African states and the sociological legitimacy of the International Criminal Court

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1 Cartoon from Victor Ndula, as available at: <http://www.cartoonmovement.com/cartoon/2857>
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Introduction

The first permanent International Criminal Court celebrates its tenth anniversary in 2012. Many commentators will seize this landmark moment in the history of international criminal law to evaluate the Court’s record of achievements. In addition to well-intended panegyrics, critical questions will be posed about the Court’s success in ending the impunity for genocide, crimes against humanity and war crimes when domestic judicial systems are either unwilling or unable to do so. One of the critical questions that certainly will be asked is whether the International Criminal Court (ICC) has proven to be a Court that receives worldwide support from all relevant audiences.

Until now, 121 states have signed and ratified the Rome Statute, the Court’s constitutive treaty. Absent from the list of States Parties are, most prominently, the United States, Russia, China, India, Pakistan, Israel, Egypt, Turkey and Saudi-Arabia. For different reasons these states have refused to join the Court. Nonetheless, despite their opposition, the Court is currently dealing with 16 cases in 7 situations. These situations were either referred by the States Parties to the Rome Statute themselves (Uganda, Democratic Republic of the Congo and the Central African Republic), by the Security Council (Darfur and Libya) or were initiated proprio motu by the Prosecutor (Kenya and Côte d’Ivoire).

What stands out when glancing over the Court’s current investigations and prosecutions, is that all deal with atrocities committed on African soil. For some time, this prosecutorial focus on Africa was not so much a concern to African states. In fact, the first three situations were brought before the Court by African states themselves. However, recent years have shown a mounting tension between African states and the Court. Since the Prosecutor announced that he would seek an arrest warrant for Sudan’s President Omar Al-Bashir, the various organs of the African Union (AU) have adopted a long list of resolutions and communiqués which seem to have expressed a number of concerns and frustrations of African states about the Court. This thesis analyses these concerns and frustrations to explain what they might imply for the legitimacy of the Court. That is to say, what does the mounting tension between African states and the Court indicate about whether the Court receives worldwide support from all relevant audiences?

To understand the importance of this question about the legitimacy of the Court, one has to consider the Court’s constitutional limitations. Despite the fact that the Preamble of the Rome Statute affirms the Court’s determination to put an end to the impunity for the perpetrators of the most serious

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crimes of concern to the international community as a whole, the Court will not investigate and prosecute all such crimes. Only when national authorities are unwilling or unable to genuinely carry out an investigation or prosecution with respect to genocide, crimes against humanity or war crimes will the Court have jurisdiction over these international crimes. Moreover, even if committed crimes fall under its jurisdiction, this does not imply that the Court will investigate and prosecute these crimes. In addition to the Court’s jurisdictional boundaries, its actions are also constrained by two other constitutional limitations.

First of all, the constitutional mandate of the Court and the financial means provided by its States Parties to fulfil this mandate limit its institutional capacity to a handful of concurrent cases. This requires the Court and, in particular, its Prosecutor to determine which committed crimes will be brought before the bench and which offences will not be addressed by the ICC. In making these selection decisions, the Rome Statute requires the Prosecutor to consider the gravity of the committed crimes and the interests of the victims involved. However, these two selection criteria are not defined in the Rome Statute. As such, they leave a very wide discretion for the Prosecutor to select the limited amount of cases that the Court will consider.

Second of all, although the Court will only play ball when national authorities are unwilling or unable to genuinely carry out an investigation or prosecution, the Court is depended upon these same national authorities to arrest and surrender suspected offenders. The Court has no standing army or police force at its disposal. This means that even if a conducted investigation has exposed reasonable grounds to believe that a person has committed crimes within the jurisdiction of the Court, that person may actually never appear before the bench, because national authorities could refuse to surrender the suspected offender to the Court.

Taken together, these two constitutional limitations on the exercise of the Court’s jurisdiction explain the importance of the legitimacy of the Court. If relevant audiences do not perceive or assume the selection decisions of the Court as appropriate and therefore refuse to cooperate with, for example, an arrest warrant, the Court stands with its hands tied. Of course, the Court can pressurize its States Parties to fulfil their responsibilities under the Rome Statute. However, at the end of the day, the Court cannot arrest a suspected perpetrator and put him on a plane to The Hague without the support of national authorities.

This thesis is not the first to underline the importance of the Court’s legitimacy in light of its constitutional limitations. Many commentators have addressed the support that the Court needs to receive from all relevant audiences and have already tabled proposals for how the Court could enhance

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its perceived or assumed legitimacy. Some of these proposals have focussed on the procedures whereby the Prosecutor will select its cases.\(^5\) Others have stressed that the Court’s legitimacy is dependent upon the goals and priorities that the Court sets for itself.\(^6\) Again others have argued that the Court will only be perceived or assumed as legitimate when its proceedings leave maximum flexibility to relevant political authorities.\(^7\)

What stands out about most of these proposals is that they are not derived from the perceptions or assumptions of relevant audiences themselves. Most commentators who have emphasized the importance of the Court’s legitimacy have not analysed how and why relevant audiences perceive or assume the Court, its rules and its decisions as legitimate or not. Instead they have presumed that rules, decisions and decision-makers which they consider appropriate, will also turn to receive support from all relevant audiences.

However, according to this thesis, the views of commentators about the appropriateness of rules, decisions and decision-makers is not necessarily a good indicator for perceived or assumed legitimacy. Unmistakably, such normative justification of rules, decisions and decision-makers does not imply that they are accepted or supported by all relevant audiences. One can only discover what relevant audiences perceive or assume as legitimate by analysing their actual perceptions and assumptions. In contrast to most existing studies on the legitimacy of the Court, that is what this thesis will attempt to do.

Whose perceptions and assumptions deserve attention in this regard? Traditionally, states were the only relevant audiences for the legitimacy of an international institution like the ICC. However, in the twenty-first century, as Margaret DeGuzman explained, ‘globalization has broadened the discourse (..) such that few would contest that the ICC’’s legitimacy audiences extend well beyond states’.\(^8\) Affected populations, perpetrators, and what DeGuzman has called the ‘global society’ are now widely recognized as ‘new’ relevant audiences for the legitimacy of the Court.\(^9\) Nevertheless, this thesis will not address the perceptions or assumptions of these new relevant audiences, but will focus on traditional legitimacy audiences.

\(^5\) See below, fn. 65-67.


Presumably, states remain the dominant actors in the development and enforcement of international law. Moreover, one should remind that the Court is foremost an intergovernmental institution with limited enforcement powers, which remains dependent on states to exercise its jurisdiction. Although new relevant audiences are on the up and up, the future of the Court lies in the hands of states. That is why their perceptions and assumptions are so important for an institution like the ICC.

Why will this thesis focus on the perceptions and assumptions of African states? As noted above, all cases that are currently investigated or prosecuted by the Court deal with offences committed on African soil. Without the cooperation of African states, it will be difficult if not impossible for the Court to complete these cases. Moreover, the possible concerns and frustrations expressed by African states through the AU give cause for an analysis of their perceptions and assumptions about the Court. It seem that the one particularly relevant audience for the Court is not fully convinced of its legitimacy.

A roadmap

How will this thesis uncover what the possible concerns and frustrations of African states might imply for the legitimacy of the Court? The first chapter kicks off by explaining how this thesis proposes to study legitimacy or, to be more precise, sociological legitimacy in the international realm. For the purpose of this thesis, such sociological legitimacy will be defined as an ideal-type mode of social control that intends to explain why actors might or might not accept certain rules, decisions and decision-makers as legitimate. The operative mechanisms for this ideal-type model of social control are the perceptions and assumptions of actors about their desirability, properness and appropriateness.

If scholars want to study the legitimacy of the Court, they have to analyse the perceptions and assumptions of states about the Court as well as about its rules and decisions. The starting points for this analysis are the actions of states with regard to the Court and the reasons given by states to justify these actions. What states do and what states say is what makes scholars wonder whether states are concerned about the desirability, properness and appropriateness of the Court.

However, their actions and statements do not have to correspond with what they perceive or assume as legitimate. The difficulty is that perceptions and assumptions are subjective qualities which are not readily accessible for outside-observers. Nevertheless, this thesis proclaims that scholars can make reasonable assumptions about the legitimacy perceptions and assumptions of states. For this purpose, the ‘context’ in which states take certain actions and advanced particular statements should be analysed.
The second chapter recounts what African states have said and done with regard to the Court during the last ten years, but in particular since July 2008. The purpose of this analysis is to explain what might have concerned and frustrated African states about the Court as well as about its rules and decisions. Initially, African states were very supportive of the Court. After having actively participated in drafting the Rome Statute, African states contributed in various ways to the Court’s build-up. Most notably, African states referred the first three situations for investigation and prosecution to the Court.

However, much changed in the course of 2008, when the Prosecutor applied for an arrest warrant against President Al-Bashir. Following this announcement, a profound crevasse appeared between the Court and most African states, including those who had ratified the Rome Statute. In particular, the numerous resolutions and communiqués adopted by various AU bodies seem to have given expression to the concerns and frustrations of African states about the Court. The second chapter explains, that these concerns and frustrations probably relate to (1) the Security Council, (2) the Prosecutor, (3) the competing obligations and interests of African states, (4) the jeopardizing effects of the Court’s involvement with ongoing peace efforts and (5) the alleged ‘double standards of the Court.

The third chapter calls to mind, that the actions and statements of African states do not have to resemble their legitimacy perceptions and assumptions about the Court. As noted above, scholars can merely make reasonable assumptions about the perceived or assumed legitimacy of the Court by analysing the ‘context’ in which the respective states operate. For this purpose, the five expressed concerns and frustrations that African states have expressed about the Court are discussed in light of the specific contexts in which they were advanced as well as the wider political space in which African states operate. Based on this contextual analysis, the third chapter concludes this thesis by making a number of reasonable assumptions about what the proclaimed concerns and frustrations of African states might imply for the legitimacy of the Court.

In short, the three chapters of this thesis are concerned with the study of sociological legitimacy (chapter 1), with the possible concerns and frustrations of African states about the Court (chapter 2) and with what these concerns and frustrations might imply for the legitimacy of the Court (chapter 3). The purpose of all this, is to find out what the mounting tension between African states and the Court indicates about the support that the Court intends to receive from all relevant audiences worldwide.
Chapter 1

The study of sociological legitimacy

I. Introduction

In popular parlance, the notion of legitimacy is used to express approbation about a certain entity or event.10 Within the relevant academic disciplines, that same notion has been given more specific denotations. A well-known philosophical distinction between concept and conception comes to hand to explain them.11 For this purpose, the concept of legitimacy can be seen as the general idea and its conceptions as the grounds or bases where legitimacy can derive from.12

On the concept or general idea of legitimacy, scholars have debated whether legitimacy should be studied for normative or descriptive purposes. Whether legitimacy should be about the normative justification or the sociological acceptance of rules, decisions and decision-makers.13 The former

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11 Ronald Dworkin gives an illuminating explanation on the philosophical distinction between concept and conception: ‘Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my ‘meaning’ was limited to these examples, for two reasons. First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case, he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness I might have had in mind’. Ronald Dworkin, Taking Rights Seriously (London 1977) 134-135. Another well-known example of a scholar that has used the philosophical distinction between concept and conception is John Rawls. His well-known ‘A Theory of Justice’ works from the concept of justice, one which he thinks it is easy to get agreement on, to a particular conception of justice: justice as fairness. John Rawls, A Theory of Justice (Harvard 1971) 5 and 14 footnote 15. See on Rawls’ use of the distinction between concept and conceptions: Samuel Freeman ed., The Cambridge Companion to Rawls (Cambridge 2003) 329-334.

The distinction between concepts and conceptions originates with a paper written by the philosopher William Gallie in 1956, entitled ‘Essentially Contested Concepts’. The essence of his argument is the idea that certain (moral) concepts like ‘good’, ‘right’ and ‘just’ are ‘essentially contested’. Although, these concepts appear to have a common or shared meaning, one could still disagree on the criteria or conceptions for its application. Of course, this holds true for many concepts, but clearly for some more than for others. Those who dispute the meaning of essentially contested concepts continue ‘to maintain that the special functions which the (concept) (...) fulfils on its behalf or on its interpretation, is the correct or proper or primary, or the only important function which the (concept) in question can plainly be said to fulfil’. Gallie mentions ‘works of art’, ‘Christian doctrine’ and ‘democracy’ as prime concepts which are generally used in this manner. Perhaps ‘legitimacy’ can be added to the list of essentially contested concepts. William B. Gallie, ‘Essentially Contested Concepts’, Proceedings of the Aristotelian Society – New Series 56 (1955-1956) 167-198.

12 This distinction between the concept and conceptions of legitimacy has previously been invoked by: Arthur Isak Applbaum, ‘Legitimacy in a Bastard Kingdom’, Harvard John F. Kennedy School of Government Centre for Public Leadership Working Paper 5, 76. This paper can be accessed at: <http://dspace.mit.edu/bitstream/handle/1721.1/55927/CPL_WP_04_05_Applbaum.pdf?sequence=1>.

13 This distinction between normative/moral and sociological/empirical/descriptive legitimacy is well-known in the literature. See for example: Jürgen Habermas, Communication and the Evolution of Society, as translated by:
concept of legitimacy derives from the work of political and legal philosophers who have reflected on the conditions under which they consider rules, decisions and decision-makers as legitimate. The latter concept of legitimacy follows the contributions of Max Weber who ‘detached legitimacy from the philosophical legacy’ by posing the question whether rules, decisions and decision-makers are accepted instead of whether they ought to be supported. This thesis is concerned with the concept of sociological legitimacy. The second section of this chapter will explain what this concept is all about (section II).

On the conceptions of legitimacy, scholars have questioned where either normative justification or sociological acceptance can derive from. They have, for example, heralded democracy, public participation, internal morality, universal morality, transparency, process fairness, the expertise of the decision-maker and rule-determinacy as possible grounds or bases of legitimacy. This thesis is not concerned with one particular conception of sociological legitimacy, but presumes that all proposed legitimacy conceptions could, in principle, explain whether rules, decisions and decision-makers are perceived or assumed as legitimate by relevant audiences. The third section elucidates the various conceptions of sociological legitimacy (section III).

After introducing the concept as well as the proposed conceptions of sociological legitimacy, this chapter turns to the question how scholars can study sociological legitimacy in the international realm. In a provisional attempt to answer this far from easy question, the fourth section analyses how IR and IL scholars have studied legitimacy. The results of this analysis are disappointing as they reveal that most IR and IL scholars speak about legitimacy as if its meaning would be self-evident. Moreover, most IR and IL scholars disqualify their research on sociological legitimacy by hypothesizing that international legal rules and international institutions which, according to them, deserve normative justification, will also turn out to receive support from all relevant audiences. In this way, they do not only blur the distinction between normative justification and sociological


acceptance, but they also ignore what sociological legitimacy is all about, namely the actual perceptions and assumptions among relevant audiences (section IV).

According to this thesis, the study of sociological legitimacy requires an analysis of such actual perceptions and assumptions. However, this is easier said than done. How can scholars determine which legitimacy conception(s) could help explain whether states perceive certain international legal rules and international institutions as legitimate? The fifth section concerns itself with this question and ends up with a contextual approach for analysing the perceptions and assumptions of African states about the legitimacy of the Court (section V and in conclusion, section VI).
II. What is sociological legitimacy?

The founding father of the sociological concept of legitimacy, Max Weber, proclaimed that all enduring structures of domination (Herrschaft) require belief on the part of the ruled that its rules and decisions are legitimate.\(^{16}\) He understood legitimacy as an ideal-type mode of social control. An abstraction that is unlikely to be found in anything like its ‘pure’ or isolated form, but which can help understand why relevant audiences support the Herrschaft as well as its rules and decisions.\(^{17}\)

For Weber, such sociological legitimacy was not the only ideal-type mode of social control. Other factors would influence the behaviour of relevant audiences as well. He placed legitimacy in opposition to two other ideal-type modes of social control: coercion and self-interest (sub-sections II.A. & II.B.). This section follows his example, in order to explain what the concept of sociological legitimacy is all about, namely an ideal-type mode of social control that attempts to explain why actors might or might not accept certain rules, decisions and decisions-makers (sub-section II.C.).\(^{18}\)

II.A. Coercion

The first ideal-type mode of social control is coercion, which refers to an order where relations of asymmetrical physical power between actors are applied to affect the behaviour of weaker actors.\(^{19}\) In such an order, acquiescence or compliance is generated by the fear for punishment from stronger actors. The classical example is presented in Thomas Hobbes’ Leviathan. In his coercive order, a strong Leviathan (for example, a hegemonic state) pacifies the interactions between other actors (the subordinate states) and enforces its rules and decisions upon them under the threat or use of ‘force’.


\(^{19}\) This ideal-type mode of social control is the philosophical point of departure for classical political realism and legal positivism (John Austin), who take the act of enforcement as the essence of law and order.
Many scholars have explained that coercion is a very primitive mode of social control. Coercion tends to generate resentment or at least decreases the likelihood that actors will voluntarily comply with a rule-enforcing actor. Consequently, as Friedrich Kratochwil proclaimed, in a coercive order ‘every exercise of coercive force has to be transferred into one of power’, otherwise the weaker actors will not comply. Over time this will increasingly become a costly practice, which might very well lead to the collapse of the order, unless the rule-enforcing actor manages to bring about more stable expectations among the subordinate actors. This can be done by restraining the coercive components of their rule-enforcement. That is to say, the rule-enforcing actors would have to slack the reins and allow the other modes of social control, i.e. self-interest and sociological legitimacy to flourish.

II.B. Self-interest

The second ideal-type mode of social control is self-interest. In a self-interest explanation of why actors behave in a certain way, the starting assumption is that the conduct of actors depends on a self-conducted calculation or assessment of their own interest. The actor would make an instrumental assessment to determine its actions by comparing the net benefits of compliance with the net costs of noncompliance. In other words, if an actor would assess that following a certain rule, decision or decision-maker advances its self-interest, then the actor is expected to act accordingly.

How can the self-interest ideal-type mode of social control be distinguished from coercion? Both modes expect that actors pursue ‘interest’ and are essentially nothing but utilitarian concepts. The crux to understand the differences between these two utilitarian concepts is the different catalyst or starting point for their operative mechanisms. According to the self-interest explanation, compliance is generated by the internal assessment of interest, while in a coercive order interest is derived from external pressure. To be more precise, as Ian Hurd noted, the self-interest mode of social control operates by ‘self-restraint on the part of the actor’ and coercion by ‘external restraint’ which is forced upon subordinate actors.

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21 Ibidem, 697-699.
22 This idea is the philosophical point of departure for what Harold Koh calls the ‘rationalistic instrumentalist strand’ in IR and IL, which assumes that states themselves continuously seek to attain their interests. Koh, ‘Why do Nations Obey International Law’, 2632.
II.C. Sociological legitimacy

The third ideal-type mode of social control is sociological legitimacy. Proponents of this concept argue that the conduct of actors cannot, or at least cannot completely be explained by referring to an internal assessment of the self-interest of these actors nor by an external pressure forced upon them. They proclaim that actors might also be motivated to comply because these actors perceive or assume the respective rules, decisions and decision-makers as desirable, proper and appropriate.  

In other words, sociological legitimacy is a subjective quality, which does not, like the normative concept of legitimacy, claim to resemble the ‘actual’ desirability, properness and appropriateness of rules, decisions and decision-makers. What matters for the third ideal-type mode of social control, is what relevant audiences perceive or assume as legitimate. These perceptions or assumptions are expected to provide ‘internal reasons’ for actors to follow or ignore rules, decisions and decision-makers.  

How can sociological legitimacy be distinguished from the two other ideal-type modes of social control? When actors perceive or assume rules, decisions and decision-makers as legitimate, they are not coerced to comply under the threat or use of force. Instead they will comply voluntarily for ‘internal reasons’. Sociological legitimacy does not operate through external restraint, but like the self-interest ideal-type mode of social control through self-restraint.

What is important to point out in this regard, is that the ‘internal reasons’ of sociological legitimacy differ from the ‘interest’ where the self-interest explanation focusses upon. The crux to understand the difference between the two ideal-type modes of social control is their contradicting point of departure. For the self-interest mode of social control this is the ‘rationalist’ logic of consequences, which proclaims that actors are primarily driven by a calculation of the consequences of their actions.  

Legitimacy perceptions and assumptions could be part of this instrumental calculation, but as nothing more than one peculiar interest. In contrast, sociological legitimacy follows the

24 See in particular: Hurd, ‘Legitimacy and Authority in International Politics’, 381. (‘Legitimacy refers to the normative belief by an actor that a rule or institution ought to be obeyed’.). Hurd, After Anarchy – Legitimacy & Power in the United Nations Security Council, 30-31. Mark C. Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, Academy of Management Review 20.3 (1995) 574. (He defined legitimacy as ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’)


26 This distinction between the logic of consequences and logic of appropriateness is derived from: James G. March and Johan P. Olson, ‘The Institutional Dynamic of International Political Orders’, International Organization 52.4 (1998) 943-970. Note that some scholars have also started to the describe the logics of arguing, practicality, purposive role playing, habit and emotion. However, it goes beyond the scope of the contribution to discuss these logics. See: Jutta Brunnée, and Stephen J. Toope, ‘Constructivism in International Law’ (2012, forthcoming) This chapter can be accessed at: <http://www.law.uvic.ca/demcon/2011%20readings/Brunnee-Toope-Victoria%202011.pdf> 7.
‘constructivist’ logic of appropriateness, which expects that actors follow rules, decisions and decisions-makers ‘that associate particular identities to particular situations’. In other words, the logic of appropriateness places legitimacy perceptions and assumption prior to the assessment or calculation of self-interest.

In sum, the concept of sociological legitimacy is an ideal-type mode of social control that attempts to explain why actors might or might not accept certain rules, decisions and decisions-makers. The operative mechanisms for this ideal-type mode of social control are the perceptions and assumptions among relevant audiences about the desirability, properness and appropriateness of rules, decisions and decision-makers.

