 2006). In fact, “the international intervention has undercut local victims’ attempts to come to terms with the region’s violent past” (Clarke, 2009, p.119). Clarke (2009) argues further that the failure of the ICC to treat “Ugandans and
other Africans as political agents creates, again, the conditions for seeing Africans as in need of salvation by a benevolent West” (p.120).

Despite the criticism that the ICC is using the LRA cases to gain some legitimacy and that it is lending a helping hand to the Ugandan government, some have credited the ICC investigations for the decision that led the LRA to negotiate cessation of hostilities with the Ugandan government in 2006. However, the LRA has demanded the annulments of the arrest warrants before the signature of a final peace agreement. The Ugandan government is offering a combination of prosecution and amnesties to lower-ranking LRA leaders, and the ICC’s decision not to annul the arrest warrant is a roadblock to any meaningful return of peace in the region.

Moreover, there are allegations of wrongdoing of the Ugandan military forces as well. The ICC has nonetheless decided to ignore these allegations and the calls for an investigation. The issue is furthermore complicated by the fact that if the ICC decides to investigate the Ugandan military forces, the government could invoke the complementarity principle and claim that it has jurisdiction over such investigation. So far the Ugandan judicial system has not collapsed; therefore, such argument would in fact make sense (Arsajani & Reisman, 2005, p.394). Some legal experts and NGOs have called on the ICC to stop the investigations of the LRA and to withdraw the arrest warrants in order to allow peace negotiations to take place and to do so in the interest of justice.

Much like in Uganda, the ICC became involved in the Democratic Republic of Congo at the request of its government. In April 2004, the government of the DRC
referred “the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC” (ICC, 2004). The ICC issued an arrest warrant in February 2006 for Thomas Lubanga. At the time, he was in the custody of the Congolese government that subsequently transferred him to the ICC custody in March 2006. The ICC charged him with three counts of war crimes and his trial began in January 2009. The ICC issued arrest warrants for Germain Katanga and Mathieu Ngudjolo Chui in July 2007 and they were transferred to the ICC custody in October 2007 and February 2008. The ICC issued a warrant for the arrest of Bosco Ntaganda in April 2008, accusing him of three counts of war crimes related to the use of child soldiers. However, Ntaganda has since joined the Congolese military forces that promoted him to the rank of general. The Congolese government has therefore refused to arrest him, arguing that it would jeopardize the peace efforts in the Kivu region (AFP, 2009). In this case, there are conflicting issues with the ICC trying to arrest Ntanganda, and the Congolese government that is shielding him for the sake of peace; and the troubling fact is that the DRC government first referred the situation of the Ituri to the ICC, that later extended the investigation to the whole country.

The government of the Central African Republic (CAR) referred the situation in its territory to the ICC in January 2005 (ICC, 2005). In May 2008, the ICC issued a warrant for the arrest of Jean Pierre Bemba, a former DRC rebel leader. The warrant argued that Bemba oversaw systematic attacks of civilians in the CAR territory between 2002 and 2003. Bemba’s group, the MLC, was reportedly invited to the CAR by the then-president Ange Felix Patasse to fight against the rebellion led by the current
president of the country Jean Francois Bozize. Bemba was indicted on five counts of war crimes and three counts of crimes against humanity and arrested by Belgian authorities and handed over to the ICC in July 2008. The MLC is currently DRC’s largest opposition party. Bemba served as one of the four DRC vice-presidents in the transitional government from 2003 to 2006, and he took 42% of the vote in DRC’s 2006 presidential election, second to President Kabila. It is thus fair to argue that Bemba’s political ambitions played a role in his arrest by the ICC. The ICC has helped President Kabila get rid of a political opponent.

Ultimately, the case that drove the most praise and criticism is the ICC involvement in Sudan. The Darfur crisis proved to be a major challenge for the ICC in dealing with Africa. The conflict between the Janjaweed militia backed by the Sudanese central government and the Darfuri rebel groups has resulted in 200,000 deaths and two million refugees according to some estimates. When the debate about the investigations and prosecution of the Darfur crisis emerged, European states favored a referral of the case to the ICC by the UN Security Council, while the United States and the African Union favored “a UN-financed African ad-hoc tribunal to be based in Arusha, Tanzania, where the UN war crimes tribunal for Rwanda was already based (Moghalu, 2006, p. 153). The Security Council favored the ICC option with a clause that included the exemption of American personnel from the Court’s jurisdiction.

On March 31 2005, UN Security Council Resolution 1593, that referred the Darfur situation to the ICC, passed with 11 votes and four abstentions from Algeria, Brazil, China, and the United States. Interestingly enough, though Sudan is not party to
the Rome Statue, it did not receive exemption for its nationals, unlike the United States.
Sudan’s Ambassador to the UN, Ahmed Erwa said that “the Resolution “exposed the fact
that the ICC was intended for developing and weak countries and was a tool to exercise
cultural superiority” (UNSC, 2005).