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27 March and Olson, ‘The Institutional Dynamic of International Political Orders’, 951
III. Where does sociological legitimacy derive from?

When accepting that sociological legitimacy is about the perceptions and assumptions of relevant audiences, the question that rises is where such perceived or assumed legitimacy can derive from? What can convince actors of the desirability, properness and appropriateness of particular rules, decisions and decision-makers? Many scholars have addressed this question and have heralded different grounds or bases of legitimacy. That is to say, they have proposed various conceptions of sociological legitimacy.

The purpose of this third section is not to choose either one of these proposed legitimacy conceptions, but to elucidate what they are about. As noted above, this thesis is not concerned with one particular conception of sociological legitimacy, but presumes that, in principle, all proposed legitimacy conceptions might help explain whether rules, decisions and decision-makers are perceived or assumed as legitimate by relevant audiences.

Essentially, four legitimacy conceptions can be distinguished. In the first place, the source-based conception of legitimacy, which deals with the origins of the authority or the mandate of decision-makers (sub-section III.A.). Secondly, the process-based conception of legitimacy, which emphasizes that sociological legitimacy derives from the process through which rules and decisions are adopted and enforced by the decision-maker (sub-section III.B.). Thirdly, the outcome-based conception of legitimacy, which argues that the perceived or assumed output of the rules, decisions and decision-makers determines their sociological legitimacy (sub-section III.C.). And finally, the actor-based conception of legitimacy, which underlines the role of the actor itself in inducing its legitimacy perceptions and assumptions (sub-section III.D.).

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28 This four-fold categorization of legitimacy conceptions is based upon a number of categorization or ‘models’ that have been proposed by scholars to systemize the different grounds or bases of sociological legitimacy. Perhaps the most well-known proposal came from Fritz Scharpf. He distinguished procedural factors (input-legitimacy) from substantive outcomes (output-legitimacy). Other useful categorization have been put forward, for example, by Daniel Bodansky (source, process and outcome-based legitimacy), Andrew Hurrell (process, substantive values, expertise, effectiveness and persuasion) and Ian Hurd (favourable outcomes, fairness and correct procedure). When deemed necessary, this section will explain, in its references how the four-fold categorization of legitimacy conceptions advanced in this thesis differs from other categorizations.


III.A. Source-based legitimacy

The first conception of sociological legitimacy deals with the origins of the authority of decision-makers. In the domestic context, ‘the people’ are expected to have given their consent to an authoritative government. In the international domain, the expressed consent of states is considered the most important source for the authority of rules, decisions and decision-makers from ‘above the state’. How does this relate to sociological legitimacy? If relevant audiences do not perceive or assume the source of the authority of a decision-maker as proper or when they doubt whether to have consented to a particular exercise of that authority, these perceptions or assumptions might negatively reflect on the sociological legitimacy of the respective decision-maker.

The most well-known exponent of the source-based conception of legitimacy in the international realm, is the debate on the alleged democratic deficit of international governance. With the increased importance of international institutions, the critique that these institutions tend to lack ‘democratic legitimation’ for their exercise of authority at the international level has blazed up brightly.29 In particular, the European Union (EU) has been susceptible to this critique. Many scholars have addressed the so-called legitimacy gap of the EU in reference to the ‘unelected character of the European Commission’, ‘the alleged weakness of the European Parliament’ and the ‘lack of a European political identity or ‘demos’’. 30 Other decision-makers like the World Trade Organization31, the United Nations Security Council32, treaty bodies of multilateral environmental agreements33, the World Commission on Dams34 and the ICC35 have been confronted with similar critiques as well.

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Although many aspects of the debate on the alleged democratic deficit of international governance relate to the process and outcome-based conceptions of sociological legitimacy as well, the point of the departure for this debate is the origin of the authority of these decision-makers. That is what the source-based conception of sociological legitimacy is about.

III.B. Process-based legitimacy

The second conception starts from the premise that sociological legitimacy derives from the process through which rules and decisions are adopted and enforced. As Thomas Franck explained, a decision or rule is legitimate to the extent that it has ‘come into being and operates in accordance with generally accepted principles of rights process’.36 This conception can be illustrated by the example of a person who thinks that a particular judicial decision is misguided, inequitable, or even unjust, but who still accepts that decision as legitimate, because it was ruled by a court with proper jurisdiction.37 The claim of the process-based conception of legitimacy is therefore not that the content of a rule or decision requires sociological acceptance, but that its underlying procedure should be perceived or assumed as desirable, proper and appropriate.38 This procedure concerns both the deliberation (III.B.1.) and the persuasion (III.B.2.) of rules and decisions.


38 In this respect my categorization differs from Hurd, who argues that what he calls ‘the procedural school of legitimacy’ is only concerned with the correctness and not the fairness of the procedure. However, when considering, the work of Thomas Franck as well as of Abram Chayes and Antonia Handler Chayes, the scholars who Hurd places within his fairness school of legitimacy, it becomes clear that these scholars are interested in both procedural and substantive fairness. To speak of a fairness school of legitimacy as a separate conception is to blur the analytically useful distinction between process-based and outcome-based legitimacy. See Hurd, After Anarchy – Legitimacy & Power in the United Nations Security Council, 69-70.
III.B.1. Deliberation

The first component of the process-based conception of legitimacy emphasizes the importance of the legitimate deliberation of rules and decisions. That is to say, the procedures, debates, discussions and communications prior to the adoption of rules and decisions should be perceived or assumed as desirable, proper and appropriate by all relevant audiences. Many scholars who have addressed the deliberative component of the process-based conception of legitimacy have based their selves on Jürgen Habermas’ theory of communicative action. Take Jens Steffek as an example. He has argued that what produces legitimacy in the internal realm ‘is less the fact of having consented [like the source-based conception of legitimacy proclaims], but rather having consented to a certain normative reasoning linking shared values and principles to practice type norms’.  

Interestingly, most scholars will, in principle, welcome this idea of reaching consensus to a ‘certain normative reasoning’ and tend to acknowledge the importance of legitimate deliberation. However, on the question what is required for legitimate deliberation there is absolutely no scholarly concordance. Consider, for example, the question whether legitimate deliberation in the international realm calls for transparency? Whether non-governmental organizations should play a (more) prominent role in international decision-making? And what about regional organizations or academic experts?  

These are just some of the questions where the deliberative component of the process-based conception of legitimacy is concerned with.

III.B.2. Persuasion

In contrast to deliberation, the second component of the process-based conception of legitimacy does not bear upon the process prior to the adoption of rules and decisions, but deals with the process of giving persuasive reasons for these rules and decisions after their adoption. This component emphasizes that for the perceived or assumed legitimacy of rules and decisions, a lot depends on the reasons given by rule-enforcing actors in support of these rules and decisions.

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40 For a discussion on expertise as a basis of legitimacy, see: Hurrell, ‘Legitimacy and the use of force: can the circle be squared?’, 22. (he notes: ‘Institutions and the norms and rules that they embody are legitimate to the degree that those centrally involved possess specialist knowledge or relevant expertise. Arguments of this kind have often been central to debates surrounding the legitimacy of multilateralism in relation to the global economy or the environment’.) See also: Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law’, 619-624.
In the international context, the complexity of this persuasion process cannot be underestimated.\textsuperscript{41} Consider already the multiple audiences and different demands that need to be addressed, if even something seemingly so innocuous as the location of the announcement of a rule or decision can affect its perceived or assumed legitimacy. As Andrew Hurrell, explained: ‘legitimacy is also about asking difficult questions about who is included and excluded from (..) allegedly shared languages and where the gaps and breakdowns occur’.\textsuperscript{42} It is exactly these kinds of questions, what the persuasion component of the process-based conception of sociological legitimacy is all about.

\section*{III.C. Outcome-based legitimacy}

The third conception of sociological legitimacy assumes that legitimacy perceptions and assumptions do not only derive from the source or the underlying process of rules, decisions and decision-makers, but also from their perceived or assumed outcomes or outputs. Actors are expected to develop perceptions and assumptions about the content and effects of rules, decisions and decision-makers. This conception concerns both their effectiveness (III.C.1) as well as the ‘quality’ of the rules adopted (III.C.2.).

\subsection*{III.C.1. Effectiveness}

The old adage that ‘nothing succeeds like success’ is an often invoked ground or basis for the sociological legitimacy of rules, decisions and decisions-makers.\textsuperscript{43} The core premise of the first component of the outcome-based conception of sociological legitimacy is ostensibly clear-cut: rules, decisions and decision-makers are expected to induce positive perceptions or assumptions about their desirability, properness and appropriateness, if they are perceived or assumed to realize the ‘favourable outcomes’, ‘effectiveness’ or ‘good performance’ where the relevant audiences had hoped for.\textsuperscript{44}

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\textsuperscript{42} Ibidem, 25.

\textsuperscript{43} As proclaimed by Arthur Help in his famous novel Realmah (1868): ‘rien ne réussit comme le succès’ (nothing succeeds like success).

\textsuperscript{44} Hurd introduces the ‘favourable-outcomes’ approach as the hypothesis that ‘the ultimate distribution of payoffs’ from a rule or institution is important for its legitimation. Hurd, \textit{After Anarchy – Legitimacy & Power in the United Nations Security Council}, 67-69.
\end{flushright}
However, like with the deliberative component of the process-based conception of legitimacy, most scholars can accept the importance of the effectiveness of rules, decisions and decision-makers, but it turns out to be quite a difficult task to agree on a comprehensive definition of such effectiveness. After all, this would require a consensus on the division of material gains and the establishment of a hierarchy of values. Therefore the question rises, what the relevant audiences perceive or assume as effective? This question cannot be answered \textit{a priori}, but will have to be addressed within the context of the particular situation. How this works out in practice will be further explained below.

III.C.2. Quality

The second component of the outcome-based conception of sociological legitimacy is concerned with the quality of rules. Most prominently, Thomas Franck has asserted that ‘legitimacy exerts a pull to compliance which is powered by the quality of the rule’.\textsuperscript{45} According to Franck, the legitimacy of a rule depends on its clarity or determinacy, its symbolic validation through rituals and stable practice, its coherence or consistence with other rules and its vertical connection to a pyramid of secondary rules (adherence).\textsuperscript{46} Hence, sociological legitimacy is conceived by him as a quality that can be ‘cultivated internally within rules’.\textsuperscript{47}

To understand what this second component of the outcome-based conception of sociological legitimacy is about, consider the following example. An actor is confronted with a brand new rule that a court has found to exist within customary law. If the actor believes that this rule is unclear, inconsistent with other rules or not validated by stable practice, that actor will likely not perceive or assume that new rule as desirable, proper and appropriate. In fact, that actor might decide not to live-up to the new rule because it challenges the quality of the rule. That is how the perceived or assumed quality of a rule might affect its sociological legitimacy among relevant audiences.

\textsuperscript{45} Franck, \textit{The Power of Legitimacy Among Nations}, 26.

\textsuperscript{46} Thomas Franck, \textit{Fairness in International Law and Institutions} (Oxford 1995), 30-46.

III.D. Actor-based legitimacy

The final conception of sociological legitimacy focusses upon the actors who develop legitimacy perceptions or assumptions. Although, the so-called actor-based conception acknowledges that sociological legitimacy can derive from the source, process and outcomes of rules, decisions and decision-makers, this conception emphasizes, above all, the role of the actors themselves in producing sociological legitimacy. This conception deals both with the internationalization of the norms underlying the respective rules, decisions and decision-makers (III.D.1.) as well as with the interaction through which new norms are expected to emerge (III.D.2.).

III.D.1. Internalization

The first component of the actor-based conception proclaims that sociological legitimacy partly derives from the internalization of the norms underlying rules, decisions and decision-makers. If an actor has not endorsed the norm(s) on which a rule, decision or decision-maker is based, then the actor will likely not perceive or assume that rule, decision or decision-maker as desirable, proper and appropriate. For example, if a state has not internalized the norms of international individual criminal responsibility, then that state will likely not perceive or assume a decision of the Court to issue an arrest warrant against one of its citizens as legitimate.

III.D.2. Interaction

The second component of the actor-based conception goes another step back from the norms underlying rules, decisions and decision-makers to the process through which these norms are developed. Focus is placed on the interactional processes ‘rooted in underlying set(s) of shared understandings’. Most notably, Jutta Brunnée and Stephen Toope have argued on the basis of Lon

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48 The process of internalization has also been coined ‘socialization’ or acculturation. Moreover, scholars have explained that this process can go through different stages or ‘cycles’ and can take place at different levels. For example, Harold Koh has spoken of social, political and legal internalization.


Fuller’s interactional legal theory, that legitimacy is ‘built through broad participation in the construction and maintenance of legal regimes’ and grounded ‘in underlying social norms’.\textsuperscript{50}

According to Brunnée and Toope, if new norms lack this interaction-based legitimacy ‘it will be difficult if not impossible to see them emerge as ‘law’.\textsuperscript{51} In other words, they connect legitimacy to legality. When a rule, decision or decision-maker is founded upon a norm that lacks interaction-based legitimacy, relevant audiences will likely not perceive or assume them as desirable, proper and appropriate. The interactional component of the actor-based conception of sociological legitimacy underlines that rules, decisions and decision-makers cannot follow one-way streets. Actors have to participate actively in their development. If this does not happen, one cannot expect actors to perceive or assume rules, decisions and decision-makers as legitimate.

\textsuperscript{50} Ibidem, 53.

\textsuperscript{51} Ibidem.
IV. The study of sociological legitimacy in IR and IL

What should be obvious by now is that sociological legitimacy or the lack thereof can come from very different directions. There is not one conception of sociological legitimacy that can explain why relevant audiences accept rules, decisions and decision-makers as legitimate. The same holds true for the perceptions or assumptions of states about the desirability, properness and appropriateness of international law and international institutions. In principle, all four legitimacy conceptions could help explain whether states perceive or assume rules of international law and decisions from international institutions as legitimate.

The question which rises from all this, is how scholars can study sociological legitimacy in the international realm? That is to say, how do scholars know which legitimacy conceptions can help explain whether states perceive or assume rules, decisions and decision-makers as desirable, proper and appropriate? In a provisional attempt to answer this far from easy question, this section analyses how IR and IL scholars have studied sociological legitimacy in the international realm.

Within the disciplines of IR and IL, the concept of legitimacy has gained in popularity over the last twenty years (sub-section IV.A.). However, this has not resulted in very solid approaches for studying sociological legitimacy in the international realm. Instead, most IR and IL scholars speak about legitimacy as if its meaning would be self-evident, which is far from the fact that there are multiple concepts and conceptions of legitimacy. Moreover, most IR and IL scholars who have studied sociological legitimacy, disqualify their research by presuming that international legal rules and international institutions which, according to them, deserve normative justification, will also turn out to receive support from all relevant audiences. In this way, they do not only blur the distinction between normative justification and sociological acceptance, but they also ignore what sociological legitimacy is all about, namely the actual perceptions and assumptions among relevant audiences (sub-section IV.B.).

IV.A. The rising popularity of legitimacy in IR and IL

Legitimacy has only recently started to receive considerable attention in the work of IR and IL scholars.52 Until around two decades ago, and in particular before the end of the Cold War, IR scholars favoured utilitarian concepts like coercion and self-interest, while IL scholars tended to focus on legality. As a result, the study of legitimacy was limited to sociologists, political scientists,

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philosophers and scholars of public administration, who mainly applied the concept to the domestic domain.53

Since then, a ‘renaissance of legitimacy-talk’ has taken place within IR and IL.54 What might explain this rising popularity of legitimacy in the international realm? In the first place, this development can be ascribed to the ideational or constructivist turn in IR and the increased openness of IL scholars to interdisciplinary approaches. Furthermore, the transforming ‘outside world’ characterized by a proliferation and strengthening of international institutions, ascending non-state actors, the rapid development of customary and treaty-based rules as well as a decline of national sovereignty can be mentioned as a logical explanation for the rising popularity of sociological legitimacy in IR and IL.55

The result of all this has been a wide variety of legitimacy studies. Most of these studies have focussed on the legitimacy of particular international institutions or organizations.56 For example, IR and IL scholars have addressed the legitimacy of the World Trade Organization, the United Nations

53 Well-known examples include: Habermas, Communication and the Evolution of Society, 178. (‘Legitimacy means that there are good arguments for a political order’s claim to be recognized as right and just; a legitimate order deserves recognition. Legitimacy means a political order’s worthiness to be recognized’). Robert A. Dahl, Modern Political Analysis (New Haven 1970, 2nd edition) 41. (‘A government is said to be ‘legitimate’ if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials or leaders of government possess the quality of ‘rightness’, propriety or moral goodness – the right, in short, to make binding rules’). David Beetham, The Legitimation of Power (London 1991), 15-16. (‘Power can be said to be legitimate to the extent that it conforms to established rules, the rules can be justified by reference to beliefs shared by both dominant and subordinate, and there is evidence of consent by the subordinate to the particular power relation’). Max Weber does not really provide a one-sentence definition of legitimacy. However in the intellectual portrait of Weber provided by Reinhard Bendix, an attempt is made to come to a Weberian definition of sociological legitimacy: ‘the obedience of the ruled is guided to some extent by the idea that the rulers and their commands constitute a legitimate order of authority’. Reinhard Bendix, Max Weber – an intellectual portrait (1960) 292.

54 Clark, Legitimacy in International Society, 12. Shane Mulligan has even stated that ‘in the last 20 years, it seems, legitimacy has come to the fore as a ‘master question’ of international relations’. Mulligan, ‘The Uses of Legitimacy’, 350.


56 Note that the distinction between institution and organization can be very subtle. Institutions could be seen as the rules and practices that derive from a given formal organization, but institutions could also be understood in a broader way so as to include both the formal organization as well as its rules and practices. This thesis follows the second - broader - approach towards institutions.
Security Council, the EU, the treaty bodies of multilateral environmental agreements, but also of international courts, the World Commission on Dams and even of private governance systems.57

In addition to this ‘institutional orientation’, which has been shared by both IR and IL scholars, legitimacy has also been ascribed to particular rules of international law.58 The most well-known exponents of this ‘rule based’ approach to legitimacy are Thomas Franck’s work on the fairness of international law, the managerial account of compliance with international law from Abram Chayes and Antonia Handler Chayes, Harold Koh’s transnational legal process theory and the more recent contributions from Jutta Brunnée and Stephan Toope on an interactional theory of international law.59

IV.B. The drawbacks of the rising popularity of sociological legitimacy in IR and IL

What most of these studies have in common, apart from following the institutional orientation or a rule-based approach to legitimacy, is that they are interested in what Thomas Franck has coined the ‘power of legitimacy’.60 That is to say, most of these different contributions intend to explain why international actors, and in particular states, accept international law and international institutions even when compliance is not always in their self-interest nor forced upon them.

Some IR and IL scholars make this focus on sociological acceptance and thus sociological legitimacy explicit. 61 For example, Ian Hurd has explained that he has been ‘interested strictly in the subjective feeling by a particular actor or set of actors that some rule is legitimate’.62 However, most IR and IL scholars are not explicit about their conceptual focus. They fail to explain their concept and


58 This has also been noted by: Bodansky, ‘Legitimacy in International Law and International Relations’, 4.


60 Franck, The Power of Legitimacy among Nations.

61 This has also been noted by: Bodansky, ‘Legitimacy in International Law and International Relations’, 10.

conceptions of legitimacy by speaking of sociological legitimacy as if its meaning would be self-evident.

Why are most IR and IL scholars not explicit about their interest in the sociological acceptance instead of the normative justification of rules, decisions and decision-makers? The answer given by Daniel Bodansky is that IR and IL scholars ‘tend to think that [sociological acceptance and normative justification] go together in practice’. In other words, most IR and IL scholars presume that international legal rules and international institutions which, according to them, deserve normative justification, will also turn out to receive support from all relevant audiences. This working assumption might very well explain, why IR and IL scholars are generally not explicit about their focus on sociological acceptance.

Consider the example of the proposals tabled to increase the legitimacy of the ICC. As noted above, some of these proposals have focussed on the procedures whereby the Prosecutor selects the

63 Bodansky, ‘Legitimacy in International Law and International Relations’, 10.
64 Note that many of these commentators fail to explain at all what they mean by legitimacy or how it can be studied. See for example: Lutz Oette, ‘Peace and Justice, or Neither? – The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond’, Journal of International Criminal Justice 8 (2010) 357. (States that ‘question marks over the ICC’s legitimacy may in turn erode further the willingness of states to cooperate’). Luc Côté, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’, Journal of International Criminal Justice 3 (2005) 171. (He emphasizes that ‘it is not the political dimension of [prosecutorial] decisions that is cause of concern (..) what is really disturbing is their occult or secret nature. Their concealed practice based upon unknown criteria gives rise to criticism and casts doubt on their legitimacy and impartiality’). Jennifer Falligant, ‘The Prosecution of Sudanese President Al-Bashir: Why a Security Council Deferral Would Harm the Legitimacy of the International Criminal Court’, Wisconsin Law Journal 27 (2010) 752. (She argues that ‘the powers held by the Security Council can significantly strengthen the ICC’s legitimacy as a functioning judicial institutions’). Human Rights Watch, ‘Policy Paper: the meaning of the ‘interests of justice’ in article 53 of the Rome Statute’ (June 2005), as available at: <http://www.hrw.org/sites/default/files/related_material/2005_ICC_Interests_%20of_Justice.pdf>. (HRW expressed its concerns about the possible ‘politicization’ of the Prosecutor if he would consider the interests of peace in exercising his discretion and that this ‘in turn would undermine the legitimacy of the Court’).