Although Sudan is not a party to the Rome Statute, the UN Security Council
referred the Darfur case to the ICC prosecutor. Under Resolution 1564, the Security
Council created the International Commission of Inquiry on Darfur in September 2004
(CRS, 2009). Four months later, the Commission reported that it has made a list of
potential war crime suspects and “strongly recommended that the Security Council
referred the situation in Darfur to the ICC” (Report of the ICID to the UN Secretary
1593 referred the situation in Darfur to the ICC prosecutor, and the Office of the
Prosecutor initiated its investigation in June 2005. In April 2007, the ICC issued arrest
warrants for Ahmad Muhammad Harun, a former Sudanese Cabinet Minister and for Ali
Muhammad Abd al Rahman, a former leader of the Janjaweed militia.

The ICC judges also issued an arrest warrant for Sudanese President Omar
Hassan al-Bashir, following a request by the ICC prosecutor, on March 4 2009. The
warrant stated that there were “reasonable grounds to believe that Bashir is criminally
responsible of five counts of crimes against humanity and two counts of war crimes.”
The ICC prosecutor initially accused Bashir of three counts of genocide in his request for
an arrest warrant to the ICC judges. However, “the panel of ICC judges who responded
to the application for warrant found, by a ruling of two-to-one, that the Prosecutor had
failed to provide reasonable grounds to believe that the Government of Sudan acted with specific intent” to destroy the three Darfur ethnic groups (CRS, 2009, p.12).

When the ICC issued an international warrant for the arrest of President Omar al Bashir, some media reported that Prosecutor Ocampo had finally found his “black Hitler” (Soudan, 2008). The ICC investigation in Darfur occurred in a context of never seen before international activism, and mostly in the Western countries. The Bush administration first called the crisis in Darfur “genocide” in 2004, after some pressure from the electorate and from civil society. It is arguable that it was a highly political issue in the United States during an election year, and the Bush administration used that as a way to defuse the attention from the Iraq war. Amazingly, in 2005, the United Nations issued a report that said that war crimes and crimes against humanity were occurring in Darfur, but it nonetheless fell short of calling it genocide. In the meantime, the word “genocide” in Darfur had become rallying cause for Hollywood. One could argue against the genocide indictment of President Bashir on the basis that the Darfuri that live in Khartoum have not been directly affected by the violence and therefore, the argument of an intention to eliminate an ethnic group can thus be dismissed.

Furthermore, Mahmood Mamdani (2009) argued that it is misleading to characterize the conflict in Darfur as opposing “Arabs” and “Africans.” The conflict opposes the “dar”-less tribes and those with “dar”, meaning those that were granted homelands during the colonial era due to their agricultural activities. The conflict is exacerbated now by the ecological crisis, the Sahara having expanded one hundred kilometers over the past forty years.
While the ICC has received praise for its investigations and prosecutions in the African continent, some observers are questioning its prioritization of Africa compared to other parts of the world, the cases it has selected, and the effects of the prosecutions on the peace processes. One question is: is the ICC specifically targeting Africans to gain some legitimacy and proof of its usefulness? Or is the ICC pursuing an abstract justice that is jeopardizing the settlement of civil wars and ethnic conflicts? Should the focus be on the survivors and ending their plight rather that prosecuting few perpetrators at the risk of prolonging the conflicts?

In analyzing the consequences of the indictment of President Bashir on the African continent, it would be also useful to summarize briefly where the United States (U.S.) stands on this issue. The Obama administration has voiced its approval for the investigation and prosecution of the crimes committed in Darfur. The White House has said that “those that have committed atrocities in Darfur should be held accountable” and Secretary of State Clinton has said that “President Bashir would have a chance to have his day in court if he believes that the indictment is wrongly charged. He can certainly contest it” (CRS, 2009). However, the State Department spokesperson Robert Wood stated, “We are in no obligation to the ICC to arrest President Bashir. We are not a party to the Rome Statute. And let’s leave it at that.” Although the U.S. government has decided to engage with the government of Sudan, U.S. Special Envoy General Scott Gration has said that this “does not mean that Bashir does not need to do what’s right in terms of facing the ICC and those charges.” In July 2009, Gration said that the Sudanese government was no longer engaged in a “coordinated” genocidal campaign, arguing that
the ongoing violence was “the remnants of genocide” and fighting “primarily between rebel groups, the Sudanese government, and some violence between Chad and Sudan” (CRS, 2009). This is to say that the U.S. government’s position on the indictment of President Bashir is ambiguous at best.

On the other hand, the decision to prosecute President Bashir has sparked a defiant attitude from the African states towards the ICC, 30 of which are parties to the Rome Statute. Though most African Union members have decided not to cooperate with the ICC on carrying out the arrest warrant against President Bashir, they nonetheless remain members of the ICC (Reuters 2009). Botswana is the only African country that has officially expressed its decision to carry out the warrant for the arrest of Bashir, when it stated that “it wishes to reaffirm its position that as a state party. It has treaty obligations to fully cooperate with the ICC in the arrest and transfer of the president of Sudan to the ICC” (Reuters, 2009).

The Sudanese government has rejected the ICC’s jurisdiction over the situation in Darfur and views it as an infringement of its national sovereignty. In February 2007, it announced that it would no longer allow the ICC personnel to speak to Sudanese officials (CRS, 2009). In 2009, a Sudanese man was reportedly convicted of spying for the ICC and was sentenced to 17 years in prison (CRS, 2009). After the arrest warrant was issued against President Bashir, Sudan expelled international aid organizations including Oxfam and Doctors without Borders, and the Sudanese president has engaged in “aggressive diplomatic outreach to allied states, travelling overseas to multiple friendly countries”, thus reducing any potential international isolation (CRS, 2009, p.14). Islamist opposition
leader Hassan al Turabi has called on President Bashir to surrender to the ICC and was
detained two months after having made that statement. The three major Darfur rebel
factions had welcomed President Bashir’s prosecution, although the Justice and Equality
Movement (JEM) that signed a peace agreement with the Sudanese government stated in
March 2009 that the arrest warrant precluded the continuation of peace talks (CRS,
2009). The Sudan People’s Liberation Movement (SPLM), which is the former southern
Sudan rebel group and is now part of the national unity government, has stated that
“Sudan should stand with Bashir at this hard time” (CRS, 2009).

An argument for judicial imperialism

As stated in this chapter, the ICC has intervened in Sudan without the government
of that country having officially asked for such intervention. However, in all the other
cases in which the ICC is currently involved in Africa, the governments of those
countries have voluntarily submitted referrals to the ICC prosecutor. One critique that
could be formulated against the argument of judicial imperialism and politics of selective
justice made in this study is whether the fact that these cases have been voluntarily
referred to the ICC by those governments does not dismiss the claim of selective justice
and judicial imperialism.

First, it must be clearly stated that the argument of selective justice and judicial
imperialism as stated in this study does not focus on a single country; it is rather at the
continental level that the ICC is exercising the said politics of selective justice. In other
words, the ICC targets Africa, compared to other parts of the world. Secondly, when
looked at closely, the governments that have refereed those situations to the ICC have
done so in order to benefit from the ICC’s help to get rid of political or military opponents, or to defeat rebel groups. The government of the President Bozize of the Central African Republic had functioned as a rebel group, and has came to power through ousting the administration of President Patasse through military operations. President Bozize has subsequently appealed to the ICC in order to prosecute the former government officials and its allies, including Jean Pierre Bemba and his political party. The same can be said about the government of the DRC. Additionally, the fact the President Kabila has promoted one the former rebel leaders to the rank of general in the DRC army and has refused to arrest him and hand him over to the ICC despite the warrant for his arrest is a testament that the government is using the ICC to further its own interests, not in the interests of justice or human rights. Lastly, the government of Uganda is accused of abuse of human rights as much as the LRA rebels, although the ICC has so far refused to investigate those claims. Therefore, the fact that those governments have voluntarily invited the ICC to investigate and prosecute crimes committed in their territory does not absolve the ICC because of the disputed legitimacy of those governments in the first place, but also because it is in the interests of those governments that the ICC is operating in those countries.

Conclusion

The implication of the ICC in the African continent has thus far more repercussions that just the arrest of a few rebel leaders or the issuance of the warrant for the arrest of a few other people. These politics of selective justice negatively affect the prospect of ending the conflicts in the continent and hinder the hope of the survivors to
see the end of their plight. Additionally, it has led the African leaders to question the legitimacy of the ICC and that of the principle of universal jurisdiction.
CHAPTER 5: THE DE-LEGITIMIZATION OF THE ICC AND THE PRINCIPLE OF UNIVERSAL JURISDICTION

Hurd (2007) notes that “legitimacy refers to an actor’s normative belief that a rule or institution ought to be obeyed” (p.7). The ICC is an institution that the African states helped establish and sustain. The African states are major actors in the legitimization process of the ICC, which provided the normative belief that the states would enforce any legal rulings of the court. As mentioned by Manirakiza (2009), 47 out of the 54 African states took part of the Rome Conference in 1998, Senegal was the first country in the world that ratified the Rome Statute, and, out of the 60 first states that needed to ratify it before it went into effect, one third were African states. One would then expect the ICC not to suffer any lack of legitimacy in Africa, but the outcome has shifted after the ICC’s involvement in the cases discussed above.