Commentators who have been more specific about what they mean when speaking about the legitimacy of the ICC are: Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, The American Journal of International Law 97.3 (2003) 541. (‘I propose, the ICC Prosecutor should draft a set of prosecutorial guidelines to govern his discretionary decision making. The promulgation of such guidelines will materially assist the Prosecutor in accomplishing both the achievement of legitimacy and the perception of legitimacy.’). DeGuzman, ‘Gravity and the Legitimacy of the International Criminal Court’, 1400-1465. DeGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’, 269-270. (She observes: ‘Legitimacy is a complex, multidimensional concept. I use the term herein to refer to the perception among relevant audiences that the ICC’s actions are worthy to respect’). Michael Strett, ‘The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court’, in: Steven C. Roach ed., Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court (Oxford 2011) 107. (‘The legitimacy of the ICC depends ultimately on its capacity to persuade observers that the exercise of its powers to investigate, prosecute, and punish violations of international criminal law is consistent with the application of rules that are universal in nature’). Takemura, ‘Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court’, 5. (Notes that ‘[a] problem in relation to international law and international institutions concerns the meaning and content of legitimacy. The word ‘legitimacy’ may be defined in various ways. In the context of international institutions and their legitimacy, the term ‘legitimacy’ is
cases that will be investigated and prosecuted by the Court. An often-heard proposal in this direction is that the Prosecutor would develop prosecutorial guidelines, containing ex ante criteria for these selection procedures. Arguably, such guidelines could provide transparency, impartiality and consistency to the Prosecutor’s selection decisions.

The first assumption underlying this proposal is that guidelines would increase the sociological legitimacy of the Court. This is again based on a second assumption, namely that proposals which provide transparency, impartiality and consistency deserve normative justification and will likewise be perceived or assumed as legitimate. In other words, the commentators who have proposed the adoption of prosecutorial guidelines have assumed that normative justification is a good indicator of sociological legitimacy.

Why might this assumption be problematic? According to this thesis, the answer to this question is two-fold. In the first place, one should remind that the normative concept of legitimacy derives from the work of political and legal philosophers who have reflected on the conditions under generally defined as the justification of authority of the law. To ponder legitimacy is to pursue the question why subjects of the law should accept authority’).

65 See above, Introduction.

66 Examples include: Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, 550. (Arguing: ‘Guidelines provide a focal point for the Prosecutor to consider the lessons learned by the ad hoc tribunals and to force himself to think carefully about the goals and purpose of international prosecution’), M. Delmas-Marty, ‘Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC’, Journal of International Criminal Justice 4 (2006) 10. (Arguing: ‘to guarantee the independence and impartiality of international criminal justice, a decision as important as the one to initiate proceedings cannot depend only on the particularities of each case. It must be objective and foreseeable and will call for precise guidelines for consistent application of the criteria resulting from neither discretion nor legality’). Avril McDonald and Roelof Haveman, ‘Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC’, Expert consultation process on general issues relevant to the ICC Office of the Prosecutor (15 April 2003), as available at: <http://www.issafrica.org/anicj/uploads/McDonaldHaveman_issues_relevant.p>. (Arguing: ‘to avoid fuelling any already existing perceptions of the ICC as a political court, to minimise any accusations of bias, and to increase transparency and boost the credibility of the Court as a strictly judicial institution, it is necessary to identifying the guiding principles underpinning the exercise of prosecutorial discretion’). Philippa Webb, ‘The ICC Prosecutor’s Discretion Not to Proceed in the ‘Interests of Justice’, Criminal Law Quarterly 50 (2005) 305-348. 306 (She has stressed that article 53 ‘argues for a model of structured discretion, including transparent, ex ante criteria for interpreting the ‘interests of justice’. These criteria would strengthen the legitimacy of the Prosecutor’s decision and build the credibility of the court’). Christopher Keith Hall, ‘The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity’, Leiden Journal of International Law 17 (2004). 11-12. (Calls for the adoption and publication of prosecutorial guidelines to manage public expectations and aid judicial review of decisions not to investigate). Geert Jan Alexander Knoops, ‘Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective, Criminal Law Forum 16 (2004) 388-389. (Stresses the importance of prosecutorial guidelines and criteria which could either be drawn from international criminal tribunals or on the basis of domestic experiences). James A. Goldston, ‘More Candour about Criteria – The Exercise of Discretion by the Prosecutor of the International Criminal Court’, Journal of International Criminal Justice (2010) 20. (He argues: ‘at a minimum, prosecutorial guidelines might help bridge the yawning gap between the Hague-based Court and its constituencies across the world trying to balance their hopes for justice against tier often uncertain knowledge of the Court’s operations and limitations’).
which they consider rules, decisions and decision-makers as legitimate. When assuming that normative justification is a good indicator of sociological legitimacy, one effectively takes their considerations of what is legitimate as an independent variable. However, this thesis argues that normative justification can never be used as independent variable. After all, there is no Archimedean point from which scholars can determine what is normatively justified.

Secondly, even if scholars could agree on what justifies rules, decisions and decision-makers, the ‘fact’ that they deserve normative justification does not imply that they are accepted or supported by all relevant audiences. That is to say, one can only discover what relevant audiences perceive or assume as legitimate by analysing their perceptions and assumptions. It is a sobering truth, but nothing less than the truth, that despite the interest of most IR and IL scholars in the sociological acceptance of rules, decisions and decision-makers, they generally tend to apply a normative concept of legitimacy and do not analyse the actual perceptions and assumptions among relevant audiences.

In sum, within the work of most IR and IL scholars, one will not find a convincing answer to the question how scholars should study sociological legitimacy in the international realm, because they tend to assume that normative justification is a good indicator of sociological legitimacy. With this sobering truth as point of departure, the following section (V) will propose a ‘new’ approach for studying sociological legitimacy in the international realm. An approach which looks at the actual perceptions and assumptions among relevant audiences, but also at the context in which they are produced.
V. Towards a contextual approach for the study of sociological legitimacy

If sociological legitimacy is indeed about the actual perceptions and assumptions of relevant audiences, the question rises how scholars can study these perceptions and assumptions? To be more precise, how can scholars determine which legitimacy conception(s) could help explain whether states perceive or assume rules, decisions and decisions-makers as desirable, proper and appropriate? This section concerns itself with this question to develop an approach for analysing the perceptions and assumptions of African states about the sociological legitimacy of the Court.

How will this section come up with an approach for studying sociological legitimacy in the international realm? First and foremost, the limits of any approach that intends to analyse the perceptions and assumptions of states about the desirability, properness and appropriateness of international legal rules and international institutions should be pointed out. Scholars cannot conclude from the observation of compliance or disobedience with rules and institutions that states consider these rules and institutions as legitimate or not. The same goes for the reasons provided by states to justify their actions (self-justifications). Neither the actions nor the self-justifications of states have to resemble their actual perceptions and assumptions. When scholars claim otherwise, they ‘run the risk of circularity’ by making self-justified compliance or disobedience part of the very definition of sociological legitimacy. This might be problematic, because self-justified compliance or disobedience could also have been instigated by other factors that influence the behaviour of states, like coercion and self-interest (sub-section V.A.).

If neither the actions nor the self-justifications of states can tell what they perceive or assume as legitimate, who or what can? The answer to this question and the most important limitation of any approach that intends to analyse the legitimacy perceptions and assumptions of states is that one cannot make any conclusive statements about what states perceive or assume as legitimate. There is no Archimedean point from which scholars can take a god’s eye view and tell what states or for that matter other relevant audiences perceive or assume as legitimate.

However, this limitation does not imply that states do not generate perceptions and assumptions about the legitimacy of rules, decisions and decision-makers. Although, scholars cannot make conclusive statements about what states perceive or assume as legitimate, they can make reasonable assumptions about their perceptions and assumptions (sub-section V.B.). According to this thesis, scholars can make such reasonable assumptions by looking at the ‘context’ in which states take actions and give reasons to justify these actions. How all of this works out in practice will be explained in the course of this section (sub-section V.C.).
V.A. From the risk of circularity…. 

The question whether states perceive or assume international legal rules and international institutions as legitimate, tends to come up if the actions of states and the reasons given by states to justify these actions suggest that the respective states are concerned about the desirability, properness and appropriateness of these rules and institutions. Scholars will likely start to study the legitimacy perceptions and assumptions of states on the basis of the self-justified compliance or disobedience of these states. Simply said, questions about the perceived or assumed legitimacy are generally triggered by what states do and what states say. This thesis is no exception. The long list of resolutions and communiqués that African states have adopted that seem to express their concerns and frustrations about the ICC, has motivated this thesis to analyse the legitimacy perceptions and assumptions of African states about the Court.

What is of major importance in this regard, is that the motivation for analysing the sociological legitimacy of the Court should not be the one-on-one outcome of its analysis. Neither the actions nor the self-justifications of states can tell what they perceive or assume as legitimate. When scholars would take the actions of states and the reasons given by states to justify these actions as indicators for the perceptions and assumptions of these states, they would ‘run the risk of circularity’. 67 This is a risk, because by making the actions and self-justifications of states part of the definition of sociological legitimacy, scholars could ignore that these actions and self-justifications might also be motivated by something else than the legitimacy perceptions and assumptions of states. Most importantly, the two other ideal-type modes of social control, coercion and self-interest, might be sidelined in explaining the actions and self-justifications of states.

V.B. …. towards reasonable assumptions about sociological legitimacy

If neither the actions nor the self-justifications of states can tell what states perceive or assume as desirable, proper and appropriate, who or what can? According to this thesis, the answer to this question is that scholars cannot make any conclusive statements about what states perceive or assume


In giving an example of a scholar who runs the risk of circularity, Daniel Bodansky refers to the following definition of sociological legitimacy from Andrew Hurrell: ‘legitimacy (..) refers to a particular kind of rule-following, or obedience, distinguishable from purely self-interested or instrumental behaviour on the one hand, and from straightforward imposed or coercive rule on the other’. Bodansky, ‘Legitimacy in International Law and International Relations’, 15. Hurrell, ‘Legitimacy and the use of force: can the circle be squared?’, 16.
as legitimate. Perceptions and assumptions are subjective qualities, which are not readily accessible for outside-observers nor for the states themselves.

As explained above, sociological legitimacy is not a matter of instrumental calculation, but of ‘[associating] particular identities to particular situations’. How this works for a certain state, at a specific place and moment in time cannot be determined with certainty. Perceptions and assumptions will likely affect what states do and say, but no scholar can tell, or at least not in a definite manner, how this process of association works in particular situations. Perchance needless to say, there is no Archimedean point from which scholars can take a god’s eye view and tell what states or for that matter all other relevant audiences perceive or assume as legitimate.

If the legitimacy perceptions and assumptions of states are not readily accessible, how can scholars still study sociological legitimacy? Three possible answers to this question might be considered. The first response is the most radical and argues that there are no legitimacy perceptions and assumptions, and that scholars should not attempt to study sociological legitimacy as an ideal-type mode of social control. Most notably, this view has been advanced by Martii Koskenniemi. He has called the study of legitimacy ‘a miserable comforter’ and has placed the concept in a tradition of ‘complex managerial vocabulary’ that would have emerged within IR to produce a ‘comfortable illusion of understanding about the post-Cold War world’. According to Koskenniemi, legitimacy would be nothing more than a fiction intended to ensure that IR scholars ‘hold the Prince’s ear’ and procure ‘a warm feeling in the audience’.

Although, Koskenniemi is right in criticizing the nebulous ways in which many IR and IL scholars have studied sociological legitimacy, he is wrong in calling legitimacy a miserable comforter and a dead end. Unmistakably, IR and IL scholars have no better reason to assume coercion or self-interest than to presuppose legitimacy as an ideal-type mode of social-control. According to this thesis, the fact that the legitimacy perceptions and assumptions of states are not readily accessible for scholars does not justify a complete denial of their existence.

Secondly, scholars could respond to the inaccessibility of the legitimacy perceptions and assumptions of states by hypothesizing that normative justification is probably a good indicator of

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68 See above, fn. 28.
70 Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’, 405-410, 413.
71 This has also been noted by: Hurd, ‘Legitimacy and Authority in International Politics’, 392.
sociological legitimacy. As explained above, this has been the approach that most IR and IL scholars have followed. However, like there is no Archimedean point to analyse the perceptions and assumptions of states, there is also no divine telescope to determine what is normatively justified. That is to say, most IR and IL scholars who have studied sociological legitimacy have only succeeded in replacing one reprehensible fiction with another. Moreover, even if scholars could agree on what justifies international legal rules and international institutions, the ‘fact’ that they deserve normative justification does not imply that they are accepted by all states. As noted above, scholars can only discover what states perceive or assume as legitimate by analysing their actual perceptions and assumptions.

The third and according to this thesis most convincing answer is that while scholars cannot completely uncover the perceptions and assumptions of states, they can attempt to make reasonable assumptions about them. If scholars cannot ignore sociological legitimacy as an ideal-type mode of social control and should not equate sociological acceptance with normative justification, they have to search for ways to grasp something of the actual perceptions and assumptions of states.

V.C. How scholars can make reasonable assumptions about sociological legitimacy

How can scholars make reasonable assumptions about the perceptions and assumptions of states? The point of departure for studying sociological legitimacy in the international realm are the actions and the reasons given by states to justify these actions (self-justifications). What states do and what states say is what makes scholars wonder whether states might be concerned or frustrated about the desirability, properness or appropriateness of certain international legal rules or international institutions. The challenge for scholars is to determine when it is reasonable to assume that their interpretation of the actions and self-justifications of states as legitimacy concerns or frustrations resembles the actual legitimacy perceptions and assumptions of these states. That is to say, whether it is reasonable to assume that the respective states are concerned or frustrated about the desirability, properness or appropriateness of certain international legal rules or international institutions.

How to come up with such reasonable assumptions is a question that should remain open for scholarly debate. This thesis does not pretend to have found the best approach for making reasonable assumptions about sociological legitimacy in the international realm. However, what this thesis does propose is a new contextual approach for studying sociological legitimacy, which is at least more comprehensive and transparent than the approach that most IR and IL scholars have followed in their previous contributions on legitimacy.

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72 See above, Chapter 1, Sub-section IV.B.
According to this approach, the first step to make reasonable assumptions about the legitimacy perceptions and assumptions of states is to acknowledge that their actions and self-justifications cannot be detached from the context or structure in which they were taken and advanced. This first step departs from the ‘constructivist’ formulation of the relationship between structures and agents or entities (states) operating as actors within structures. This constructivist logic posits, that scholars should not intend to draw a dividing line between agents and structures, ‘because many interesting empirical phenomena in international relations are understandable only by a methodology that avoids assuming a neat separation between agents and structures’.\textsuperscript{73} The idea is that agents instantiate structures through their actions, while those structures simultaneously enable and constrain agency.

The actions and self-justifications of states are also expected to derive from a mutually constitutive relationship between the states and the structures in which they operate. The second step for developing reasonable assumptions about the legitimacy perceptions and assumptions of states is to analyse their actions and self-justifications in light of this mutually constitutive relationship.

For the purpose of this second step, this thesis proposes to apply an artificial analytical distinction between (1) the specific context in which states take actions and give reasons to justify these actions, and (2) the wider political space in which the respective states operate. In this regard, the specific context resembles the relevant factors that could have had a ‘direct’ effect on the specific actions and self-justifications of states. Such relevant factors might, for example, include the previous experiences of states with particular international legal rules or international institutions, the previous actions and self-justification of states, the direct causes for the adoption or enforcement of certain rules or decisions, the related actions and self-justifications from other actors and the procedure whereby certain rules or decisions were adopted or enforced. These are just some of many possible relevant factors, which could have a direct effect on the specific actions and self-justifications of states.

On the basis of a contextual analysis of the specific actions taken by states and the reasons provided by states to justify their actions, this thesis determines which legitimacy conception(s) can best explain what they might imply for the Court’s sociological legitimacy. Subsequently, the findings

of the contextual analysis of the actions and self-justifications of states are brought together and discussed in light of the wider political space in which the states operate.

This wider political space does not refer to relevant factors that could have had a direct effect on the specific actions and self-justifications of states, but points to the relevant facets of the distinctive places in which these states operate. This concept of wider political space derives from the so-called ‘spatial turn’ in the social sciences, which is a ‘set of propositions about the production of theory’ claiming that scholars should not assume that events and practices take place in an abstract or homogenous space, but in very distinctive places that affect these events and practices, while these events and practices again affect the development of the wider space. In other words, proponents of the spatial turn follow the constructivist logic of a mutually constituted relationship between agents and structures. Space is made through social practice, and social practice is made through the distinctive places of this wider space.

The development of the so-called ‘spatial turn’ in the social sciences follows from ‘the recognition that social relations are becoming increasingly interconnected on a global a scale [which] necessarily problematizes the spatial parameters of those relations’. As explained by Neil Brenner, ‘under these circumstances, space no longer appears as a static platform of social relations, but rather

74 Note that Ian Clark has proposed to conceive legitimacy ‘as a political space’, but not, like this thesis, ‘as an unbounded or normatively autonomous one’. According to English School scholar Clark, the political space is bounded by ‘the collateral values of legality, morality and constitutionality’ which would take the appearance of ‘semi-permanent structures’. This thesis does not depart from such presumptions, which are invoked by Clark to herald the existence of an ‘international society’. Instead, this thesis departs from an empty conceptualization of political space. That is to say, the concept of political space is treated as an empty cartridge. Although, the specific political space in which an actor operates will be ‘bounded’ by normative and material constraints, outside of that unique context the concept of political space should be treated as a tabula rasa. Clark, International Legitimacy and the World Society, 29-30, 2.


An example of ‘abstract space’ is given by Lefebvre, when discussing the abstract space of modern capitalism: ‘Abstract space is not homogenous; it simply has homogeneity as its goal, its orientation, its “lens.” And indeed, it renders homogenous. But in itself its if multiform (...) Thus to look upon abstract as homogenous is to embrace a representation that takes the effect for the cause, and the goals for the reason why the goal was perused. A representation which passes itself off as a concept, when it is merely an image, a mirror and a mirage; and which instead of challenging, instead of refusing, merely reflects. And what does such a specular representation reflect? It reflects the results sought’. Lefebvre, The Production of Space, 287. As also quoted in: Neil Brenner, ‘Beyond state-centrism? Space, territoriality, and geographical scale in globalization studies’, Theory and Society 28 (1999) 50.

as one of their constitutive dimensions, itself historically produced, reconfigured, and transformed’. This insight has moved IR scholars to speak of a ‘territorial trap’ within IR and to challenge the conceptualization of states as the containers of societies. According to Brenner, this conceptualization would map the entire interstate system ‘in terms of a distinction between “domestic” politics and “foreign relations” and [would reinforce] the state’s container-like character as the boundary separating “inside” from “outside”’.78

In this regard, the concept of wider political space recognizes that the actions and self-justifications of states, like all exponents of socio-historical change, do not occur within the fixed territorial boundaries of states but rather ‘through the continual production, reconstitution or transformation of these boundaries and the spatial practices that they enclose’.79 Do not understand this spatial perspective on states wrongly. The abstraction of states as unitary actors remains very relevant. Not only, because international law is founded on this abstraction, but also because states, or to be more precise the actors representing these states, operate at the ‘international level’ as if representing unitary actors.

What is of major importance for the purposes of this thesis, and in particular for the second step in making reasonable assumptions about the legitimacy perceptions and assumptions of states, is that the actions and self-justifications of states cannot be detached from the distinctive places in which these states operate. That is to say, to make reasonable assumptions about the legitimacy perceptions and assumptions of states, one has to address the wider political space in which these states operate.

What might be relevant facets of this wider political space? One could think in this regard, for example, about the rise of competing non-state actors, the political and economic relations of states, processes of re- and deterritorialisation, regional identity and cooperation, the constitutional organisation of states and the role of state actors representing states at the international level. These are just some of many possible relevant aspects of the wider political space in which states operate. At this point, such relevant facets might sound vague, because they do not relate to a specific situation, but when the distinctive places are analysed in which states develop legitimacy perceptions and assumptions, the abstraction of political space will be replaced by specific facets of the wider political

77 Ibidem. In the words of Anssi Paasi: ‘territories are not frozen frameworks where social life occurs. Rather, they are made, given meanings, and destroyed in social and individual action. Hence, they are typically contested and actively negotiated. Spatial organization, meanings of space, and the territorial use of space are historically contingent and their histories are closely interrelated’. Anssi Paasi, ‘Territory’, in: J. Agnew ed., A Companion to Political Geography (Oxford 2010) 109-120, 110.


space in which the respective states operate. In light of these relevant facets, this thesis proposes to
discuss the findings of the contextual analysis of the actions and self-justifications of states. In this
way, reasonable assumptions can be made about the legitimacy perceptions and assumptions of states.

Unmistakably, there are a number of catches to this contextual approach. Most importantly,
the reasonable assumptions which this approach generates are subject to what the respective scholar
decides to highlight within the specific context and the wider political space in which states operate.
Consequently, the reasonable assumptions of this approach can by no means succeed in circumventing
what Arthur Applbaum has coined ‘the parasitic relation’ between normative and sociological
legitimacy.\textsuperscript{80} Indeed, describing sociological legitimacy through the proposed contextual approach,
also ‘describes views about normative legitimacy’.\textsuperscript{81} However, despite this limitation, the contextual
approach which this thesis proposes, should be preferred to the manner in which most IR and IL
scholars have studied sociological legitimacy in the international realm. The contextual approach of
this thesis is not only more transparent in its assumptions, but also focusses on what sociological
legitimacy in the international realm is all about, namely the actual perceptions and assumptions of
states.

In short, this thesis proposes to make reasonable assumptions about the legitimacy perceptions
and assumptions of states by analysing their actions and self-justifications in light of the specific
contexts in which they are taken and advanced as well as the wider political space in which the states
operate. Based on a contextual analysis of the possible legitimacy concerns and frustrations, this thesis
attempts to discover which legitimacy conception(s) can best explain what the separate concerns and
frustrations might imply for the sociological legitimacy of the respective international legal rules and
international institutions. Subsequently, the separate legitimacy concerns and frustrations are taken
together and discussed in light of the wider political space in which the states operate. In this way, this
thesis attempts to come up reasonable assumptions about the legitimacy perceptions and assumptions
of states.

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\textsuperscript{80} Applbaum, ‘Legitimacy in a Bastard Kingdom’, 79.

\textsuperscript{81} Ibidem.
VI. Conclusion: how to study sociological legitimacy in the international realm?