The reality is that perception matters, and often times it matters even more than reality. And the reality of the actions of the ICC speaks for itself, as discussed so far in this study. So, why is the legitimacy of the ICC questioned in Africa? Legitimacy being subjective and defined in relation to the actor’s perception, Hurd (2007) asserts that “When an actor believes a rule is legitimate, the decision whether to comply is no longer motivated by the simple fear of retribution or by a calculation of self-interest but, instead, by an internal sense of rightness and obligation” (p.30). The opposite is also true. When an actor perceives the rule of action illegitimate, the decision to not comply is not just made by a calculation of self-interest, it is also motivated by a sense of rightness and obligation.
The process of de-legitimization of the ICC is not just a decision of refusing to comply with a ruling; it is a process that led to the decision of not cooperating with the ICC, and denying it its legitimacy to make such rulings. Arab and African leaders, as well as the African Union, the Arab League, and the Organization of the Islamic Conference have rallied behind the Sudanese government on this issue. They have criticized the ICC and have called for the deferral of the arrest warrant (CRS, 2009). However, the ICC still has several supporters in Africa who believe that the arguments that Africa is unfairly targeted are baseless; Botswana and Uganda have both supported the ICC. Moreover, Archbishop Desmond Tutu has criticized African governments for supporting Bashir, writing “I regret the charges against President Bashir are being used to stir up the sentiment that the justice system, and in particular, the international criminal court, is biased against Africa. Justice is in the interests of victims, and the victims of these crimes are African. To imply that the prosecution is a plot by the West is demeaning to Africans and understates the commitment to justice we have seen across the continent” (Tutu, 2009). It is true that the focus should be on the victims and that the prosecutions should be done for their sake. The issue nonetheless is that the ICC is not serving the interests of the victims in Africa.

The most compelling argument that views Africa as being victim of judicial imperialism is certainly the official stance of Rwanda. Rwanda is not a state party to the Rome Statute. Knowing the country’s recent history, it is quite compelling that its government has decided not to be part of a court that is primarily aimed at prosecuting crimes of genocide. Its President, Paul Kagame, whose 800,000 fellow Tutsis were
slaughtered in 1994, has said that “Rwanda cannot be party to ICC for one simple reason … with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries” (Manirakiza, 2009, p.32). He also adds, "Rwanda cannot be part of that colonialism, slavery and imperialism."

Others have made the case that the ICC is exploiting the fact the judicial institutions are usually weak in Africa, which allowed the ICC to use the complimentary clause to conduct its investigations (Hanson, 2008). Jean Ping, current President of the African Union Commission, has said that “the international Justice system seems to fight impunity only in Africa, as if there was nothing happening also in Iraq, Gaza, Colombia, or the Caucasus” (Manirakiza, 2009, p.32). In the same regard, the President of Togo, Yayi Boni has echoed the same sentiment when he said that “the ways in which the international criminal justice is currently working show that only the Black Africans are targeted. No one can take that legitimate feeling away from the Africans” (Coulibaly, 2010). The ICC is delegitimized in Africa for not having investigated and prosecuted actions that fall in its jurisdiction elsewhere in the world. Struett (2008) has rightfully noted that “for the ICC to be legitimate, it must create the impression that war crimes, crimes against humanity and genocide can be prosecuted regardless of whom commits them, be they citizens of impoverished failed states or great powers” (p.165). So far, the ICC has failed to create that impression.
The African Union reaction: A collective exercise of sovereignty

Besides the individual decisions of the African states parties to the Rome Statute not to honor their engagement by enforcing the ICC indictment, the African Union has officially endorsed a common policy and has raised issues concerning the matter. The involvement of the African Union in matters that concern primarily state parties and individuals is a collective stance for weaker players in the international arena. The African leaders, measuring the extent to which many of them could become potential “victims” of the ICC prosecutor’s machine, or of the “small European judges” invoking the principle of universal jurisdiction, have riposted with a common voice and made a bloc against the expansion of the ICC’s powers into the internal affairs of their states.

On July 14 2009, the Commission of the African Union issued a document titled “Decision on the meeting of African state parties to the Rome Statute of the International Criminal Court”. The document notes that the decision was arrived at “by consensus with only one opinion to the contrary” and that the meeting and the decisions made during the sessions follow suite to the recommendations of the meeting of the African states parties to the Rome statute held on June 9 2009, and the recommendations of the Executive Council of the African Union. The African Union found it necessary moreover to reiterate the fact that the decision made, although contrary to the actions of the ICC, reflects nonetheless “the consistent position of the AU of unflinching commitment of AU member states to combating impunity and promoting democracy, the rule of law, and good governance on the continent” (AU, 2009). One can notice that the African Union is
not opposed to the idea of the pursuit of justice per se; the point of discontent is the ICC’s actions in the continent.

The ICC is the best permanent mechanism that the international community has come up with so far in order to deal with the most heinous crimes. While some critics could formulate the opinion that the African Union is taking a stance against the ICC, it is important to underline the fact that African states have not just tried to undermine the work of the ICC without proposing alternatives. Indeed, the African Union Commission has reiterated “the need to empower the African Court on Human and People’s Rights to deal with serious crimes of international concern in a manner complementary to national jurisdiction.” Therefore, it recognizes the need to establish a mechanism of international laws that would work in coordination with the national courts to prosecute crimes against humanity in the African continent (AU, 2009).