This chapter has discussed the concept, conceptions and study of sociological legitimacy. On the concept or general idea of sociological legitimacy, this chapter has noted that sociological legitimacy is an ideal-type mode of social control, which attempts to explain why actors might or might not accept certain rules, decisions and decision-makers as legitimate. The operative mechanisms for this ideal-type mode of social control are the perceptions and assumptions of these actors about the desirability, properness and appropriateness of the respective rules, decisions and decision-makers.

On the conceptions of sociological legitimacy, this chapter has argued that legitimacy perceptions and assumptions can come from very different directions. There is not one conception of sociological legitimacy that can explain why relevant audiences accept rules, decisions and decision-makers as legitimate. Four legitimacy conceptions can be distinguished: (1) source, (2) process, (3) outcome and (4) actor-based legitimacy. In principle, all these four legitimacy conceptions could help explain what actors perceive or assume as legitimate.

On the study of sociological legitimacy, this chapter has, first of all, analysed how IR and IL scholars have studied legitimacy in the international realm. Over the last two decades, the concept of legitimacy has gained in popularity within the disciplines of IR and IL. However, this has not resulted in comprehensive approaches for studying sociological legitimacy. In fact, most IR and IL scholars speak about legitimacy as if its meaning would be self-evident. More problematic even, is that most IR and IL scholars assume that normative justification is a good indicator of sociological legitimacy. In this way, they do not only blur the distinction between normative justification and sociological acceptance, but also ignore where sociological legitimacy is all about, namely the actual perceptions and assumptions among relevant audiences.

With this sobering truth as point of departure, this chapter has proposed a contextual approach for studying sociological legitimacy in the international realm. This approach recognises that neither the actions nor the reasons given by states to justify their actions can tell what states perceive or assume as legitimate. Because perceptions and assumptions are subjective qualities, which are not readily accessible for outside-observers, scholars cannot make conclusive statements about what states perceive or assume as legitimate. However, this does not imply that scholars should ignore sociological legitimacy as an ideal-type mode of social control or should equate sociological legitimacy with normative justification like most IR and IL scholars have done. Instead, scholars should attempt to make reasonable assumptions about the actual perceptions and assumptions of states. This thesis proclaims, that this can be done by analysing the actions and self-justifications of states in light of the specific contexts in which they are taken and advanced as well as the wider political space in which states operate. By following this contextual approach, the second and third chapter of this thesis will study the legitimacy perceptions and assumptions of African states about the Court.
Chapter 2

The mounting tension between African states and the International Criminal Court

I. Introduction

When the first permanent International Criminal Court opened its doors on 1 July 2002, almost one-third of the required sixty ratifications came from African states. In the years that followed, the support from African states proved more than a diplomatic beau geste. Most notably, three African states were willing to refer situations on their own territory for investigation and prosecution to the Court and most African states supported the Security Council referral of the situation in Darfur to the Prosecutor. Unmistakably, the early years of the Court indicated that many African states and at the least the thirty-three African states that decided to ratify the Rome Statute were willing to join forces with the Court (section II).

However, dark clouds started to gather over their relationship in the course of 2008, when the Prosecutor decided to apply for an arrest warrant against the President of Sudan, Omar Al-Bashir (section III). Since July 2008, six years after the Court first opened its doors, the tension between African states and the Court has mounted. This tension has manifested itself in many disguises. For example, African states have refused to arrest President Al-Bashir, they have approached the Security Council to defer the proceedings initiated against him, they have stopped referring situations to the Court, they have threatened to withdraw from the Court, they have opposed the Court’s involvement in other situations and, above all, they have supported the adoption of a long list of resolutions and communiqués by the various organs of the African Union (AU). These resolutions and communiqués seem to have expressed a number of concerns and frustrations of African states about the Court over the last four years (sections IV- XII).

This thesis intends to analyse these possible concerns and frustrations of African states to explain what they might imply for the sociological legitimacy of the Court. That is to say, what does the mounting tension between African states and the Court indicate for the perceptions and assumptions of African states about the desirability, properness and appropriateness of the Court as well as its rules and decisions? For a Court with limited enforcement powers, which remains dependent on states to exercise its jurisdiction, such perceived or assumed legitimacy is no luxury but a life line.

82 See below fn. 99.
The previous chapter has expounded that scholars can study the legitimacy perceptions and assumptions of African states about the Court by analysing their actions and self-justifications in light of the specific contexts in which they were taken and advanced as well as the wider political space in which African states operate. This chapter clears the first hurdle for such a contextual analysis by uncovering what African states have said and done with regard to the Court since its establishment during the Rome Diplomatic Conference in 1998. Subsequently, the following chapter will come up with a contextual analysis of these actions and self-justifications of African states in order to end up with reasonable assumptions about the legitimacy perceptions and assumptions of African states and as such about the Court’s sociological legitimacy.

The most important sources that this chapter will consult to expose what African states have said and done with regard to the Court are the communiqués and resolutions of the various organs of the AU. In the first place, the decisions of the half-yearly meetings of the AU Assembly, which gathers the Heads of State and Government of all African states (with the exception of Morocco who is not a member to the AU), can provide insight in the possible concerns and frustrations of African states. Secondly, this chapter will look at the communiqués of the four ICC-related sessions of the African Union Peace and Security Council (AUPSC), whose composition of fifteen African states changes every two or three years. Thirdly, the communiqués and press statements of the AU Commission are relevant sources for the purpose of this chapter. Although the Commission is not composed of individual African states, but consists of ten officials who represent the AU as whole under auspices of the Assembly, its statements cannot be ignored. Above all, because the Commission has often been the first AU organ to give a response to the decisions of the Court; responses which the AU Assembly has tended to endorse in its later sessions.

Furthermore, in addition to the communiqués and resolutions of the AU Assembly, the AUPSC as well as of the AU Commission, this chapter will also make use of policy documents from individual African states, newspaper articles, secondary literature and official documentation on the Rome Diplomatic Conference, the Court and the Security Council. Taken together, these various sources present a well-documented overview of what African states have said and done with regard to the Court since its establishment in 1998 (in conclusion, section XIII).

II. How African states helped building the Court

When considering the establishment of the first permanent International Criminal Court, it should be pointed out that the Court was ‘[not] shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid’. In fact, African states actively participated in drafting the Rome Statute (sub-section II.A.). Moreover, by referring three situations to the Prosecutor (sub-section II.B.) and by accepting the first referral of the Security Council to the Court (sub-section II.C.), the African states who joined the Rome Statute helped building the Court in its early days.

II.A. Drafting the Rome Statute

In 1994, the United Nations General Assembly (UNGA) decided to pursue the establishment of an International Criminal Court and took the draft statute of the International Law Commission for such a Court as its point of departure. Following an Ad Hoc Committee and a Preparatory Committee, the Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court convened in Rome, at the headquarters of the Food and Agriculture Organization, on 15 June 1998. At this remarkable occasion, which gathered delegations from more than 160 states and hundreds of NGOs, the representative of the Organization of the African Union (OAU), the predecessor of the AU, proclaimed that African states had a special interest in the urgent establishment of the Court, because ‘its people had endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence which continue today, despite the continent’s post-colonial phase’. This statement was not an ex post facto commitment to the Court made under external pressure, but a rendition of the active involvement of African states in the negotiations that resulted in the adoption of the Rome Statute on 17 July 1998.

In particular, the Southern African Development Community (SADC) played a leading role in co-ordinating the African states and in promoting the ‘African’ viewpoints. Prior to the Rome

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87 The SADC has a membership of 15 states: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic
Conference, in September 1997, the member states of the SADC had issued a common statement calling for a Court with (1) automatic jurisdiction over genocide, crimes against humanity and war crimes, (2) with an independent prosecutor having the power to initiate proceedings *proprio motu*, (3) with stable financial resources and (4) with the obligation for states to fully cooperate at all stages of the proceedings.\(^88\) These negotiation principles returned in the Dakar declaration on an International Criminal Court adopted by the OAU Council of Ministers in February 1998.\(^89\)

The negotiation principles enlisted in the common statement of the SADC and the OAU’s Dakar declaration closely resembled the propositions of the ‘like-minded group’.\(^90\) This geographically heterogeneous caucus of states gradually expanded its membership during the negotiations, including fourteen African states, to a total of sixty states by the time the Rome Conference convened.\(^91\) The members of this group cut across traditional regional lines in committing to principles that conflicted with the draft statute of the International Law Commission and, more or less, with the ideas of the permanent members of the Security Council. Together with the well-organized coalition of NGOs, in which many African NGOs participated as well, the like-minded group became ‘the driving dynamism’ of the Conference and managed to secure most of its objectives.\(^92\)

The final draft statute for the Court, that was adopted after four weeks of tense negotiations, differed significantly from the original draft of the International Law Commission. Due to the significant efforts of African States, either on own account or through the SADC and the like-minded group, the adopted Rome Statute reflected many of the principles envisioned in the common statement of the SADC and the OAU’s Dakar declaration. Most of all for this reason, the delegation of Lesotho, as the chair of the African group and as a member to the SADC, succeeded in convincing all of Tanzania, Zambia and Zimbabwe. All 15 states signed the Rome Statute. However, Angola, Madagascar, Mozambique, Seychelles, Swaziland and Zimbabwe have not ratified the Rome Statute.


\(^91\) The African states were: Burkina Faso, Burundi, Congo (Brazzaville), Egypt, Gabon, Ghana, Lesotho, Malawi, Namibia, Senegal, Sierra Leone, South Africa, Swaziland and Zambia. See: Schabas, *An Introduction to the International Criminal Court*, 18-19, supra note 63.

\(^92\) Some 90 NGOs based in, among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia joined the NGO Coalition for an International Criminal Court. As noted in: Mochochoko, ‘Africa and the International Criminal Court’, 248.
participating African states, probably with the exceptions of Libya and Algeria, to accept the Rome Statute as a package deal. In any case, when looking back, as Max du Plessis has observed, ‘the picture that emerges is a Court created with extensive and deep involvement of African nations – a court in reality created to a large extent by Africans in concert with other nations of the world.’

II.B. The early years of the Court and the self-referrals by African states

The commitment of many African states to the Rome Statute was affirmed when the OAU, at its first Ministerial Conference on Human Rights on 16 April 1999, adopted a resolution requesting ‘those states which have not yet done so to give consideration to the ratification’ of the constitutive treaty of the Court. By that time, worldwide, only two states had ratified the Statute, among which Senegal as the first state ever to accept the jurisdiction of the Court. When the Court eventually opened its doors on 1 July 2002, almost one-third of the required sixty ratifications came from African states. In May 2004, the African Union (AU), i.e. the more progressive successor of the OAU, again called upon all African states to universally ratify the Rome Statute. By August 2012, this request was endorsed by thirty-three African states, leaving twenty-one AU member states outside the ambit of the Court.

93 Maqungo, ‘The establishment of the International Criminal Court: SADC’s participation in the negotiations’.

94 The vote was not taken by a roll-call. Only the declarations made by States themselves indicate who voted in favour, against or abstained on the adoption of the Rome Statute. The overall result was that 120 states voted in favour, 21 abstained and 7 voted against. See: Schabas, An Introduction to the International Criminal Court, 21.


100 Since 1 July 2002, the following African states have ratified the Rome Statute: Burkina Faso (10 April 2004), Burundi (21 September 2004), Cape Verde (10 October 2011), Chad (1 November 2006), Comoros (18 August 2006), Congo (2 May 2004), Djibouti (5 November 2002), Guinea (14 July 2003), Kenya (15 March 2005),
In its early days, the Court was not only supported by the significant amount of ratifications from African states, but also by the self-referrals from the governments of Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR). Their referrals to the Court were the first to be made under article 14 of the Rome Statute and resulted in the first situations investigated by the Prosecutor and the first warrants of arrest issued by one of the two Pre-Trial Chambers (PTC). Despite the fact that the political intentions behind the referrals of the three African states have been questioned, these first three situations indicated that at least some African states recognized that the Court had an active role to play on the African continent. As such, the early days of the Court saw perhaps the first fulfilment of the ‘special interests’ for African states in the urgent

Liberia (22 September 2004), Madagascar (14 March 2008), Malawi (19 September 2002), Seychelles (10 August 2010), Tanzania (20 August 2002), Tunisia (26 June 2011), Zambia (13 November 2002).

The following African states have not ratified the Rome Statute by the time of writing: Algeria, Angola, Cameroon, Cote d’Ivoire, Egypt, Equatorial Guinea (has not signed the Rome Statute either), Eritrea, Ethiopia (has not signed the Rome Statute either), Guinea-Bissau, Libya (has not signed the Rome Statute either), Mauritania (has not signed the Rome Statute either), Morocco (is not a member to the African Union), Mozambique, Rwanda (has not signed the Rome Statute either), République Arabe Sahariene Democratique (is a member to the African Union, but not internationally recognized; has therefore not signed the Rome Statute), São Tomé and Príncipe, Somalia (has not signed the Rome Statute either), Sudan, South-Sudan (has not signed the Rome Statute, while not being an independent country before 9 July 2011), Swaziland (has not signed the Rome Statute either) Togo (has not signed the Rome Statute either), Zimbabwe.


See for example: Max Du Plessis, ‘The International Criminal Court and its work in Africa – Confronting the myths’, Institute for Security Studies Papers 173 (2008) 11. (He observes: ‘the referrals – particularly by Uganda and the Congo – moreover demonstrate how African states have attempted to use the ICC for political ends. It is no secret that the Ugandan and Congolese governments had their own reasons for inviting the ICC to do business in their respective countries.’). Charles Chernor Jalloh, ‘Regionalizing International Criminal Law?’, International Criminal Law Review 9 (2009) 448. (He notes: ‘though obviously also motivated by other selfish reasons, for example, a desire to punish elusive adversaries or concerns about the political costs of unpopular domestic prosecutions, these self-referrals are still significant given that the Rome statute applies equally to all persons without any distinction based on official capacity.’). Fatoumata Diarra – Judge at the International Criminal Court, ‘Africa and the ICC: the need for a closer partnership’, Africa Legal Aid Quarterly (2007) 85 (She argues in the context of discussing the three self-referrals, that ‘there is the adverse impact of the apprehension that the Court could be “used” by certain States seeking to attain specific goals thus turning the Court into an instrument for their own political purposes’).
establishment of the ICC, as proclaimed by the representative of the OAU during the Rome Conference.  

II.C. The first Security Council referral to the Court

Following the first three self-referrals by African states to the Court, the Security Council decided to refer a situation on African soil to the Court as well. In September 2004, United States’ Secretary of State, Colin Powell, urged the Security Council to start a full scale investigation on Darfur, because ‘genocide has occurred and may still be occurring in Darfur’.  

In response, Security Council resolution 1564 established an International Commission of Inquiry headed by late judge Antonio Cassese. The Commission, which included some highly respected African scholars as well, found that the Government of Sudan (GOS) and the Janjaweed rebel movement ‘[were] responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law’ and therefore recommended investigation and prosecution by the ICC.  

In accordance with the findings of the Commission, the Security Council adopted resolution 1593 on 31 March 2005. This resolution ‘[decided] to refer the situation in Darfur since 1 July 2002 to the Prosecutor’. 

Although, this decision of the Security Council later proved to be the first stumbling block on the relationship between the African states and the Court, the first referral under article 13(b) of the Rome Statute was in fact supported by two of the three non-permanent African member states of the

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104 As noted above, fn. 87.


107 International Commission of Inquiry on Darfur, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’, 67 (25 January 2005), as available at: <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf> 3, 145. Du Plessis, ‘The International Criminal Court that Africa Wants’, 54. (he points out that Therese Striggner-Scot (a barrister and principal partner with a legal consulting firm in Accra, Ghana, and who served as judge of the high courts of Ghana and Zimbabwe, and was the executive chairperson of the Ghana Law Reform Commission from January 200 to February 2004) and Dumisa Ntsebeza (a former commissioner on the Truth and Reconciliation Commission in South Africa, and who served as acting judge on the high court of South Africa, as well as the South African labour court) were part of the Commission.).

Security Council. The delegations of Tanzania and Benin voted in favour of the resolution for two self-proclaimed reasons. In the first place, because both states as parties to the Rome Statute ‘strongly believe[d] that the Court [would be] the most appropriate international organ for dealing with the situation in Darfur’ and would ‘ensure (...) that credible and timely action [would] be taken against persons charged with atrocities and serious crimes’. Secondly, Tanzania and Benin assented to resolution 1593 since it ‘[recognized] the proposal by Nigeria [made by President Obasanjo on behalf of the AU] regarding the need to provide national healing and reconciliation in Sudan, in cooperation with the AU and the international community, as appropriate’.

For the delegation of Algeria, being the third non-permanent African member state of the Security Council, this mere recognition of the Nigerian proposal was apparently insufficient as they expressed their ‘regret that the members of the Council [had] declined to assess [the proposal] in light of the possibilities it offers for attaining our common objective of placing the fight against impunity in the service of the strengthening of peace and national reconciliation’. Algeria, who signed but did not ratify the Rome Statute, claimed to have ‘no choice but to abstain’, because the resolution ignored ‘the African approach, based on justice and reconciliation’. With great pathos (or bathos) the Algerian representative concluded its remarks by expressing a ‘regret’, namely ‘that, out of a concern for compromise at all costs and at whatever price, those defending the principle of universal justice have in fact ensured that, in this domain, the use of double standards — of which some have accused the Council — and a two-track justice were most unexpectedly demonstrated’. These concerns were not endorsed by the AU, who did not adopt any statement on resolution 1593.

Despite the strongly formulated statement of Algeria, many African states were actually very supportive in their actions towards and statements about the Court during its early years. They contributed in various ways to the Court’s build-up: (1) through their active participation in drafting the Rome Statute, (2) by referring the first situations for investigation to the Court and (3) by assenting to or at least acquiescing in the first Security Council referral to the Court. Overall, Philippe Kirsch was not exaggerating when stressing in his 2006 address as President of the Court to the AU, that ‘without Africa the ICC would not exist as it does today’.

110 Ibidem. The first quote is derived from the statement of the delegation of Tanzania and the second quote from the delegation of Benin.
111 Ibidem. The quote is derived from the statement of the delegation of Tanzania.
112 Ibidem.
113 Ibidem.
III. The first stumbling block

Much changed in the course of 2008. Albeit the initial support of many African states for the Court, dark clouds started to gather over their relationship. On 14 July 2008, only two weeks after the AU Assembly passed a resolution on the principle of universal jurisdiction warning for the ‘abuse and misuse of indictments against African leaders’ (sub-section III.A.), the Prosecutor announced his application for an arrest warrant against Omar Al-Bashir, the President of Sudan (sub-section III.B.).

III.A. The prelude: African states and universal jurisdiction

On 1 July 2008, the AU Assembly adopted a resolution which ‘[requested] all UN Member States, in particular the [European Union] States, to impose a moratorium on the execution’ of all warrants issued on the basis of universal jurisdiction.115 Although, the Assembly ‘recognized 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’, the resolution also proclaimed that ‘the abuse of the Principle (...) is a development that could endanger International law, order and security’, and that ‘the political nature and abuse of the principle (...) 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’.116

These statements, which are the first of many from the Assembly on the alleged abuse of universal jurisdiction, were mainly motivated by two contingencies. In the first place, the Assembly was agitated about the charges pressed by the Spanish investigative Judge Andrue Mereless against forty current and former senior Rwandan military officials.117 Secondly, the resolution responded to the indictments issued by the French investigative Judge Jean-Louis Bruguière against Rose Kabuye, who was at that time the Chief of State Protocol of the Rwandan President Paul Kagame, and eight

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115 Ibidem. The Princeton Principles on Universal Jurisdiction define universal jurisdiction as: ‘criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction’. Universal jurisdiction is exercised by individual states and should be distinguished from the jurisdictional grounds of the Court which are laid down in articles 5 (crimes within the jurisdiction of the Court), 11 (jurisdiction ratione temporis), 12 (preconditions to the exercise of jurisdiction) and 13 (exercise of jurisdiction) of the Rome Statute. ‘The Princeton Principles on Universal Jurisdiction’ (2001), as available at: <http://lapa.princeton.edu/hosteddocs/unive_jur.pdf>.


other senior Rwandan officials for their alleged involvement in the assassination of Rwanda’s former President Juvenal Habyarimana on the eve of the 1994 Rwandan Genocide.\textsuperscript{118}

Apart from their merits, these concerns on the abuse of universal jurisdiction should be recognized for forming the prelude to the response of African states to the Prosecutor’s application for an arrest warrant against President Al-Bashir on 14 July 2008.\textsuperscript{119} In fact, in its first communiqué on the Prosecutor’s application, the African Union Peace and Security Council (AUPSC) ‘reiterated [the AU’s] concern with the misuse of indictments against African leaders’ on the ground of universal jurisdiction.\textsuperscript{120} In this way, the AUPSC acknowledged how close the mounting tension between African states and the Court related to the concerns of African states about the exercise of universal jurisdiction by individual states.

III.B. The Prosecutor’s application for an arrest warrant against President Al-Bashir

In March 2005, when the Security Council referred the situation of Darfur since 1 July 2002 to the Prosecutor, one could not yet see the dark clouds gathering. As noted above, two of the three non-permanent African members states of the Security Council actually voted in favour of resolution 1593. What happened next? Following this first referral of the Security Council, the Prosecutor initially moved carefully and sought the cooperation of the Sudanese Government, who had signed but not ratified Rome Statute. In his first report to the Security Council in June 2005, the Prosecutor even noted that the Government of Sudan (GOS) could still outplay the Court on grounds of complementarity.\textsuperscript{121} Initially, there was no reason for the GOS or for that matter any other African state to be concerned about the Court’s involvement in the Darfur situation. However, soon the actions


of the Prosecutor pursuant to resolution 1593 would prove to become the first stumbling block on the relationship between African states and the Court.