The priority is for an African mechanism, which suggests that the ICC is viewed as a foreign tool that is abusing its power in Africa and is violating the sovereignty of African states. The collective appeal to an African international court is a testament to the identification of Africa as a single entity in the international system, which comes together to reinforce its presence and power in reaction to what it views as infringement upon its sovereignty by the ICC.

The African Union justifies its decision not to cooperate with the ICC as a logical consequence of the manner in which the prosecution against President Bashir has been conducted—specifically, the “publicity-seeking approach of the ICC prosecutor, the refusal by the UN Security Council to address the request made by the African Union
for deferment of the indictment against President Bashir of The Sudan, under Article 16 of the Rome Statute of the ICC.” It is interesting to note that the AU is not arguing for or against the guilt of the Sudanese president. The decision not to cooperate with the ICC is due to the “approach of the ICC prosecutor”, and the decision of the Security Council not to honor the AU’s call for a deferment of the indictment of Bashir (AU, 2009).

Furthermore, the African Union reiterates that the “the situation in Darfur is too serious and complex an issue to be resolved without recourse to a harmonized approach to justice and peace, neither of which should be pursued at the expense of the other.” The delicate balance between delivering justice to the victims and pursuing peace is once again at the heart of the polemic between the ICC and the African Union (AU, 2010). A harmonized approach to peace and justice in Sudan would take into consideration the geographical and historical roots of the conflict in Darfur (Mamdani, 2009), but also the upcoming referendum on the independence of South Sudan, which is scheduled for 2011, and its potential consequences must not be ignored.

The “three interlocking issues of peace, justice, and reconciliation” are also at the heart of the statement issued by the African Union on 4 February 2010, a day after the judgment of the ICC Appeals Chamber on Darfur. This was in reference of the appeal initiated by the ICC prosecutor in order to include charges of genocide in the indictment of President Bashir. The African Union has reiterated once again that it “has always emphasized its commitment to justice and its total rejection of impunity.” However, the AU also stresses on the fact that “the search for justice should be pursued in a manner not
detrimental to the search for peace” while the indictment of President Bashir does not pursue that endeavor (AU, 2010).

**Justice vs. Peace: Why the ICC is unwelcome in Africa**

The effect of the ICC prosecutions on conflicts in Africa has been subject to heated debate. One of the main criticisms is that “by prosecuting active participants in ongoing or recently settled conflicts, the Court risks prolonging violence or endangering fragile peace processes” (CRS, 2009, p.24). The ICC is making peace negotiations more elusive by removing the offer of amnesty from the negotiations table and “it is difficult to tell victims of these conflicts that the prosecution of a small number of people should take precedence over a peace deal that may end the appalling conditions they endure and the daily risks they face” (Grono, 2006). The aims of peace and justice are apparently in conflict in Uganda, Sudan, and the DRC. The LRA’s leader Joseph Kony has refused to go to Juba, in Southern Sudan, to sign a final peace agreement between his movement and the government of Uganda, for fear of being arrested and handed over to ICC. The annulment of the arrest warrant is a last roadblock to the end of a civil conflict that lasted over two decades (Yukhananov, 2008). The Ugandan government has argued that it has the right to withdraw the case from the ICC since it voluntarily referred it to the Court in the first place. It is now seeking to hold the trials within its own jurisdiction with a combination of traditional forms of justice, which would require the offenders to ask for forgiveness, and offers of compensation to the victims (Yukhananov, 2008).

The argument for recourse to traditional African forms of justice on the road to lasting peace is echoed in large parts of the continent. The ICC is often portrayed as a
mechanism that delays the peace processes. Litha Musyimi-Oganga, an official at the African Union Commission, has said, “We must engage traditional methods known best to Africans to solve the Darfur problem” (Yukhananov, 2008, p.120). Furthermore, Mamdani (2009) writes that “more than the innocence or guilt of the president of Sudan, it is the relationship between law and politics, including the politicization of the ICC, that poses a wider issue, one of greatest concern to African governments and peoples” (p.273). He adds, “The ICC is rapidly turning into a western court to try African crimes against humanity. Even then, its approach is selective: it targets governments that are adversaries of the United States and ignores U.S. allies, effectively conferring impunity on them” (Mamadani, 2009, p.284). Indeed, the ICC has only targeted the LRA leadership in Uganda, and not the pro-American Ugandan government, which is another issue that speaks to the politics of domination from the West.