After the conclusion of the Darfur Peace Agreement signed in Abuja (Nigeria) on 15 May 2005, which was welcomed and endorsed by the AUPSC\footnote{African Union Peace and Security Council, ‘Communiqué of the 51st Meeting of the Peace and Security Council’ (15 May 2006), as available at: <http://www.africa-union.org/root/AU/AUC/Departments/PSC/ps/PSC_2004_2007/pdfs/2006/2006_51_C1E.pdf>. ‘Darfur Peace Agreement’ (6 May 2006), as available at: <http://www.cfr.org/sudan/darfur-peace-agreement-2006/p11020>}, and the adoption of an amnesty decree by President Al-Bashir in June 2006, the Prosecutor took a more aggressive stand towards the GOS.\footnote{For an excellent analysis of the changing operations of the Prosecutor in the Darfur investigation, see: Victor Peskin, ‘Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan’, Human Rights Quarterly 31 (2009) 666-678.} In February 2007, the Prosecutor filed charges before PTC I against the Sudanese Minister of State for humanitarian affairs, Ahmed Harun, and the government’s befriended military commander of the Janjaweed rebel movement, Ali Kushayb.\footnote{Pre-Trial Chamber I, ‘Warrant of Arrest for Ahmad Harun’ (27 April 2007), as available at: <http://icc-cpi.int/iccdocs/doc/doc279813.PDF>. Pre-Trial Chamber I, ‘Warrant of Arrest for Ali Kushayb’ (27 April 2007), as available at: <http://icc-cpi.int/iccdocs/doc/doc279858.PDF>.} After the GOS had refused to cooperate with the Court on these warrants, the Prosecutor moved upward on the Sudanese line of command and decided to request PTC I to issue an arrest warrant against President Al-Bashir for ten counts of genocide, crimes against humanity and war crimes on 14 July 2008.\footnote{Office of the Prosecutor, ‘Press Release: ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur’ (14 July 2008), as available at: <http://icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/a>. Office of the Prosecutor, ‘Prosecutor’s Application for Warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR’ (14 July 2008), as available at: <http://www.icc-cpi.int/NR/rdonlyres/64FA6B33-05C3-4E9C-A672-3FA2B58CB2C9/277758/ICCOTPSummary20081704ENG.pdf>.} This application of the Prosecutor immediately caused an outcry from the League of Arab States and the AUPSC.\footnote{Note that some observers have concluded that the arrest warrant for President Al-Bashir was a ‘revenge’ for the GOS’s lack of cooperation with the Court on the arrest warrants against Harun and Kushayb. Nouwen and Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’, 959. (They note the following statement which the Prosecutor reportedly made to a high-level AU official: ‘if Sudan had handed over these two guys, it would not have had the problem of the President.’).} The latter issued a communiqué on 21 July 2008, in which the Council
emphasized the AU’s ‘unflinching commitment to combating impunity’, but also recalled ‘the principle of the presumption of innocence’, stressed ‘the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standards’ and expressed its ‘concern at the threat that such [perception] may pose to efforts aimed at promoting the rule of law and stability, as well as building strong national institutions in Africa’. Furthermore, the Council expressed its ‘conviction that, in view of the delicate nature of the processes underway in the Sudan, approval by [PTC I] of the [warrant] could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur’.

In light of all this, the fifteen members of the AUPSC, including nine states who had ratified the Rome Statute by that time, decided to request the Security Council, in accordance with the provisions of Article 16 of the Rome Statute, ‘to defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interests of victims and justice’. The Security Council discussed this request in considering the extension of UNAMID, the hybrid peacekeeping operation of the AU and the UN in Darfur on 31 July 2008. However, the Security Council proved divided on the matter and disappointed the African states by only taking notice of the deferral request. In response, the AUPSC reiterated its request in a new communiqué on 22 September 2008.


128 Ibidem.


IV. The first arrest warrant for President Al-Bashir

‘If 2008 provided the background for increasing frustration with what African leaders saw as an unfair and biased international criminal justice system (..) 2009 witnessed the eruption of all out rhetorical war’ between African states and the Court. 131 In this regard, the first half-yearly meeting of the AU Assembly of the Heads of State and Government, since the Prosecutor’s application for an arrest warrant against President Al-Bashir, only brought sabre rattling. The Assembly adopted a resolution which expressed ‘its deep concern at the indictment made by the Prosecutor (..) against the President of the Republic of Sudan’ and endorsed the requests of the AUPSC to the Security Council to defer the proceedings under article 16 of the Rome Statute. 132

However, on 4 March 2009, the PTC decided to issue an arrest warrant against President Al-Bashir for war crimes and crimes against humanity (but not for counts of genocide), one could already hear the sound of bugles. 133 Within twenty-four hours, the AUPSC responded and expressed its ‘deep concern over the decision taken by [PTC I]’. 134 According to the Council, this decision came ‘at a critical juncture in the process to promote lasting peace, reconciliation and democratic governance in Sudan’ and had ‘the potential to seriously undermine the ongoing efforts to address the many pressing peace and security challenges facing the Sudan’. 135 For these reasons, the AUPSC ‘[appealed] once again to the UN Security Council to assume its responsibilities by deferring the process initiated by the ICC to give a chance to peace’. 136 One does not have to read these statements carefully to observe the rising concerns and indeed frustrations of African states about the application of the Prosecutor, the positive decision of PTC I on this application and the unwillingness or inability of the Security Council to adequately address their deferral requests.


135 Ibidem.

136 Ibidem.
The expressed agitation was of such a level in the build-up to the next AU Assembly meeting in Sirthe (Libya) on 3 July 2009, that reports began to warn for a mass withdrawal of the African States Parties to the Court.137 Four days prior to this meeting, the former UN Secretary-General Kofi Annan called in The New York Times on all African leaders not to take ‘a step backward in the battle against impunity’, by ‘[denouncing] and [undermining] the international court’.138 He noted the views expressed by some African leaders that ‘international justice as represented by the [ICC] is an imposition, if not a plot, by the industrialized West’, but stressed that such an ‘outrage against justice demean[s] the yearning for human dignity that resides in every African heart’.139

This remarkable call from Kofi Annan, himself a highly-respected African statesman, might have helped to ensure that no African state, who had already ratified the Rome Statute, decided to withdraw from the Court in the summer of 2009. However, his side-line intervention could not prevent that the Assembly, in which the African States Parties to the Court held a majority, adopted a very firm decision on the ICC.140 Herein, the Assembly for the first time ‘[noted] with grave concern the unfortunate consequences that the indictment has had on the delicate process underway in the Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur’.141 In contrast to its earlier and most of its later resolutions, the Assembly did not speak of the possibility of negative implications, but about the actual ‘unfortunate consequences’ of the warrant.142

Furthermore, the Assembly expressed for this first time its concern over the conduct of the Prosecutor. Initially, African states did not vent their agitation about the Prosecutor’s application for


139 Ibidem.


141 Ibidem.

142 Ibidem.
an arrest warrant against President Al-Bashir on the Prosecutor himself, but focussed on the Security Council in requesting a deferral of the proceedings under article 16. However, six days before the Prosecutor would file his appeal to PTC I’s decision of 4 March 2009 not to issue an arrest warrant against President Al-Bashir for counts of genocide, the Assembly opposed for the first time to what they considered inappropriate actions of the Prosecutor.

A final new step of the Assembly was its decision ‘that in view of the fact that the request by the AU [to defer the proceedings initiated against President Bashir of the Sudan in accordance with Article 16 of the Rome Statute] has never been acted upon, the AU Member States shall not cooperate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender [of Al-Bashir]’. Apart from a mass withdrawal, the opposition of the Assembly to the Court, its Prosecutor and the Security Council’s deadlock could not have been more outright. African states now openly refused to cooperate with the warrant issued against the Sudanese President.

Although this resolution was adopted with only one reservation, namely from Chad, who at that time was still involved in a cross-border conflict with Sudan, its full content was likely not wholeheartedly supported by all African states. Most notably, Botswana and, after strong pressure of domestic NGOs, South-Africa announced that they would still live-up to their obligations under the Rome Statute despite the Assembly decision to the contrary. Moreover, rumours that Assembly delegations were strongly pressured, if not ‘bullied’, to support the non-cooperation clause in the resolution by then AU Chairman Muammar Gaddafi and Jean Ping, who was until July 2012 the Chairman of the AU Commission, could not be completely dispelled by a press statement from the AU Commission denouncing them. Although the Commission’s statement emphasized that the

143 Ibidem.


145 On 16 July 2012 he was replaced, despite his attempts to obtain another term, by Dr. Nkosazana Clarise Dlamini Zuma. She was South Africa’s Minister of Foreign Affairs from 17 June 1999 to 10 May 2009 and became Minister of Home Affairs in the Cabinet of her ex-husband, the current President of South Africa, Jacob Zuma. African Union, Press Release: 19th Ordinary Session of the African Union Ends in Addis Ababa – Summit elected first AUC female Chairperson (16 July 2012), as available at: <http://www.au.int/en/sites/default/files/PR%20%20CLOSING%20OF%2019TH%20SUMMIT.pdf>.

146 As noted by: Mills, ‘“Bashir is Dividing Us”: Africa and the International Criminal Court’, 425. (He observes that ‘the African states parties to the Court had a majority of seats in the Assembly and could have indicated a
decision ‘was arrived at by consensus’ and represented ‘a logical consequence of the stated position of the AU on the manner in which the prosecution against President Bashir has been conducted’, the rumours persisted and found, to some extent, support in the announcements of Botswana and South Africa.\textsuperscript{147}

Notwithstanding the doubts about the unanimity of the support of African states for the non-cooperation clause, there is no reason to question the fact that all African states, perhaps with the exception of Botswana, supported the underlying message of the resolution. This message was at the time, above all, one of ‘grave concern’ and indeed frustration about the application of the Prosecutor, the positive decision of PTC I on his application, the conduct of the Prosecutor and the unwillingness or inability of the Security Council to adequately address the peace concerns of African states.

In October 2009, these concerns were once more reiterated by the AUPSC when the AU High Level Panel on Darfur, which was established by the AUPSC in July 2008, presented its findings ‘on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed [in Darfur]’.\textsuperscript{148} The pan-African solutions for African problems, proposed by the so-called Mbeki report, included the establishment of a Hybrid Court and a Truth, Justice and Reconciliation Commission.\textsuperscript{149} In endorsing these recommendations, the AUPSC ‘once again, [urged] the UN Security Council to heed the AU’s call for the deferral of the process initiated by the [ICC] against President [Al-Bashir] in the interest of peace, justice and reconciliation’.\textsuperscript{150} As such, the AUPSC reaffirmed the concerns and frustrations of African states about the impediments posed by the first warrant on the efforts of the AU to solve the humanitarian crisis in Darfur and about the disobliging Security Council, who failed to address the AU’s repetitive deferral requests.

\textsuperscript{147} African Union Commission, ‘Press Release’ (14 July 2009), as available at: <http://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CE8QFjAA&url=http%3A%2F%2Fwww.africaunion.org%2Froot%2F2009%2FJuly%2FPress%2520Release%2520%2520ICC.doc&ei=d0gUIH0NIgp0QWA84YoCQ&usg=AFQjCNH1BHXd7UgHaX7SHu6mBn3q1iBUQ&sig2=IgE36mi0s8aa5DFwjrjDUw>.


V. A ceasefire?

During its half-yearly meeting in July 2009, the Assembly did not only decide that African states would not cooperate with the warrant, but also requested the Commission ‘to convene a preparatory meeting of African States Parties (..) open to other Member States’ at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010’. During this preparatory meeting, the Ministers of Foreign Affairs and Justice were to address, among other issues, the re- and deferral powers of the Security Council, the immunities of officials whose states are not party to the Rome Statute, the practical application of articles 27 and 98 of the Rome Statute and new guidelines for the exercise of prosecutorial discretion.

On 6 November 2009, twenty-six State Parties and fifteen African non-state parties gathered in Addis Ababa to discuss these issues. During this ministerial meeting agreement was reached on two recommendations. In the first place, the African states present decided to request the Office of the Prosecutor (OTP) ‘to review the 2009 regulations and the 2007 Policy Paper regarding the guidelines and code of conduct of the exercise of prosecutorial powers to include factors of promoting peace and submit them to the Assembly of States Parties in order to ensure more accountability’.

Secondly, the African states concluded that article 16 of the Rome Statute, which grants the UN Security Council the power to defer investigations or prosecutions for twelve months when its responsibility for the maintenance of international peace and security under Chapter VII of the UN Charter is concerned, would have to be amended. When accepted, the proposed amendment would allow the UN General Assembly to exercise the deferral powers of article 16, in case the Security Council would fail to take a decision on a deferral request within six months.

151 Note that this reference to non-state parties was specifically included, because the non-state parties to the Rome Statute were barred from the first ministerial meeting of African States Parties to the Rome Statute that took place in Addis Ababa on 8 and 9 June 2009. Jemima Njeri Kariri, ‘30 June 2009: AU Commitment to the ICC’ (30 June 2009), as available at: <http://www.iss.co.za/pgcontent.php?UID=6811>.


153 Ibidem.


155 Ibidem, at 3.

156 Ibidem, at 4.
Both proposals were officially submitted by the Republic of South Africa, on behalf of all African States Parties, during the eighth annual session of the Assembly of States Parties (ASP) to the Rome Statute from 16 to 26 November 2009. However, the proposals received rather modest support from the ASP, which decided to encourage the OTP to continue holding consultations with states on its prosecutorial strategy and to establish a Working Group for the purpose of considering amendments to the Rome Statute. Nonetheless, despite this rather modest support, the submission and deliberation of their proposals by the ASP were welcomed in the resolution of the AU Assembly on the ICC of January 2010.

In the build-up to the first Review Conference of the Court, which would be hosted by the Government of Uganda in May 2010, the Assembly’s resolution of January 2010 was relatively lenient about the Court. Although, the Assembly expressed its ‘[deep regret] that the request by the [AU] to the UN Security Council to defer the proceedings initiated against President Bashir (...) [had] not been acted upon’, the African states did not include inflammatory statements about the decisions of the Court and its Prosecutor in the resolution. Moreover, the Assembly did not recall its non-cooperation decision with regard to the arrest warrant issued against President Al-Bashir.

In a similar vein, after the Appeals Chamber of the Court ruled on 3 February 2010, that PTC I would have to reconsider its decision not to issue an arrest warrant for counts of genocide against President Al-Bashir, the AU Commission merely released a discreet press statement. In this statement the Commission noted that the decision ‘[ran]in the opposite direction’ of the ‘AU’s search for justice (...) in a manner not detrimental to the search for peace’, but again did not reiterate the decision from the African states of July 2009 that they would not cooperate with the first warrant for President Al-

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159 Ibidem.
Bashir. Instead the Commission targeted the Security Council who still had ‘not given due consideration to [its deferral] request’.

In short, if 2009 witnessed the eruption of all out rhetorical war between African states and the Court, the first months of 2010 saw a confined cease-fire. The reason for this temporary turn of events was the Review Conference that would take place on African soil in May 2010. Before and during this Conference, African states gave expression to a much more cooperative attitude towards the Court in order to ensure that the Conference would be a successful one.

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161 Ibidem.
VI. The second arrest warrant for President Al-Bashir

After the conclusion of the Review Conference, some diplomatic signs indicated that the confined ceasefire could lead to a more structural improvement of the relationship between the Court and the African states. On 8 July 2010, the President of the ICC, Judge Sang-Huon Song, engaged with the Chairperson of the AU Commission, Jean Ping, and other AU officials to discuss, among other things, the opening of an ICC Liaison Office at the Headquarters of the AU in Addis Ababa. Initially, this proposal, intending to improve the relations between the Court and the AU, was not outright rejected by the African states and the Chairperson of the AU Commission.

However, on 12 July 2010, PTC I issued a second arrest warrant against President Al-Bashir, but this time not for crimes against humanity and war crimes, but for counts of genocide. In response to this judgement, the Commission and the AUPSC expressed their concerns about its ‘counterproductive consequences’ and subsequently, the Assembly ‘[rejected] for now, the request by the ICC to open a Liaison Office to the AU’. The ceasefire was off the table.

Furthermore, in its resolution of 21 July 2010, the Assembly also ‘[expressed] its disappointment that the [Security Council] had not acted upon the request by the [AU] to defer the

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proceedings initiated against Al-Bashir.\textsuperscript{167} Moreover, the Prosecutor got it in the neck as the Assembly ‘[expressed its] concern over the conduct of the ICC prosecutor, Mr. Moreno Ocampo who [would have made] egregiously unacceptable, rude and condescending statements on the case of President [Al-Bashir] and other situations in Africa’.\textsuperscript{168} Finally, in contrast to its resolution of January 2010, the Assembly now also ‘[reiterated] its decision [of July 2009] that AU Member States shall not cooperate with the ICC in the arrest and surrender of President Al-Bashir’.\textsuperscript{169} However, in contrast to that decision, the Assembly added a clause to the resolution which ‘[requested] the Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC’.\textsuperscript{170}

This addition was likely incorporated in the resolution through the intercession of some African States Parties to the Court, including Botswana and South Africa. These states would have preferred a less aggressive resolution, which would have repeated the non-cooperation clause.\textsuperscript{171} However, the majority of African states wanted to reaffirm the Assembly’s decisions of July 2009. After long negotiations, the Assembly decided to add the new balancing clause to its previous decision not to cooperate with the arrest and surrender of President Al-Bashir in order to somehow accommodate the different views among some African states.

\textsuperscript{167} Ibidem.
\textsuperscript{168} Ibidem.
\textsuperscript{169} Ibidem.
\textsuperscript{170} Ibidem.
VII. President Al-Bashir travels to Chad and Kenya

The next episode in the mounting tension between African states and the Court began on 21 July 2010, when President Al-Bashir set foot on Chadian soil, but was not arrested by the authorities of this State Party to the Rome Statute. Instead, President Al-Bashir was welcomed with an embrace of Idriss Deby, the President of Chad. As explained by Chad’s Interior and Security Minister, Ahmat Mahamat Bachir, Chad did not ‘feel’ obligated to arrest [Al-Bashir] because he was a sitting president. This visit was, of course, a major victory for the Sudanese President, but it also heralded by many other African states as marking the end of long hostilities between Sudan and Chad.

On 28 August 2010, President Al-Bashir again cocked a snoot at the Court by joining the festivities in celebration of the new Kenyan constitution in Nairobi. In reaction to the storm of critique about this second visit of Al-Bashir to a State Party of the Court, the Kenyan Foreign Minister, Moses Wetangula, stated that ‘he [was there] in response to [an] invitation to all (...) neighbours and the sub-region to attend this historic moment for Kenya’. He added that, ‘you do not harm or embarrass your guest, [since] that is not African’. In a meeting later that year with the then President of the ASP, Ambassador Christian Wenaweser of Liechtenstein, Minister Wetangula explained the refusal of the Kenyan government to execute the arrest warrant in view of ‘his country’s competing obligations towards the Court, the [AU], and regional peace and stability’.

Despite this self-justification, PTC I decided to inform the Security Council on the presence of President Al-Bashir in Kenya and Chad. The AU Commission responded furiously to this decision

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173 As noted by: Gwen P. Barnes, ‘The International Criminal Court’s Ineffective Enforcement Mechanisms: The Indictment of President Omar Al-Bashir’, Fordham International Law Journal 34 (2011) 1609. Remark that Chad was the only state to make an official reservation to the non-cooperation clause of the July 2009 Assembly decision.

174 Note that Raila Odinga, the Prime Minister of the Kenyan coalition government, which was established under the auspices of Kofi Annan after the post-election violence in 2008, has stated that the invitation, which came from Kenyan President Kibaki, was a mistake. See: Mills, “Bashir is Dividing Us”: Africa and the International Criminal Court’, 438. Kepller, ‘Managing Setbacks for the International Criminal Court in Africa’, 5.


176 Ibidem.


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and ‘[expressed] its deep regret that [the PTC] grossly [ignored that] (...) the decisions adopted by the AU policy organs are binding on Chad and Kenya’. The Commission added that ‘it [would] be wrong to coerce [both states] to violate or disregard their obligations to the AU’ and ‘[recalled] that both Chad and Kenya being neighbours of the Sudan have an abiding interest in ensuring peace and stability in The Sudan (...) which can only be achieved [through] continuous engagement with the elected government of that country’.

During its next biannual session in January 2011, the Assembly of Heads of State and Government followed the Commission in expressing its deep regret about the decision of PTC I. Furthermore, the Assembly ‘[decided] that [in] receiving President Bashir, the Republic of Chad and the Republic of Kenya were implementing various AU Assembly Decisions on the warrants of arrest (...) as well as acting in pursuit of peace and stability in their respective regions’.

With this decision, the Assembly stroke out on a new course with regard to the ICC. The Assembly now started to emphasize the competing obligations and interests of, in particular, the African States Parties to the Court. According to the Assembly, the Court could not ignore that all African states have obligations towards the AU and profound interest in peace and stability within their regions. This new course linked up to the balancing clause of July 2010, which called upon all AU member states ‘to balance, where applicable their obligations to the AU with their obligations to the ICC’.


179 African Union Commission, ‘On the decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya’ (29 August 2010), as available at: <https://docs.google.com/viewer?url=http://www.african-union.org/root/ua/actualites/2010/aout/press%2520release%2520on%2520the%2520decision%2520of%2520the%2520pre%2520trial%2520of%2520the%2520icc%2520informing%2520the%2520security%2520council%2520about%2520president%2520al-bashir%2520of%2520the%2520sudan%2520presence%2520th.pdf>.