In the quest for peace, the Ugandan parliament had voted to offer amnesty to the LRA leadership but the government referred the case to the ICC to charge the LRA leadership with crimes against humanity. In instances where there could be no winner in a conflict, it would be more reasonable to seek survivor’s justice rather than victor’s justice, to alleviate ongoing suffering of the victims (Mamdani, 2009). When peace and criminal justice are irreconcilable, the international community should favor peace. In that sense, the ICC involvement in the African conflicts has made the goals of achieving peace more difficult. Had the ICC had existed then, there would be no peace and reconciliation in South Africa in 1990. The ICC would have also prevented the peace process in Mozambique that have allowed the RENAMO, the armed opposition backed at
the time by the apartheid regime of South Africa, to sign a peace agreement and benefit from amnesty (Mamdani, 2009).

A study of the means by which Africa’s longest and bloodiest civil wars ended provides key elements that show that the ICC involvement in the continent does not help the process of bringing peace to the ravaged regions. Local deals and traditional forms of justice have ended conflicts more than any policy of prosecution and western justice. Generally, at the end of the conflict, the victors have shown reluctance to prosecute the other parties, and in many cases, the losers have been integrated in the governments, as a way to bind them to the national goal of peace and development, and to end the rebellion.

Peace became possible in Mozambique only when the South African apartheid regime decided to stop supporting the RENAMO. The peace talks between the guerilla organization and the government of Mozambique led its leaders to integrate the government, which ended the bloody guerilla war (Dowden, 2007). The same process ended the civil war in Sierra Leone after the Revolutionary United Front (RUF) rebel leaders were brought into the government, following the peace agreement signed in 1999. Although the ruthless RUF leader Foday Sankoh was later arrested and died in prison, that agreement was the starting point of the peace process in Sierra Leone (Dowden, 2007). In Angola, after the killing of Jonas Savimbi in 2002, the rebel group that he led integrated the government and the parliament, which helped establish a lasting peace in the country.

In this long list are examples where peace was made without vengeance and retribution, not even at the personal level; anti colonial leaders like Jomo Kenyatta and
Robert Mugabe are also vivid testaments of the power to make peace with their former oppressors. All these examples contradict the often sung statement of the ICC that there is “no peace without justice”. It is obvious that in some cases there can be peace without justice; or at least without justice as it is understood by the western courts (de Waal, 2009). Peace was achieved in Liberia only when there was an offer for Charles Taylor for a safe asylum in Nigeria.

However, the ICC has failed to integrate this historical and socio-political approach in its investigations and prosecutions in Africa. It followed the footsteps of its forerunners in the continent instead. Without any doubt, the cultural forms of justice and the popular tribunals in Rwanda have proven to be much more effective than the International Criminal Tribunal for Rwanda (ICTR). As Richard Dowden (2007) has noted, “in thirteen years, at a cost of over $1 billion, the ICTR achieved only twenty-eight convictions.”

Moreover, the ICC issued arrest warrants against the LRA leaders in Uganda at a time where the peace talks were under way, which made the LRA leaders decide not to go to South Sudan to finalize the peace agreements, for fear of being arrested and extradited to The Hague. In Northern Uganda, the victims of the civil war blame the LRA as much as they blame the Ugandan army. While no one would deny the horrible crimes perpetrated by the LRA, it is nonetheless important to mention that the Ugandan government forcibly displaced and put in internment camps more than two million people where far more died from hunger and disease than at the hand of the LRA rebels. At the time when the Ugandan President Museveni was calling on the ICC to prosecute the LRA
leaders, a cultural form of justice and reconciliation was already taking place in Northern Uganda. The traditional Acholi way of ending disputes which included traditional ceremonies with repentance and reconciliation should have been allowed to take its course, due to its better chance of bringing peace in the region than the prosecution of a few number of LRA leaders.

The questions that need to be answered about the involvement of the ICC in conflicts in Africa are whether it is worth it if the justice cannot bring peace in the regions affected by the conflicts. Who is the justice for? Is it for the victims of the conflict? Is this to flatter the ego of the officials of the ICC and for the peace of conscience of the western governments that feel the pressure from their constituents?

State sovereignty and its perception are dynamic concepts that have different meanings across time and space. In Africa, state sovereignty is particularly subject to controversy and is often perceived with a great sense of honor and pride. Because African states were born out of a struggle to end colonization and they have gained international sovereignty through a different trajectory than the states of Europe, the sense of sovereignty among the African political elite is conceived as a concept of “us” versus “them”.

African states that have removed themselves from the neo-colonial ropes that tied them with the former colonial powers, have strong arguments in favor of their need to preserve their sovereignty. The lack of implementation of successful economic policies has made most African states more inclined to accept the diktat from the Bretton Woods institutions that force them to adopt policies often prescribed by the Western powers.
Whereas African governments are weak in relation to their ability to make their own economic policies and to change their strategic economic alliances when needed, in recent years they have shown eagerness in trying to preserve their sovereignty when it comes to international justice. The reason could be that the international justice apparatus makes the political leaders vulnerable and accountable not only to their national jurisdictions, (which they could manipulate if need be), but also to international jurisdictions, on which they do not have leverage.

That lack of leverage on the international justice apparatus makes the concept of universal jurisdiction particularly relevant in the discussion of the African elites’ reaction to international law. Belgium’s role in the Hissène Habré case is particularly perceived in the African continent as the latest instance in a series of abuses of the principle of universal jurisdiction. The argument that the African political leaders could become the target of “small” European judges that would hold them hostage of the principle of universal jurisdiction has some merit. That possibility led the African Union to take a bold stance against the exercise of that principle, although the organization is always prompt to include in its statements that it is fundamentally attached to the idea of international justice. In that sense, the African Union claims that it is the abuse of the principle of universal jurisdiction that poses a problem.

The African Union has emerged as a collective sovereign entity that speaks in the name of the African states. Furthermore, it has an idea of international justice that would be spearheaded by African courts on African soil. This unprecedented move has two consequences. First, African states have stripped themselves of part of their own
sovereignty and have handed it over to the African Union. The African Union benefits from emerging as a single entity trusted with part of the sovereignty of the individual African states by gaining more legitimacy and becoming more relevant. The pan-Africanist discourse that has called for a federal African state has long questioned the relevance of the defunct Organization of African Unity (OAU) because it had failed to achieve any meaningful step towards African unity. In 2002, its replacement by the African Union, somewhat built in the model of the European Union, has had the advantages of working more diligently towards creating a single avenue where the collective sovereignty of the African states would be defended and preserved. The creation of the African Union Commission headed by a President that speaks the voice of Africa is a great leap forward in that sense.

However, it should be made clear that the African states are ceding part of their sovereignty just by the act of abstaining from enforcing the ICC rulings, at the request of the African Union. This delegation of part of their sovereignty to the African Union is different from the European Union model, which is an institutional delegation of sovereignty. In Africa, this process is new and is rather a collaborative process at this point. Moreover, the strong stance for nonintervention applies to external actors. At the continental level, African states are more willing to work collaboratively and open avenues of sharing common understandings of a collective sense of sovereignty.

The current President of the African Union Commission, Jean Ping, has expressed Africa’s disappointment after the ICC has refused to suspend the indictment of President Bashir. Ping mentioned that the request was made in order “to give to the
peace process a chance to succeed.” Referring to President Bashir, he asked, “What would be achieved when he would be taken to the Court? What about peace? We Africans, we are starting to have the feeling that international criminal justice is just targeting Africans. Doesn’t anything happen elsewhere, in Asia, in South America” (quoted in Coulibaly, 2010)? The African Union is thus becoming more legitimate and relevant by adopting a policy of non-compliance and non cooperation with the ICC.

The arguments put forward in this study show that indeed the ICC and the principle of universal jurisdiction operate with cases of selective justice, unfairly targeting Africans. That view does not attempt to exonerate the individuals investigated and prosecuted for any wrongdoings. That was not the object of this study. Obviously, horrible things were committed on African soil and the perpetrators must face justice. However, it is not in the interest of justice to punish only those that are weak and turn a blind eye when others commit atrocities. That poses the question of legitimacy of the international justice system.

As discussed above, the ICC did not initially have any problem of legitimacy in the eyes of the African political elite and the African populations. In fact, Africa had welcomed the ICC, knowing that a permanent court would be a deterrent to committing the most atrocious crimes. Unlike the ad hoc tribunals, the ICC, due to its permanent status, would build up more legitimacy throughout the time by the actions that it would have undertaken. However, as the cases for investigations, the prosecutions, and the warrant arrests started focusing exclusively on Africa and Africans, the process of delegitimizing the ICC started. In addition, in the world of international politics,
perception matters as much as reality. The perception in the African continent is that the ICC is unfair; therefore, it lost its credibility and legitimacy.

The process of de-legitimization of the ICC is led by the legitimate voice on the African continent: the African Union. By deciding not to enforce the decisions and rulings of the ICC, the African Union has concluded that the ICC is not a legitimate institution for international justice on the continent. The process of de-legitimization reaches a new step at each annual meeting of the African Union General Assembly. At its Fifteenth Ordinary Session held in Kampala, Uganda from July 25 to July 27 2010, the African Union expressed the same position once again. Although it vows its “commitment to fight impunity”, it has nonetheless reiterated “its decision that AU Member States shall not cooperate with the ICC in the arrest and surrender of President El-Bashir of Sudan” (AU, 2010).

It is interesting to note that the Assembly was held in Uganda, one of the countries that are signatories of the Rome Statute, but more importantly, Uganda had referred the “situation” in its northern part to the ICC prosecutor, which led to warrants being issued for the arrest of the Lord’s Resistance Army (LRA) leaders. The African Union requested its Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC, and has rejected “for now, the request by the ICC to open a Liaison Officer to the AU in Addis Ababa, Ethiopia” (AU, 2010).