180 Ibidem.


182 Ibidem.


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VIII. The Kenya situation

Besides the new focus on the obligations and interests of African states, the Assembly resolution of January 2011 will also be reminded for ‘[supporting and endorsing] Kenya’s request for a deferral of the ICC investigation and prosecutions in relation to the 2008 post-election violence under Article 16 of the Rome Statute’ for the very first time.\(^{184}\) This deferral request would not be required to accommodate peace concerns, but ‘to allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity’.\(^{185}\)

After a period of inaction from the Kenyan government with regard to the prosecution of those responsible for the brutal violence that followed the presidential elections of 27 December 2007, the Prosecutor requested PTC II to authorize the opening of a *proprio motu* investigation, which the Chamber did on 31 March 2010.\(^{186}\) Later that year, on 14 December 2010, the Prosecutor revealed the names of the six accused for who he requested the Court to issue summonses to appear.\(^{187}\) The suspected orchestrators of the post-election violence, in which over 1100 people were killed and hundreds of thousands more were displaced, included three Cabinet Ministers as well as the Commissioner of the Kenya Police at the time the atrocities took place.\(^{188}\) Moreover, the most prominent name on the list of the Prosecutor was that of Finance Minister and Deputy Prime Minister Uhuru Kenyatta, son of Kenya’s founding father Jomo Kenyatta.

In response to this announcement of the Prosecutor, the Kenyan government ‘began a concerted effort to prevent a trial from ever taking place’.\(^{189}\) On 22 December 2010, the Kenyan parliament unanimously passed a motion to withdraw from the Rome Statute.\(^{190}\) Despite the fact that


\(^{185}\) Ibidem.


\(^{189}\) Ibidem, 226.

the enforcement of this motion would not affect the jurisdiction of the Court over the six suspected offenders, since a formal withdrawal would only take effect after a year, the non-binding motion was indicative of the Kenyan resistance against the initiated prosecutions. The opposition of the Kenyan government was also affirmed by its request to the Security Council to defer the proceedings under article 16 of the Rome Statute and, according to some reports, by its attempts to convince other African states to withdraw en masse from the Court. Whether or not the Kenyan government was actually lobbying for an Assembly resolution that would call on African states to withdraw from the Court, the Assembly only expressed its support for the deferral request of the Kenyan government in its resolution of January 2011.

In addition to this deferral request and the new focus on the competing obligations and interests of African states, the Assembly continued to express concerns and frustrations of African states about the disobliging Security Council, the Prosecutor and the negative implications of the arrest warrants issued against President Al-Bashir for all efforts intending to bring peace to Darfur, Sudan and the wider region. First of all, the Assembly remained calling upon the Security Council to defer the proceedings initiated against President Al-Bashir, because of his ‘unwavering commitment (..) to sustaining peace between northern and southern Sudan and (..) for the early resolution of the crisis in Darfur’. Secondly, the Assembly continued to press for an amendment to article 16 of the Rome Statute and called upon all African States Parties ‘that have not yet done so to co-sponsor [this] proposal’. Finally, the Assembly took a logical step, given its earlier concerns about the actions of the first Prosecutor, by ‘[underscoring the need that] the position of the ICC Prosecutor [would go] to an African during the (..) elections for Prosecutor scheduled for December 2011’.

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194 Ibidem.
IX. President Al-Bashir travels to Djibouti

On 8 May 2011, President Al-Bashir paid his third visit to an African State Party of the Court by attending the inauguration ceremony of Djibouti’s long-sitting President, Ismail Omar Guelleh. Four days later, on 12 May 2011, PTC I condemned this visit and decided to inform the Security Council and the ASP about President Al-Bashir’s presence in Djibouti. In response, the AU Assembly proclaimed on 1 July 2011, ‘that by receiving President Bashir, the Republic of Chad, Kenya, and Djibouti were discharging their obligations under Article 23 of the Constitutive Act of the [AU] and Article 98 of the Rome Statute as well as acting in pursuit of peace and stability in their respective regions’.

With this response, the Assembly for the first time invoked a legal justification for the visits of President Al-Bashir to African States Parties of the Court: article 98 of the Rome Statute. This provision states ‘the Court may not proceed with a request for surrender which would require the requested State to act inconsistently’ with either ‘its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State’ (article 98(1)) or with ‘its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court’ (article 98(2)). As noted above, this provision was also used to justify the decision of the Assembly in July 2009, that AU member states would not cooperate with the arrest and surrender of President Al-Bashir.

According to the Assembly, the African States Parties to the Court were free to receive President Al-Bashir, because article 98(1) would oblige the Court to respect the obligations of these states under international law with regard to the personal immunity of Al-Bashir as President of Sudan. Moreover, the Assembly stressed that the Court could not ignore the profound interests of African states in peace and stability within their regions.


X. The Libya situation

In its resolution of July 2011, the Assembly did not only welcome the visit of President Al-Bashir to Djibouti, but also ‘[requested] the UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interests of Justice as well as peace in the country’. After its request to defer the proceedings initiated against President Al-Bashir and those related to the Kenya situation, which were both reiterated in the Assembly’s resolution of July 2011, this was the third request that African states made under article 16 of the Rome Statute.

Earlier that year, on 26 February 2011, the three non-permanent African member states of the Security Council (Gabon, Nigeria and South-Africa) had supported the adoption of Security Council resolution 1970. This resolution had ‘[decided] to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor’ in light of the ‘gross and systematic violation of human rights [and] the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government’.

However, after the NATO-led intervention in Libya and the warrant of arrest issued by PTC I against Muammar Gaddafi, the Assembly strongly opposed Court’s involvement in the Libya situation. In particular, the Prosecutor had to take the rap for this. In its resolution, the Assembly ‘[expressed its] deep concern at the manner in which the ICC Prosecutor [handled] the situation in Libya’. Furthermore, the Assembly ‘[noted] that the warrant of arrest issued by [PTC I] ‘seriously

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198 United Nations Security Council, ‘6491st meeting’ (26 February 2011), as available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-E9C-8CD3CF6E4FF96E4FF9%7D/Libya%20S20PV%206491.pdf>. The Nigerian representative noted that ‘Nigeria is satisfied that the resolution provides for the protection of civilians and respect for international humanitarian and human rights law. We believe that the full implementation of these measures will swiftly and effectively address the ongoing crisis’. The representative of Gabon stated that ‘the situation in Libya for almost two weeks required an answer and a clear and strong message from the Security Council, in accordance with the responsibility entrusted to it by the Charter of our Organization. That is why Gabon has voted with the other members of the Council, not only to condemn the killing of peaceful demonstrators but to make the Libyan regime aware of the consequences of such actions’. The representative of South African proclaimed that ‘this unanimous resolution sends a clear and unambiguous message to the Libyan authorities to end the carnage against their people. Further, it complements the decision of the African Union Peace and Security Council, which strongly condemned the indiscriminate and excessive use of force against peaceful protesters and called upon the Libyan authorities to end forthwith all acts of violence, in accordance with international humanitarian and human rights law. We are confident that the measures contained in this resolution will contribute to the long-term objective of bringing peace and stability to this sisterly nation’.


[complicated] the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation'.

Because of these peace concerns, the Assembly ‘[decided] that Member States shall not cooperate in the execution of the arrest warrant’ and requested the Security Council to defer the proceedings under article 16 of the Rome Statute.

In the end, all such efforts proved in vain. No political solution was found for the crisis in Libya. Muammar Gaddafi refused to retreat its troops and was killed on 20 October 2011 near Sirte, the city which to years earlier had hosted the AU Assembly.  

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201 Ibidem.

XI. President Al-Bashir travels to Chad and Malawi

After the remarkable session of the Assembly in July 2011, which had firmly opposed the Court’s involvement in the Libya situation and had invoked a legal justification for the visits of President Al-Bashir to African States Parties of the Court, the Sudanese President travelled for the second time to Chad on 7 August 2011 and visited his fourth and until now last African State Party to the ICC, Malawi, on 14 October 2011. Both visits were again condemned by PTC I in December 2011. However, this time, in contrast to its earlier decisions on the first-time visits of President Al-Bashir to Chad, Kenya and Djibouti, PTC I also addressed the argument of competing obligations under article 98(1) of the Rome Statute.

In its separate decisions on President’s Al-Bashir’s visits to Chad and Malawi, PTC I ‘[noted] the various [AU] resolutions requiring its members not to cooperate with the Court regarding the warrants of arrest against [Al-Bashir]’ and observed that ‘the sole legal justification the [AU gave] for why its legal position is compatible with the Statute [was] by reference to “the provision of Article 98 of the Rome Statute of the ICC relating to immunities”, [which] the Chamber [considered] (...) to be article 98(1) of the Statute’. According to PTC I, ‘there is an inherent tension between article 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State’. While article 27(2) states that ‘immunities (...) shall not bar the Court from exercising its jurisdiction’, article 98(1) argues that the Court may not ignore the obligations of states under international law with respect to the State or diplomatic immunity of a person of a third State, like Sudan. However, PTC I proclaimed that this tension did not entitle Malawi, Chad or ‘by extension the [AU] (...) to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests’.


204 Ibidem. Pre-Trial Chamber I, ‘Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir’ (13 December 2011), as available at: <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf> (‘Decision on Chad’).

205 ‘Decision on Malawi’, par. 15. ‘Decision on Chad’, par. 12.


207 ‘Decision on Malawi’, par. 43. ‘Decision on Chad’, par. 14. How the PTC came to this conclusion will be further discussed below, Chapter 3, Section IV.
In response to these decisions, the AU Commission issued a particularly firm press statement, which proclaimed that the AU ‘shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to Africa’.\textsuperscript{208} In this statement, which was interspersed with legal arguments, the Commission further expressed ‘its deep regret that the decision[s] had the effect of (i) purporting to change customary international law in relation to [personal immunity], (ii) rendering Article 98 of the Rome Statute redundant, non-operational and meaningless [and] (iii) making a decision per incuriam [(through lack of care)] by referring to decisions of the [AU] while grossly ignoring the provisions of Article 23(2) of the Constitutive Act of the [AU] which obligate[s] all AU Member States “to comply with the decisions and policies of the Union”’.\textsuperscript{209}

During its next biannual meeting, the Assembly expressed support for these statements of the Commission by ‘[reaffirming] that Article 98(1) was included in the Rome Statute (...) out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and [that] by referring the situation in Darfur to the ICC, the UN Security Council [had] intended that the Rome State would be applicable, including Article 98’.\textsuperscript{210} Moreover, the Assembly reaffirmed that Malawi, Djibouti, Chad and Kenya were implementing various Assembly decisions by receiving President Al-Bashir and accordingly ‘[urged] all Member States to comply with [these] decisions (...) pursuant to Article 23(2) of the Constitutive Act and Article 98 of the Rome Statute of the ICC’.\textsuperscript{211} In light of all this, the Assembly also requested ‘the Commission to consider seeking an advisory opinion from the International Court of Justice (ICJ) regarding the immunities of State Officials under international law’.\textsuperscript{212}

In short, all these decisions indicate that many African states were seriously concerned and frustrated about the judgements of PTC I, which had simply set aside the proclaimed competing obligations and interests of, in particular, the African States Parties to the Court.

\textsuperscript{208} African Union Commission, ‘Press Release: on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan’ (9 January 2012), as available at: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>.

\textsuperscript{209} Ibidem. Note that the Commission, and later the Assembly continue to speak about article 98 without specifying whether referring to clause 1 or 2.


\textsuperscript{211} Ibidem.

\textsuperscript{212} Ibidem.
XII. The most recent decisions of the AU Assembly

On 15 June 2012, the Gambian Fatou Bensouda, the candidate supported by the AU, was sworn in as the ICC’s second chief Prosecutor. Although, her appointment certainly shed a new light on the whole situation, it did not immediately bridge the profound crevasse between African states and the Court. In its most recent resolution of 16 July 2012, the Assembly reiterated many of the possible concerns and frustrations of African states about the Court. As in most of its earlier resolutions on the ICC, the Assembly repeated its request to the Security Council to defer the proceedings initiated against President Al-Bashir and those issued in the Kenyan situation. Furthermore, for the first time since July 2010, the Assembly recalled its request to all AU member states ‘to balance, where applicable, their obligations to the [AU] with their obligations to [the] ICC’. In this way, the Assembly seemed to reaffirm its concerns and frustrations about the disobliging Security Council and the competing obligations and interests of African states.

In follow-up to its possible concerns and frustrations about these competing obligations and interests of African states, the Assembly took two notable decisions in July 2012. In the first place, the Assembly ‘[endorsed] the recommendation of the Meeting of Ministers of Justice and Attorneys

213 International Criminal Court, ‘Press Release – Ceremony for the solemn undertaking of the ICC Prosecutor, Fatou Bensouda’, as available at: <http://www.icc-cpi.int/NR/exeres/E070289C-4836-49F2-BD81-DE3D92F68B6A.htm>. The officials records of the ASP note the following on her election: ‘During the informal consultation process, which ended on 30 November 2011, it became clear there was a strong desire among States Parties to see the next Prosecutor elected by consensus, if at all possible, and that the most qualified person should be elected.


214 Note that this summit took place in Ethiopia at the Headquarters of the AU and not, as originally planned, in Malawi. In May 2012, Malawi’s new President, Joyce Banda, announced that she did not want President Al-Bashir to attend the summit in Malawi. In response, Sudan asked the AU to shift the shift the summit from Malawi, because the agenda included the ongoing tensions between Sudan and South Sudan. Without further deliberation, The AU announced that Malawi had withdrawn to host the summit and that after consultations among member states it was decided that the summit would take place in Ethiopia at the Headquarters of the AU. As derived from: BBC News, ‘Sudan's Omar al-Bashir not welcome for Malawi's Banda’ (4 May 2012), as available at: <http://www.bbc.co.uk/news/world/africa-17963368>. BBC News, ‘Sudan's Bashir demands AU summit moves from Malawi’ (7 June 2012), as available at: <http://www.bbc.co.uk/news/world-africa-18359924>. African Union, ‘Communiqué’ (11 June 2012), as available at: <http://au.int/en/summit/sites/default/files/Communique%20on%2019th%20AU%20Summit%202011.06.12-3.pdf>. BBC News, ‘Ethiopia to host Africa Union summit after Omar al-Bashir Malawi row’ (12 June 2012), as available at: <http://www.bbc.co.uk/news/world-africa-18407396>.


216 Ibidem.
General to approach the [ICJ], through the [UNGA] for seeking an advisory opinion on the question of immunities under international law, of Heads of State and senior state officials from States that are not parties to the Rome Statute of the ICC’.\textsuperscript{217} With this decision, the Assembly reemphasized that the African states firmly disagreed with PTC I’s interpretation of article 98(1) of the Rome Statute. The Assembly again advanced the view that the African States Parties to the Court are free to receive President Al-Bashir on their territory, because the Court would have to respect their obligations towards the AU that would find legal justification under international law with respect to the personal immunity of Heads of State.

Secondly, the Assembly took a new step by ‘[encouraging], for effective reliance on Article 98 [(2)] of the Rome Statute, [the] African State Parties to the Rome Statute (..) and African non-State Parties to consider concluding bilateral agreements on the immunities of their Senior State officials’.\textsuperscript{218} If article 98(1) could not provide the intended legal justification, than international agreements under article 98(2) of the Rome Statute, pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, could withhold the Court from proceeding with a request for surrender.\textsuperscript{219}

In addition to these two decisions with regard to the competing obligations and interests of African states, the Assembly also agreed to include two other remarkable decisions in its most recent resolution. First of all, the Assembly ‘[urged the] African States Parties to the Rome Statute to enhance the African representation on the Bench of the ICC in order to ensure that Africa contributes optimally to the evolution of the Court’s jurisprudence in this context’.\textsuperscript{220} This decision might be explained as an indirect welcoming of Fatou Bensouda’s designation, but also as a reminder that the appointment of an African Prosecution is not enough to overcome all the expressed concerns and frustrations of African states about the Court.

Second of all, the Assembly heralded the eminent wish of African states to find pan-African solutions for African problems. In the first place, the Assembly did so by ‘[requesting] the Commission, the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights to publicize, within the continent, what it has done towards the protection of civilians in situations where international crimes have been perpetrated’.\textsuperscript{221}

\begin{itemize}
\item \textsuperscript{217} Ibidem.
\item \textsuperscript{218} Ibidem.
\item \textsuperscript{219} This will be further discussed below in Chapter 3, Section IV.
\item \textsuperscript{221} Ibidem.
\end{itemize}
gave expression to this desire by ‘[endorsing] Libya’s request to put on trial in Libya its own citizens charged with committing international crimes’. 222 Finally, the Assembly reaffirmed the importance of pan-African solutions for African problems by ‘[welcoming] (...) the elaboration of a Model National Law on Universal Jurisdiction over International Crimes [by the Commission] and [by encouraging] Member States to fully take advantage of this Model National Law in order to expeditiously enact or strengthen their National Laws in this area’. 223 With this last decision, the prelude for the response of African states to the Prosecutor’s application for an arrest warrant against President Al-Bashir, returned in what have likely not been the final bars of the composition.

222 Ibidem.

223 Ibidem.
XIII. Conclusion: what might have concerned and frustrated African states about the Court?

Taken together, the most recent decisions of the AU Assembly closely resemble many of the concerns and frustrations that African states seem to have advanced about the Court since the Prosecutor’s application for an arrest warrant against President Al-Bashir. Although many African states were very supportive in their preceding actions and statements with regard to the Court, this application and later the decision of the PTC to issue an arrest warrant marked the turning point in their relationship with the Court. After July 2008, a profound crevasse emerged between the Court and most African states, including those who had ratified the Rome Statute. In particular, the resolutions and communiqués adopted by various AU organs appear to have given expression to the concerns and frustrations of African states about the Court as well as its rules and decisions.

This chapter has consulted these resolutions and communiqués, supplemented with newspaper articles, secondary literature, and official documentation of the Court, the Rome Conference and the Security Council, to recount what African states have said and done with regard to the Court since July 2008. From all this, as spun out in the previous sections, five possible concerns and frustrations of African states about the Court can be derived.

In the first place, African states have questioned the unwillingness or inability of the Security Council to deliberate and decide upon their repetitive requests to defer the proceedings initiated against President Al-Bashir and later those in relation to the Kenya and Libya situations. Seemingly to the frustration of African states, the Security Council disoblige its responsibilities under article 16 of the Rome Statute and refused, without one notable exception, to deliberate upon their deferral requests.

Secondly, the resolutions and communiqués apparently gave expression to the concerns and frustrations of African states about the inappropriate actions of the Prosecutor. Initially, African states mainly targeted the Security Council, but in the course of 2009 they began to openly challenge the actions of the first Prosecutor, Mr. Moreno Ocampo. The recent appointment of Fatou Bensouda as the second Prosecutor of the ICC might have eased some of their concerns and indeed frustrations. However, it remains to be seen to what extent Bensouda’s appointment will affect the OTP’s policies and as such could take away what appears to concern and frustrate African states about the Prosecutor.

Thirdly, following the decisions of PTC I with regard to the five visits of President Al-Bashir to four African States Parties of the Court, the African states emphasized their competing obligations and interests. According to the resolutions of the Assembly as well as the communiqués and press statements of the AU Commission, the Court could not ignore the fact that the African States Parties also hold obligations towards the AU and have a profound interest in ensuring peace and stability within their regions. Most notably, the Assembly has proclaimed that these obligations find legal
justification under international law with respect to the personal immunity of President Al-Bashir. However, PTC I has refused to accept this legal justification and has concluded that the African States Parties to the Court and by extension the AU cannot rely on article 98(1) of the Rome Statute to justify their non-compliance with the arrest warrants issued against President Al-Bashir. This response seems to have concerned and at times frustrated African states.

Fourthly, after the Prosecutor’s applications for arrest warrants against President Al-Bashir and later Muammar Gaddafi, the various bodies of the AU warned that these warrants seriously risked to jeopardize ongoing peace efforts. The Assembly invoked this political exigency to support its deferral requests under article 16 of the Rome Statute, to justify its non-cooperation decisions and to welcome the visits of President Al-Bashir to four African States Parties of the Court. However, probably to the frustration of African states, the Security Council and the Prosecutor proved unwilling or unable to address their peace concerns.

Finally, some of the resolutions and communiqués of the various bodies of the AU have spoken of the ‘double standards’ of the Court. For example, in response to the decision of the PTC on the most recent visits of President Al-Bashir to Chad and Malawi, the AU Commission issued a press statement, which proclaimed that the AU ‘shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC to Africa’. From such statements, one might derive that African states could be concerned and frustrated about the (unequal) manner in which the Court exercises its jurisdiction.

In sum, African states might have been concerned and frustrated about (1) the disobliging Security Council, (2) the inappropriate actions of the Prosecutor, (3) the competing obligations and interests of African states, (4) the jeopardizing effects of the Court’s involvement with ongoing peace efforts and (5) the alleged double standards of the Court.

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224 African Union Commission, ‘Press Release: on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan’ (9 January 2012), as available at: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>.
Chapter 3

African states and the sociological legitimacy of the Court

I. Introduction

What African states have said and done with regard to the Court, does not have to resemble their legitimacy perceptions and assumptions. The fact that African states have adopted a long list of resolutions and communiqués from which the previous chapter derived five possible concerns and frustrations about the Court, is insufficient to conclude that African states do not perceive or assume the Court as well as its rules and decisions as desirable, proper and appropriate.

As explained in the first chapter, perceptions and assumptions are subjective qualities which are not readily accessible for outside-observers. Scholars can therefore not make any conclusive statements but can only provide reasonable assumptions about these perceptions and assumptions as well as about what they might imply for the sociological legitimacy of the Court. This thesis argues that such reasonable assumptions can be made (1) by analysing the specific contexts in which African states have decided to express their concerns and frustrations about the Court and (2) by considering the wider political space in which African states operate.

This third and final chapter will embark upon this task in the following manner. In the first place, the specific contexts in which the five possible concerns and frustrations have been advanced, will be analysed. The purpose of this contextual analysis is to find out which legitimacy conception(s) can best explain what these concerns and frustrations might imply for the sociological legitimacy of the Court.

The outcomes of this contextual analysis will indicate that the expressed concerns and frustrations about (1) the disobliging Security Council, (2) the inappropriate actions of the Prosecutor, (3) the competing obligations and interests of African states, (4) the jeopardizing effects of the Court’s involvement with ongoing peace efforts and (5) the alleged double standards of the Court, cannot be explained by one particular conception of sociological legitimacy. Instead the expressed concerns and frustrations might relate to different components of both the process- and outcome-based conceptions of sociological legitimacy (sections II-VI).

Subsequently, the wider political space in which African states operate will be addressed. In this regard, especially the desire of African states to find pan-African solutions for their common problems deserves elaboration. On 9 July 2002, eight days after the Court first opened its doors, the African Union (AU) was established to play a prominent role in developing such pan-African solutions. For this purpose, a progressive human rights agenda was placed at the core of its
Constitutive Act. In contrast to its predecessor, the Organisation of African Unity (OAU), which had upheld the absolute protection of sovereignty, the AU would be committed to democracy and human rights to ‘enter in a new era in the history of [the African] continent’.  

However, as a well-known Akan proverb reads: ‘the crocodile does not die under the water so that we can call the monkey to celebrate its funeral’. The tendency to protect sovereignty and to support fellow African states, the proverb can be used to say, did not give away for the implementation of the progressive human rights agenda overnight. Instead, a profound tension has emerged between, on the one hand, the ‘old’ norms of sovereignty and, on the other hand, the ‘new’ self-proclaimed human rights norms.

In light of this tension and other relevant facets of the wider political space in which African states operate, this chapter will discuss the findings with regard to the five expressed concerns and frustrations of African states about the Court (section VII). The purpose of this discussion, is to come up with reasonable assumptions about what these possible concerns and frustrations might imply for the sociological legitimacy of the Court (in conclusion, section VIII).


II. The disobliging Security Council

On 21 July 2008, in response to the Prosecutor’s application for an arrest warrant against President Al-Bashir, the AUPSC requested the Security Council to defer the proceedings initiated by the Court under article 16 of the Rome Statute. In support, the AUPSC emphasized that the proceedings could jeopardize the ongoing peace efforts and noted that ‘a prosecution [might] not be in the interest of victims and justice’. Two weeks later, the Security Council deliberated upon this request in considering the extension of UNAMID, the hybrid operation of the AU and the UN in Darfur.

However, after deliberating upon the deferral request, the Security Council proved unable or unwilling to endorse it (sub-section II.A.). For African states, the deliberation in the Security Council upon their repetitive deferral requests, or the lack therefore, might have revived their broader objections with regard the Security Council and its past involvement with the judicial proceedings of the Court under article 16 of the Rome Statute (sub-section II.B.). These broader objections might help understand why African states have proposed to amend article 16 (sub-section II.C.) and which legitimacy conception(s) can best explain what the disobliging Security Council, from the perspective of African states, might imply for the sociological legitimacy of the Court (sub-section II.D.).

II.A. Deliberation in the Security Council

On 31 July 2008, the Security Council adopted resolution 1828 (14-0-1, with the United States abstaining) which extended the mandate of the UN-AU operation in Darfur (UNAMID) for a further period of 12 months. During the preceding negotiations, the deferral request of the AUPSC was openly endorsed by the delegations of Russia, China, Libya, Burkina Faso, Indonesia, Vietnam and South Africa. The representative of the Russian Federation noted that the Non-Aligned Movement, the Organization of the Islamic Conference and the League of Arab States took the same position and that they together ‘represent[ed] quite simply the views of two thirds of the international


However, the United Kingdom, France, Belgium, Italy, Croatia and most prominently the United States refuted, in the words of the Belgian representative, ‘the arguments of those who are calling upon the Council to react in advance to developments that we cannot foresee at this stage, by invoking article 16 of the Rome Statute’. 231

At the end of the day, the African states decided to support the resolution to ensure the continuation of the hybrid operation in Darfur and because the following preamble was attached to the resolution:

‘Taking note of the African Union (AU) communiqué of the 142nd Peace and Security Council (PSC) Meeting dated 21 July (S/2008/481, annex), having in mind concerns raised by members of the Council regarding potential developments subsequent to the application by the Prosecutor of the International Criminal Court of 14 July 2008, and taking note of their intention to consider these matters further;’

Although, this preamble was foremost an agreement to disagree, it also recognized the intention of the Security Council, as explained in the statement of the United Kingdom, that ‘the issue [would] be addressed on another day’. 232 This reassurance of the resolution’s sponsor did not withhold the Libyan representative of wondering ‘if, at the request of more than two thirds of the membership of the international community, the Security Council does not invoke article 16 of the Rome Statute, when will it do so?’. 233

On the other side of the table, the United States decided to abstain in the voting ‘because the language added to the resolution would send the wrong signal to President Al-Bashir and undermine efforts to bring him and others to justice’. 234 After curtailing the jurisdiction of the Court in earlier

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230 Ibidem.

231 Ibidem.

232 Ibidem. The representative of the United Kingdom further noted that: ‘we will not stand in the way of a Security Council discussion of whether there is a case for invoking article 16 of the Rome Statute in relation to President Al-Bashir, but that discussion will raise profound questions about the relationship between peace and justice. It is not something that the Security Council should rush into’.

233 Ibidem. The representative of Libya further noted: ‘we did not receive the hoped-for response from certain Council members. (..) [but] because we were keen to ensure the continuity and effectiveness of the mission, we accepted the consensual language of the ninth preambular paragraph, which gives the Council the opportunity to further consider the issue of invoking article 16 of the Rome Statute of the ICC regarding the situation in Darfur. We hope that that will be done as soon as possible, because the main objective remains to ensure security and stability in the Sudan and the region’.

234 Ibidem. The representative of the United States further noted: ‘This Council cannot ignore the terrible crimes that have occurred throughout the conflict in Darfur and the massive human suffering that the world has witnessed. The Council addressed that tragic situation when it adopted resolution 1593 (2005), and the United States at that time noted the importance that we have attached and that we continue to attach to the Council’s role in connection with investigations and prosecutions of the International Criminal Court (ICC). As is well known, the United States abstained in the voting on that resolution in the light of our concerns about the ICC, but, as we said when resolution 1593 (2005) was adopted, “We strongly support bringing to justice those
resolutions, the United States was said to have a favourable change of heart towards the Court. This was, of course, wholeheartedly welcomed by the supporters of the ICC, but it also ‘had the curious effect of drowning out the African Article 16 concerns’. 235

On 22 September 2008, the Security Council responded to its failed first attempt to invoke article 16 and reiterated its request to the Security Council ‘to act immediately in this direction in order to promote peace and justice in Darfur and in the Sudan as a whole’. 236 However, despite this renewed request, which was endorsed by the Assembly in its first meeting after the Prosecutor’s application, the Security Council did not live-up to the pronounced ‘intention to consider these matters further’. 237 The request of the African states to defer the proceedings initiated against President Al-Bashir was not further deliberated by the Security Council after 31 July 2008. Later deferral requests in relation to the Kenya and Libya situations would suffer the same fate. They were not deliberated upon by the Security Council.


Note that in the side line of a Security Council meeting in December 2008 on the situation of Sudan, some states made statements about a possible deferral. However, no reference was made to these statements in the final resolution. United Nations Security Council, ‘6028th meeting’ (3 December 2008), as available at: <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF9%7D/Sudan%20S%20PV%206028.pdf>. For example, the representative of South Africa observed: ‘we continue to hope that this Council will take the time necessary to have a discussion and decide on an article 16 deferment as it relates to the President of Sudan (..) It is our contention that article 16 can best be applied prior to issuing a warrant of arrest, so as to avoid interference with the judicial process. Thus, the Council’s consideration of the request by the AU Peace and Security Council becomes urgent’. Furthermore, take note of the following statement from the representative of the United Kingdom: ‘I have listened carefully to the debate today and have noted that some Council members have suggested that the Security Council should act to defer the ICC’s investigation. This is not my Government’s view. We see no justification at present for the suspension of the ICC’s work in Darfur, and my Government does not back any such plan. The onus is on the Government of the Sudan to take much more ambitious, bold and concrete action to cooperate with the ICC and to achieve peace in Darfur’.

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II.B. The Security Council, the Court & article 16

The unwillingness or inability of the Security Council to further consider their deferral requests, might have concerned and indeed frustrated African states. However, such concerns and frustrations were probably not only expressed because of ‘the risks posed by the ongoing ICC process to search for lasting peace and stability in the Sudan’, but also because the Security Council had ‘failed to consider with the required attention the request made by the AU’. In other words, African states were perhaps not only dissatisfied about the Security Council’s ‘decision’ not to invoke article 16 to defer the proceedings initiated against President Al-Bashir and later those in relation to the Kenya and Libya situations, but also about how the Security Council had reached these ‘decisions’, namely without further deliberating their deferral requests.

Of course, this was not the first time that African states expressed their concerns and frustrations about the functioning of the Security Council. In fact, one of the reasons which has been mentioned for the creation of the AUPSC as a new forum to find pan-African solutions for African problems, was that the UN Security Council had repetitively failed to address the peace and security challenges of the African continent. Moreover, African states had at many occasions called for ‘a comprehensive reform of the [UN] System [and particularly of the Security Council] which would take into account the principles, objectives and ideals of the [UN] Charter for a fairer world based on universalism, equity and regional balance’.

Most notably, in the ‘Ezulwini Consensus’ of 2005, which is still the common position of African states on the proposed reform of the UN, the AU recalled that ‘in 1945, when the UN was being formed, most of Africa was not represented and that in 1963, when the first reform took place, African Union Peace and Security Council, ‘Communiqué of the 175th Meeting of the Peace and Security Council’ (5 March 2009), as available at: <http://www.africa-union.org/root/au/organs/175%20Communique%20ICC%20Arrest%20Warrant%20Rev1_Eng.pdf>.

The inverted comma’s are placed to emphasize that the Security Council never formally adopted a decision in which it refused to endorse the deferral request of the African states.

Note that other scholars have observed as well as that African states have been concerned and frustrated about how the Security Council responded to their deferral requests. For example, Keppler observes: ‘even among officials who strongly support the ICC, concerns has mounted that the Security Council showed disrespect for the AU by failing to respond either positively or negatively to its deferral request’. Keppler, ‘Managing Setbacks for the International Criminal Court in Africa’, 9.


Africa was represented but was not in a particularly strong position’. Therefore, the African states expressed their desire ‘to be fully represented in all the decision-making organs of the UN, particularly in the Security Council [which would require] (...) not less than two permanent seats with all the prerogatives and privileges of permanent membership including the right of veto and five non-permanent seats’.

In addition to these wider objections with regard to the current composition of the Security Council, African states have also questioned the Council’s previous involvement with the judicial proceedings of the Court. During the negotiations prior to the adoption of the Rome Statute, African states firmly opposed the proposal of the International Law Commission to structure the relationship between the Security Council and the Court in analogy to the relationship between the Security Council and the UN General Assembly under article 12(1) of the UN Charter. This would have implied that when the Security Council dealt with a situation under Chapter VII of the UN Charter, no prosecution could be commenced, unless the Security Council would have decided otherwise.

According to the African states and many other states as well, the judicial functions of the Court should preferably not be subordinated to the actions of a political body like the Security Council of the African Union, ‘The Common African Position on the Proposed Reform of the United Nations: The Ezulwini Consensus’ (7–8 March 2005), as available at: <http://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CFAQFjAA&url=http%3A%2F%2Fwww.africaunion.org%2FNews_Events%2FCalendar_of_%2520Events%2520Calendar_of_2520Extra%2520ordinary%2520session%2520of%2520Executive%2520Council_2520of%2520the%2520African%2520Union%2520February%25202005&ei=FCcmUOeGHoK6hAeB0YCoDA&usg=AFQjCNFtBwoSUXJTf4PX3_QNF-YeFjRdWw&sig2=PracTL_EjX9wRc66fOxtAg>

Ibidem. Note that some scholars have also linked the concerns and frustrations of African states to the desired reform of the Security Council. For example, Mills observes: ‘The feeling of being ignored by the Security Council is one thing, An even deeper grievance however, is embedded within the broader debate over reform of the Security Council. (...) Indeed, a few African states have laid claim to a permanent seat – notable Egypt, Nigeria, and South Africa - and the AU more generally has argued for more seats for Africa. There is also a general feeling among African states that the Security Council’s current make-up is unjust, does not reflect new global and regional realities and imposes double standards’. Mills, ‘“Bashir is Dividing Us”: Africa and the International Criminal Court’, 429.


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


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Council. After very extensive negotiations on this issue, the African states agreed together with the like-minded group to the ‘Singapore-Canada compromise’. This allowed the Security Council to exercise some influence over the Court by referring situations to the Prosecutor (article 13(b) of the Rome Statute) and by deferring investigations or prosecutions when the Security Council deemed such appropriate for the maintenance of international peace and security (article 16 of the Rome Statute).

Although, most African states supported this compromise, their initial concerns about the involvement of the Security Council with the judicial proceedings of the Court were soon resuscitated. A few weeks prior to the entry into force of the Rome Statute on 1 July 2002, the United States announced, that it would pronounce a veto over all future peacekeeping operations, unless the Security Council would invoke article 16 of the Rome Statute to protect the Member States’ contributing personnel from prosecution by the Court. This announcement reflected the American concern that the Court’s proceedings could impinge upon its domestic jurisdiction. When the Security Council refused to endorse this ‘request’, the United States vetoed a draft resolution extending the mandate of the UN Stabilisation Force in Bosnia and Herzegovina. Moreover, the United States warned to cease paying its 25% share of the UN peacekeeping operations budget for so long as the Security Council would not agree to its demands.


Consequently, for the states supportive of international peacekeeping as well as the Court a ‘Hobson’s choice’, between rewriting the Rome Statute or placing the future of peacekeeping operations at risk, became increasingly difficult to avert. Neither the vocal opposition of representatives from over a hundred governments, including many African states, nor a letter from the UN Secretary-General, Kofi Annan, to the Secretary of State from the United States, Colin Powell, proved able to change the American position. In his extraordinary letter, Kofi Annan claimed that granting the American demands would fly ‘in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty’. In addition, he warned that invoking article 16 to protect the Member States’ contributing personnel would seriously risk to discredit the Security Council.

However, all these efforts turned out in vain as the Security Council found no other option than to unanimously adopt resolution 1422 on 12 July 2002. This resolution ensured the continued presence of the UN Stabilisation Force in Bosnia and Herzegovina, but above all removed the immediate threat of an American veto over all future peacekeeping operations by ‘[requesting] consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a [UN] established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution

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For example, the Representative of South Africa stated in the Security Council: ‘We come before the Council to register our concern at a critical time when the Security Council’s credibility is seriously threatened. The Security Council, entrusted with the maintenance of international peace and security, is now being asked to question the authority of an international body, the International Criminal Court. We believe that the Council’s mandate leaves no room either to reinterpret or even to amend treaties that have been negotiated and agreed by the rest of the United Nations membership. An action by one permanent member has cast a shadow over the operation of the International Criminal Court and indeed over the application of international law in general’.


255 Ibidem.
of any such case, unless the Security Council decides otherwise’. 256 One year later, the Security Council adopted resolution 1487, which extended this deferral request for another twelve months. 257

After resolution 1487 expired in June 2004, the Security Council did not agree to a third periodic deferral request. 258 For the United States this was also no longer a priority, because it had already signed and ratified bilateral agreements under article 98(2) of the Rome Statute with over 90 countries. 259 These agreements were intended to bar any investigation or prosecution by the Court of crimes committed by American nationals within these countries. 260

However, despite these agreements, the Security Council disguisedly incorporated article 16 in three later resolutions to tranquilize the American concerns about the jurisdictional regime of the Court. The required support of the United States for a resolution establishing a multinational stabilization force in Liberia (resolution 1497) and the first two referrals of the Security Council to the Court (resolution 1593 on Darfur and resolution 1970 on Libya) could only be obtained by curtailing the jurisdiction of the Court with regard to non-state parties like the United States. 261


259 See below fn. 263.


Perhaps it does not come as much of a surprise, that in all these three instances where the Security Council again deferred the jurisdiction of the Court after June 2004, the state concerned (Liberia, Sudan and Libya) had not (yet) signed a bilateral agreement under article 98(2) of the Rome Statute with the United States.\textsuperscript{262} In other words, the American government made sure, by all available means, that its nationals would not be investigated or prosecuted by the Court. Article 16 proved a very useful tool for the United States in this regard.

In light of all this, the African concerns and frustrations about how the Security Council had dealt with its repetitive requests to defer the proceedings initiated against Al-Bashir under article 16 might closely link-up to its wider objections about the Security Council and its past involvement with the judicial proceedings of the Court.\textsuperscript{263} Although the international community felt to have no choice but to accept the American requests to invoke article 16 at numerous occasions, the Security Council proved unwilling or unable to even deliberate the African request after 31 July 2008.

United Nations Security Council, ‘Resolution 1593’ (31 March 2005), as available at: \url{<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>}. United Nations Security Council, ‘5158th meeting’ (31 March 2005), as available at: \url{<http://www.david-morrison.org.uk/scps/2005 0331.pdf>}. This resolution explicitly recalled article 16 in its preamble and decided that nationals, current or former officials or personnel from a contributing state outside Sudan, which is not a party to the Rome Statute, shall be subject to the exclusive jurisdiction of that contributing state. The Tanzanian representative observed: ‘we are concerned that the resolution also addresses other issues that are, in our view, extraneous to the imperative at hand’. Furthermore, the representative of Benin ‘[expressed its regard over the fact] that the text we have adopted contains a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute’). Point out that over-all from the 11 states that supported the resolution seven states made a statement which questioned the concessions made to the concerns of the United States.


\textsuperscript{262} The United States concluded a bilateral agreement with Liberia on 8 October 2003, that is two months after the adoption of resolution 1497. The bilateral agreement is available at: Georgetown Law Library, ‘International Criminal Court - Article 98 Agreements Research Guide’. Until now the United States has not concluded bilateral agreements under article 98 of the Rome Statute with the governments of Sudan, South Sudan and Libya.

\textsuperscript{263} Note that Du Plessis comes to a similar conclusion in stating that: ‘there is no doubt that the AU’s criticisms of the ICC’s involvement in Sudan stem in great measure from a central problem of the United Nations: the skewed politics of the Security Council. Because of the council’s legitimacy problem, many states see its work as a cynical exercise of authority by great powers. The problem is not helped by the fact that article was controversially invoked for the first time just days after court’s statute became operative on 1 July 2002 to protect the US’. Du Plessis, ‘The International Criminal Court that Africa Wants’, 73.
II.C. The failed attempt to amend article 16

These broader objections of African states about the Security Council and its past involvement with the judicial proceedings of the Court might also help explain why the African States Parties to the Court decided to submit an amendment to article 16 before the ASP in November 2009. This amendment, as presented by the delegation of South Africa, proposed to permit the UN General Assembly to request the Court to defer an investigation or prosecution after the Security Council would have failed for six months to adopt a resolution to that effect.264

By including this amendment to the Rome Statute, the African states might have hoped that they would no longer be dependent on the political whims of the Security Council to see their deferral requests deliberated and decided upon.265 However, unfortunately for the African states, the proposed

264 To be more precise, the following revision was suggested: ‘[(i)] No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions. [ A state with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.] [Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council’s responsibility under par. I consistent with Resolution 377(v) of the UN General Assembly.].

265 However, even if accepted, the African states could likely not have requested the UNGA to defer the proceedings against President Al-Bashir under the current stand of international law. In the proposed amendment, the African states made a prudent reference to UNGA resolution 377(v) which is better known as the Uniting for Peace resolution. The rationale for this reference was to ensure that the desired deferral power of the UNGA would not conflict with article 12(1) of the UN Charter, which explicitly forbids the UNGA to make recommendations concerning a dispute or situation considered by the Security Council. In the Uniting for Peace resolution, the UNGA had proclaimed that ‘if the Security Council because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security (..) the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members’ [italics added]. The ICJ in its Advisory Opinion on the construction of a Wall in the Occupied Palestinian Territory has, arguably, approved this reasoning in order to move debates from the Security Council to the General Assembly. However, the Uniting for Peace resolution only allows the General Assembly to address the disputes and situations where the Security Council has failed to act upon due to a lack of unanimity among the permanent members. That is to say, when the Security Council cannot adopt a resolution because one of the permanent members uses or threatens to use its veto power. Consequently, as Charles Jalloh, Dapo Akande and Max Du Plessis have convincingly shown in a recent article, the proposed amendment ‘may not cover all the cases contemplated by the AU’. For example, the General Assembly would not have been able to make a deferral request in the case of President Al-Bashir under the proposed amendment. The unwillingness or the inability of the Security Council to address the request from the African states after July 2008 was not caused by a lack of unanimity among the permanent members. In fact, as discussed above, the issue of a possible deferral divided the whole Security Council and not just the permanent members.

United Nations General Assembly, ‘Resolution 377(v)’ (3 November 1950), as available at: <http://unispal.un.org/UNISPAL.NSF/0/55C2B84DA9E0052B05256554005726C6> par. 1. International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (6 July 2004) par 27-41. (The Court observed that ‘both the General Assembly and the Security Council initially interpreted and applied Article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council’s agenda (..) However, this interpretation of Article 12 has evolved subsequently (..) The Court considers that the accepted practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1 of the Charter’). Jalloh, Akande and Du Plessis, ‘Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court’, 35.
amendment received hardly any support during subsequent sessions of the ASP. At its eighth session in November 2009, the ASP decided that the proposed amendment, amongst other proposals, would be discussed substantively at the ninth session of the ASP (2010). Nonetheless, in contrast to other proposed amendments, the proposal of the African States Parties was not deliberated upon during the ninth nor the most recent tenth session of the ASP in December 2011. All of this indicates, that the proposal will likely not obtain the support from seven-eighths of the States Parties, as required by article 121(4) of the Rome Statute.

Although the proposed amendment received little support and was not substantively deliberated upon by the ASP, the resolutions and communiqués of the various AU bodies have given no reason to assume that the African states have been much concerned or frustrated about this at first look, very disappointing process. Of course, many African states would have liked to expand the powers of the UN General Assembly under article 16 of the Rome Statute. However, the amendment was perhaps not mainly the result of its concerns about the current formulation of article 16, but mostly about how the Security Council responded to their deferral requests. In other words, the African states might have been not so much concerned and frustrated about the quality of article 16, but questioned the manner in which the Security Council deliberated their request under this provision to defer the proceedings initiated against President Al-Bashir. As explained, this might closely relate to their broader objections to the Security Council and its past involvement with the judicial proceedings of the Court.