It is not clear what it means to balance the obligations of the AU with those of the ICC, but what is clear is that the African Union’s official position is that none of its Member States should arrest President Bashir if they were able to. Indeed, Bashir visited
Chad on July 21 2010, the first instance of him visiting a country that had ratified the Rome Statute. As expected, Chad did not put him under arrest, therefore complying with the African Union’s decision of not cooperating with the ICC.

The process of de-legitimization of the ICC has the effect of diminishing the credibility and effectiveness of the ICC into fulfilling its mission of investigating and prosecuting the crimes of genocide, war crimes, and crimes against humanity and crimes of aggression. At the same time, it does not limit the willingness of the African leaders to combat impunity. By implementing mechanisms of prosecution of the atrocious crimes at the continental level, the African states have straightened their collective sovereignty while rallying around their cause the perceived unfairness of the international justice system.

The Making of new African Norms

This study has argued that their history of colonization has made the African states protective of their sovereignty and they have become more inclined to support a strong position of nonintervention especially since the start of this new century. The African states have relied upon the African Union to provide a common front in responding to the perceived legal imperialism of the ICC and the abuse of the principle of universal jurisdiction. African states, having thus considered the ICC and universal jurisdiction efforts to lack legitimacy, have sought to de-legitimize them accordingly, which could be seen as an attempt at breaking norms of international criminal justice. However, the arguments made here are that instead of just breaking norms of international law, African states are rather adopting new norms, which they argue are
better suited in serving their needs and the wider international community. In fact, the act of breaking norms and creating new ones is not a recent phenomenon. As Hurd (2007) argues, “States attempt to legitimize new norms, and thus change their social relationships” (p. 196). African states have reframed their social relationships by bonding together and having made the African Union the leader of the legitimizing authority of these new norms of non-compliance to the international justice system.

Moreover, Hurd (2007) notes that “the process of delegitimation (…) is necessarily also a project of relegitimation of new understandings of the norm” (p. 196). By delegitimizing the ICC and the principle of universal jurisdiction, African states are working at the same time in the process of legitimizing an African mechanism of international law that would deal with matters of international justice within the continent. The stance against for non-intervention and for the preservation of the sovereignty of the African states dictates the adoption of new norms that would make the African states as the agents of the enforcement of intentional law in the continent.

Conclusion

This chapter has argued that African states exercise a collective sovereignty system through the African Union that seeks to delegitimize the ICC and the principle of universal jurisdiction. African leaders’ perception is that they are unfairly targeted by those institutions and thus, have adopted a defying stance against the international justice apparatus. Having proposed alternative mechanisms of enforcement of international law in the continent, African states have proceeded in establishing and legitimizing new
norms of international law that would not violate their sovereignty and make them victims of legal imperialism.
CONCLUSION

The implementation of the ICC is an important step towards the prosecution and prevention of the most heinous crimes. However, in a world made of states, the prospect of delivering justice for individuals is a very ambitious endeavor of the ICC that became perverted by power politics. The ICC has so far only decided to investigate and prosecute cases in Africa, and none of the cases are against the immediate interests of the great powers. These politics of selective justice negatively affect the prospect of ending the conflicts in the continent and hinder the hope of the survivors to see the end of their plight. The abuse of the principle of universal jurisdiction is another instance of politics of selective justice.

The empirical evidence presented in this study shows that African states are opposing to the legal imperialism a strong argument of non-intervention in order to preserve their sovereignty. The colonial past has made African states more aware of the need to protect their sovereignty, which does not derive from what Grovogui calls “Westphalian commonsense.” African peoples have been denied the possibility to exercise the freedom of self-determination and the enjoyment of political and economic sovereignty. That led to a new perception of the same subjugation being perpetuated by the new mechanisms of international criminal justice, despite the initial support of the African states to the idea of a permanent international court.

The process of de-legitimization of the ICC and the principle of universal jurisdiction is led by the African Union, which has emerged as a collective forum for the preservation of African interests, especially the sovereignty of African states. At the
same time, the African union is advocating new norms that give a better chance to peace processes to succeed in the continent and ending conflicts, while fighting against impunity. The adoption of African traditional forms of justice, the consideration of the delicate balance between peace and justice, and the need for strong institutions in Africa are all at the heart of the enterprise of legitimization of African mechanisms and countering the diktat of the ICC and the “small European judges.”

This process has also led to the strengthening of a common shared understanding of the idea of a collective identity in Africa. It is beyond the scope of this study to investigate the extent to which a collective identity has emerged in Africa and how the African Union has been able to be the voice for that realm. That would necessitate a further study, which could help understand the effectiveness and usefulness of such collective identity for Africa and the impact it might have on international relations. Finally, this study is part of the larger focus on the study of regional dynamics in the field of international relations. These regional dynamics are getting an ever increasing capability of shaping international politics. It would be worth investigating not only the impact that the African Union will have in the continent, but also the extent to which its voice will be projected in the global arena.
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