II.D. The disobliging Security Council & the sociological legitimacy of the Court

What might all these contextual observations on the expressed concerns and indeed frustrations of African states about the disobliging Security Council imply for the sociological legitimacy of the Court? In first instance, they seem to tell more about the Security Council than the Court. Indeed the expressed concerns and frustrations given reason to believe that African states question the origins of the authority of the Security Council (source-based legitimacy) and the process whereby its rules and decisions are adopted and enforced (process-based legitimacy). However, through article 16 of the Rome Statute, these wider objections towards the Security Council might also affect the sociological legitimacy of the Court.

266 During the eight ASP a Working Group on Amendments was created that serves as a mechanism to continue discussion on proposed amendments. At the ninth ASP the states parties agreed not discuss proposed amendments substantively, but to first develop procedures that would guide discussion of substantive amendments. The report of the Working Group on Amendments for the tenth ASP considered numerous substantive proposals, but not the proposed amendment of the African States Parties which was only listed in an annex to the report. International Criminal Court, ‘Report on the Working Group on Amendments’ (9 December 2011), as available at: <http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-32-ENG.pdf>.
It should be reminded that the deferral provision was included as a political escape clause in the Rome Statute and has indeed been used in this manner, in particular, to tranquilize the American opposition against the jurisdictional regime of the Court. When the African states were confronted with the Prosecutor’s application for an arrest warrant against President Al-Bashir, they wanted to appeal to this provision of the Rome Statute as well. In this regard, it does not matter much whether the African states advanced the deferral request out of support for President Al-Bashir, out of fear that other African Heads of State would also be forced to appear before the Court or, as the resolutions and communiqués of the AU have proclaimed, because the ‘process could jeopardize the ongoing peace efforts (..) and [might] not be in the interest of victims and justice’. What is more important is that African states wanted their deferral request to be taken seriously within the political arena of the Security Council.

In this respect, the first attempt of the African states to invoke article 16 was not a complete failure. After all, Security Council resolution 1828 acknowledged the deferral request made by African states and took note of their intention to consider these matters further. Moreover, many African states might even have accepted that the Security Council did not immediately take chances on such a complex and politically loaded issue. However, what the African states likely perceived as completely inappropriate, was that despite their repeated requests to continue the deliberations of a possible deferral, the Security Council proved unwilling or unable to do so. After adopting resolution 1828, the Security Council simply ignored all appeals of African states to the political escape clause of the Rome Statute.

From this perspective, the expressed concerns and indeed frustrations about the disobliging Security Council were perhaps not so much motivated by the lacking quality of article 16 nor by the fact that the desired outcomes, a deferral of the proceedings initiated against President Al-Bashir and later those related to the Kenya and Libya situations, were not realized (outcome-based legitimacy). For sure, these factors might be relevant as well to explain the actions and the reasons provided by African states to justify their actions. After all, African states have continued to press for a deferral and their proposal to amend article 16 is still pending. However, what seems to stand out over and above, is that African states questioned the Security Council’s deliberation upon their deferral requests. Foremost, they appear concerned and indeed frustrated about how the Security Council ‘decided’ not to defer the proceedings initiated against President Al-Bashir, namely without further deliberating their deferral requests.

In light of all this, the concerns and frustrations of African states with the disobliging Security Council are perhaps best explained by the first component of the process-based conception of sociological legitimacy, which stresses the importance of the legitimate deliberation of rules and decisions. Many African states have likely not perceived the debates, discussions and communications prior to the ‘decision’ of the Security Council not to invoke article 16 as correct and fair. This lacking process-based legitimacy relates, of course, to the perceived or assumed legitimacy of the Security Council, but also to the rule itself, article 16 of the Rome Statute. This provision has proven a useful tool in the hands of some and a pick purse in the hands of others.

Finally, the concerns and frustrations of African states about the disobliging Security might also negatively reflect on the sociological legitimacy of the Court. Article 16 connects the faith of the Court to the Security Council. If the deliberations of deferral decisions are not perceived or assumed as legitimate, this will most certainly affect the sociological legitimacy of all later decisions of the Court in relation to the situation which the Security Council ‘decided’ not to defer. This is how the disobliging Security Council, from the perspective of African states, might affect the Court’s sociological legitimacy.
III. The inappropriate actions of the Prosecutor

Initially, African states did not vent their agitation about the Prosecutor’s application for an arrest warrant against President Al-Bashir on the Prosecutor himself, but focussed on the Security Council in requesting a deferral of the proceedings under article 16 of the Rome Statute. However, in the summer of 2009, the Assembly expressed, for the first time, its possible concerns and frustrations about the conduct of the Prosecutor. Later that year, during the ASP in November 2009, the South African representative, speaking on behalf of the African States Parties to the Court, requested the Prosecutor to include peace factors in exercising his prosecutorial discretion. From the perspective of African states, Mr. Moreno Ocampo might have exercised his prosecutorial discretion in an inappropriate manner (sub-section III.A.).

Furthermore, in July 2010, the Assembly openly opposed the first Prosecutor of the Court by refuting the ‘egregiously unacceptable, rude and condescending statements [of the Prosecutor] on the case of President [Al-Bashir] and other situations in Africa’. In trying to give persuasive reasons for prosecuting Al-Bashir, the Prosecutor made statements which the African states apparently considered inappropriate (sub-section III.B.).

Finally, in July 2011, the Assembly ‘[expressed its] deep concern at the manner in which the ICC Prosecutor [handled] the situation in Libya’. The Prosecutor acted quickly in response to Security Council resolution 1970, which referred the situation in Libya to the Court, by almost immediately requesting the PTC to issue arrest warrants for Muammar Gaddafi, his son Saif Al-Islam and the Head of Intelligence Al Sanousi. For many African states, the Prosecutor’s decisions with regard to the Libya situation might have been inappropriate, not only because these decisions would impede the ongoing peace efforts of the AU, but perhaps also because the Prosecutor would have failed to consider the political implications of his decisions. (sub-section III.C.)

This section analyses the specific contexts in which the possible concerns and frustrations of African states about the inappropriate actions of the Prosecutor have been advanced. The purpose of this analysis is to find out which legitimacy conception(s) can best explain what these concerns and frustrations might imply for the sociological legitimacy of the Court (sub-section III.D.).


III.A. The inappropriate exercise of prosecutorial discretion

In June 2009, the Assembly expressed for the first time its concern over the conduct of the Prosecutor and scheduled a preparatory meeting for the African States Parties to the Court, ‘to prepare, inter alia, guidelines and a code of conduct for [the] exercise of discretionary powers by the ICC Prosecutor’. This ministerial meeting, which took place on 6 November 2009, agreed to request the OTP ‘to review (..) the 2007 policy paper regarding the guidelines and code of conduct of the exercise of prosecutorial powers to include factors of promoting peace and submit them to the [ASP] in order to ensure more accountability’.

In September 2007, the OTP had issued this policy paper on its understanding of the interests of justice element as laid down in article 53 of the Rome Statute. This article provides a discretionary power for the Prosecutor to defer investigations or prosecutions in the ‘interests of justice’, an element which is not defined in the Rome Statute nor in its Preparatory Works and as such leaves an unfettered discretion to the Prosecutor. According to many commentators, the Prosecutor could use his or her discretion under this provision to ensure that investigations or prosecutions would not derail genuinely negotiated peace agreements. In particular, when such agreements would include an amnesty

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272 See for example: Kenneth A. Rodman, ‘Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’, Leiden Journal of International Law 22 (2009) 99–126. (Arguing in the context of article 53 that ‘the Prosecutor should construe his discretion broadly to take account of the political context in which international criminal law has to operate’). Allison Marston Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, The American Journal of International Law 97.3 (2003) 510-552. (States that ‘the Rome Statute does not refer to either amnesties or truth commissions. The negotiators decided not to address these issues directly in the Statute, leaving it up to the Prosecutor to consider them in the context of factors such as ‘the interests of justice’’). Avril McDonald and Roelof Haveman, ‘Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC’, Expert consultation process on general issues relevant to the ICC Office of the Prosecutor (15 April 2003), <http://www.issafrica.org/anicj/uploads/McDonald_Haveman_issues_relevant.p> . (Arguing about article 53 that ‘The Prosecutor might for example consider (..) security issues (..) threats to the security of a fragile transitional state (..) political issues, including the existence of a peace treaty, amnesties (..) and a TRC’). Kai Ambos, ‘The Legal Framework of Transitional Justice’, Study prepared for the International Conference ‘Building a Future on Peace and Justice’ (Nuremberg 25-27 June 2007) 70-72. (Arguing that ‘whether one likes it or not, there is no other clause in the ICC Statute allowing so explicitly for policy considerations’ and ‘the victims’ justice interests cannot be limited to the interests of a criminal prosecution excluding a limine their possible interests in peace, traditional reconciliation etc.’).

Note that these views have been firmly contested by a number of scholars, who have essentially argued that article 53 is ill-suited to accommodate truth and reconciliation commissions and amnesties. See for example: Drazan Dukic, ‘Transitional justice and the International Criminal Court – in the ‘interests of justice’’, International Review of the Red Cross 89.867 (2007). (Arguing that by allowing ‘blatant political judgements through the back door of ‘interests of justice’ assessments would be uncongenial to the Rome Statute’s strenuous attempts to curb prosecutorial discretion’). Hector Olasolo, ‘The Prosecutor of the ICC before the Initiation of
offer or an alternative justice mechanism like a truth (and reconciliation) commission. However, the Prosecutor proclaimed in his 2007 policy paper ‘that there is a difference between the concept of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the [OTP]’. The approach which the Prosecutor took in the 2007 policy paper as reconfirmed in the 2009 Regulations is best described as peace-excluding. That is to say, an approach which a priori excludes the eventuality that proceedings could be deferred in the interests of peace.

This peace-excluding approach of the Prosecutor conflicts with the thoughts of many commentators as well as with the proclaimed views of African states on this matter, who have all stressed that the Prosecutor should consider peace factors in exercising his prosecutorial discretion. During the negotiations at the eight ASP in November 2009 no agreement was reached on a proposal

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273 For scholars who have discussed article 53 as a plausible avenue to accommodate amnesties (often in relation to truth commissions, see for example: John Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’ (693-704), in: Antonio Cassese, Paola Gaeta and John R.W. Jones ed., The Rome Statute of the International Criminal Court: A Commentary (Oxford 2002) 702. (Arguing that ‘more plausibly’ than article 16, 17 or 20, ‘a genuine amnesty may be protected by prosecutorial discretion’ under article 53). Richard J. Goldstone and Nicole Fritz, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers’, Leiden Journal of International Law 13 (2000) 655-667. (They argue ‘that amnesties, which adhere to internationally accepted guidelines are consistent with the interests of justice and the prosecutor may (...) defer to domestically enacted amnesty processes). Mark A. Drumbl, Atrocity Punishment and International Law (2007) 142-143. (Speaks about the possibility of a deferral under article 53 to truth commissions or amnesties). Christine Van den Wyngaert and Tom Onega, ‘Ne bis in idem Principle, Including the Issue of Amnesty’, in: Antonio Cassese, Paola Gaeta and John R.W. Jones ed., The Rome Statute of the International Criminal Court: A Commentary (Oxford 2002). (They argue that the prosecutor’s assessment of article 53 and not article 20 – the ne bis in idem provision – allows for the accommodation of amnesties and truth commissions). See also: Michael P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, Cornell International Law Journal 32 (1999) 524. (Scharf considers article 16 the most important provision with respect to a potential amnesty exception, but also argues that ‘where the Security Council has not requested the International Criminal Court to respect an amnesty-peace deal and thereby to terminate a prosecution, the Court’s Prosecutor may nevertheless choose to do so under article 53 of the Rome Statute’).

274 For scholars who have discussed article 53 as a plausible avenue to accommodate alternative justice mechanisms, see for example: Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court, European Journal of International Law 14 (2003) 481-505. (Arguing that ‘it is at least conceivable that the ICC could conclude that it would not be in the ‘interests of justice’ to interfere with a democratically adopted, good faith alternative programme that creatively advanced accountability objectives’). Declan Roche, ‘Truth Commission Amnesties and The International Criminal Court’, British Journal of Criminology 45 (2005) 565-581. (Calls upon the Prosecutor to take a cooperative approach through article 53 towards Truth Commissions, which would entail that the Prosecutor delays bringing any prosecutions until a truth commission has completed its work).

to that effect from the African States Parties to the Court, which was later endorsed by the AU Assembly in January 2010.\textsuperscript{276} After that, the proposal was not further deliberated upon during later sessions of the ASP. As a result, the concerns of African states and many commentators alike about \textit{how} the Prosecutor has decided to exercise his discretion under article 53 remain unaddressed.

**III.B. The inappropriate statements of the Prosecutor**

Besides their concern about the exercise of prosecutorial discretion, African states have also proclaimed their objection to certain statements of the Prosecutor. In the first place, the AU Commission has denounced the ‘publicity-seeking approach of the ICC Prosecutor’ in its press release of 14 July 2009.\textsuperscript{277} Moreover, the AU Assembly has ‘[expressed its] concern over the conduct of the ICC Prosecutor, Mr. Moreno Ocampo who [made] egregiously, unacceptable, rude and condescending statements on the case of [President Al-Bashir] and other situations in Africa’ in its resolution of July 2010.\textsuperscript{278}

What might have motivated African states to express their frustration in such a firm manner about the Prosecutor? Most likely, the Assembly responded in the Assembly’s decision of July 2010 to statements of the Prosecutor in relation to the decision of PTC I to issue a second arrest warrant against President Al-Bashir for three grounds of genocide. After the Prosecutor had compared monitoring Sudan’s election under President Al-Bashir with ‘monitoring a Hitler election’ in March 2010, the Prosecutor authored an article in the Guardian on 16 July 2010, which, in the words of William Schabas ‘[distorted] the decision of the PTC issued [earlier that week] authorizing three genocide charges in a [second] arrest warrant directed against President Al-Bashir’\textsuperscript{279}.  

\textsuperscript{276} As noted above, the ASP only ‘[noted] the consultation held by the [OTP] on the prosecutorial Strategy with States, International Organizations and Civil Society and encourages the [OTP] to continue to carry out such consultations on its Policy papers and guidelines, and to keep the ASP informed in this regard’. See above, Chapter 3, Section V.


In this article, under the title ‘now ends the Darfur denial’, the Prosecutor recalled that ‘the world once claimed ignorance of the Nazi atrocities’ and that ‘fifty years later the world refused to recognize an unfolding genocide in Rwanda’, but stressed that ‘on Darfur, the world [would] now officially [be] on notice’. The Prosecutor proceeded by saying that ‘the genocide [in Darfur would] not [be] over’ and that ‘Bashir’s force [would] continue to use different weapons to commit genocide’ against ‘helpless, voiceless [people] with no hope for the future’. In support, the Prosecutor referred to the decision of PTC I to issue a second warrant against President Al-Bashir and stated that the ‘Court [had] found that Bashir [was] deliberately inflicting on [the] living conditions of [these people] calculated to bring about their physical destruction’. According to the Prosecutor, ‘the Court’s recent decision could provide a last chance for the world to react properly, to transform “never again” from a promise into a reality’.

These statements of the Prosecutor were misleading to the extent that PTC I had not determined that a genocide had or would still be taken place in Darfur. The PTC had only ordered a second arrest warrant for President Al-Bashir. The Prosecutor failed to acknowledge in his article that the presumption of innocence still applied. Moreover, by using the word ‘denial’ in the context of the Nazi Holocaust, the implication was, as explained by William Schabas, ‘that those who question[ed] whether genocide [would be] the appropriate characterization of crimes committed in Darfur’ or those, like the African states, who [doubted] whether the Court’s involvement would benefit the situation on the ground, ‘[would be] in the same camp as the anti-Semitic hatemongers who claim[ed] there were no gas chambers at Auschwitz’.

In light of all this, one can imagine why African states might have expressed their concerns and indeed frustrations about the ‘egregiously, unacceptable, rude and condescending statements’ of the Prosecutor. For African states the Prosecutor’s attempts to give persuasive reasons for prosecuting President Al-Bashir went down the wrong way.

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280 Ibidem.
281 Ibidem.
282 Ibidem.
283 Ibidem.
284 William A. Schabas, ‘Inappropriate Comments from the Prosecutor of the International Criminal Court’ (16 July 2010), as available at: <http://humanrightsdoctorate.blogspot.nl/search?updated-min=2009-12-31T16:00:00-08:00&updated-max=2010-08-10T14:08:00%2B01:00&max-results=50&start=113&by-date=false>.
285 Assembly of the African Union, ‘Decision on the progress report of the Commission on the implementation of decision Assembly/AU/Dec/270(XIV) on the Second Ministerial Meeting on the Rome Statute of the
III.C. The inappropriate decisions of the Prosecutor on the Libya situation

In addition to the Prosecutor’s questionable interpretation of the interests of justice provision and his subverting statements on the case of President Al-Bashir, African states have also expressed their concerns and frustrations about the Prosecutor’s decisions in relation to the Libya situation. Most notably, in its resolution of July 2011, the Assembly ‘[expressed its] deep concern at the manner in which the ICC Prosecutor [has handled] the situation in Libya’ and ‘[noted] that the warrant of arrest issued by [PTC I] concerning Colonel [Gaddafi], seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually-reinforcing way, issues relating to impunity and reconciliation’.

For these reasons, the Assembly ‘[decided] that Member States shall not cooperate in the execution of the arrest warrant’.

It goes without saying, that there are multiple facets to this decision of the Assembly. The wider objections African states about the situation in Libya deserve further discussion elsewhere and the alleged jeopardizing effects of the warrants on the ‘efforts aimed at finding a negotiated political solution to the crisis in Libya’ will be addressed below in section IV. What matters here, is that African states have also expressed their concerns and frustrations about ‘the manner in which the Prosecutor [has handled] the situation in Libya’. This passage of the resolution suggests that the African states did not only oppose the decisions of the Prosecutor and the PTC for their undesirable consequences, but also because the process through which the Prosecutor came to his decision to apply for an arrest warrant against Gaddafi was not perceived or assumed to be inappropriate.

Why might African states have questioned the decision-making process of the Prosecutor? Probably, this relates back to the concerns of African states about how the Prosecutor has decided to exercise his discretion under article 53 of the Rome Statute. Of course, as James Goldston observed, ‘the true contribution, if any, of charging decisions to political developments is probably impossible to determine with any precision’. However, although ‘it would surely be foolish for any Prosecutor to bring criminal charges [or not] for the purpose of ending [or preventing] a war, many [including African states] remain sceptical that the OTP does not, in practice, give any consideration to the


Ibidem.

Ibidem.

impact of its decisions on the prospect of continued conflict. What might explain the proclaimed concerns and frustrations of African states about the process through which the Prosecutor came to his decision to apply for an arrest warrant against Gaddafi is exactly this. From the perspective of African states, the Prosecutor might have failed to consider the political implications of his decisions on the Libya situation.

III.D. The inappropriate actions of the Prosecutor & the sociological legitimacy of the Court

What might all these contextual observations on the concerns and frustrations of African states about the inappropriate actions of the Prosecutor imply for the sociological legitimacy of the Court? First of all, the concern advanced by African states and many commentators alike about the Prosecutor’s interpretation of article 53 indicates that African states might have found the manner in which the Prosecutor has decided to exercise his discretion inappropriate. This can perhaps be best explained by the first component of the process-based conception of sociological legitimacy, which stresses the importance of legitimate deliberations prior to the adoption of rules and decisions. From the perspective of African states, the process whereby the Prosecutor decided to exercise his discretion might have been considered incorrect and undesirable, because it completely failed to address any peace factors.

Second of all, the proclaimed concerns and indeed frustrations of African states about some statements of the Prosecutor might indicate that African states perceived the Prosecutor’s attempts to give persuasive reasons for prosecuting President Al-Bashir inappropriate. Probably, this can be best explained by the second component of the process-based conception of legitimacy, which emphasizes that for perceived or assumed legitimacy a lot depends on the reasons given by international institutions or rule-enforcing actors to justify their actions. African states apparently perceived the actions of the Prosecutor as improper, partly because of some statements made by the Prosecutor.

Finally, the possible concerns and indeed frustrations expressed by the Assembly about the Prosecutor’s decisions in relation to Libya suggests that African states did not perceive or assume the decision-making process of the Prosecutor as appropriate. Probably, this relates back to the proclaimed concern of African states about how the Prosecutor has decided to exercise his discretion under article 53 of the Rome Statute and as such can perhaps also be best explained by the first component of process-based conception of sociological legitimacy. As said, this component underlines the importance of legitimate deliberations prior to the adoption of rules and decisions. In light of all this, it seems that the decisions of the Prosecutor in relation to the Libya situation were not perceived

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290 Ibidem.
or assumed as appropriate, because the Prosecutor would have failed to consider the political implications of his decisions.

In short, the expressed concerns and frustrations about the inappropriate actions of the Prosecutor might relate in two ways to the sociological legitimacy of the Court. In the first place, the expressed concerns and frustrations could imply that African states have not perceived the decision-making process of the Prosecutor as appropriate. Secondly, African states might not have perceived the attempts of the Prosecutor to give persuasive reasons for prosecution President Al-Bashir as proper.
IV. Competing obligations and interests

African states have emphasized their competing obligations and interests in response to the decisions of PTC I that condemned the visits of President Al-Bashir to African States Parties of the Court in 2010 and 2011. According to the resolutions of the Assembly and the communiqués of the AU Commission, the respective African States Parties fulfilled their obligations under article 23(2) of the AU Constitutive Act by not cooperating with the arrest warrants and welcoming him on their territory. Moreover, their decision not to arrest and surrender Al-Bashir would find legal justification in article 98 of the Rome Statute with respect to immunities under international law and political exigency in the profound interest of these states in ensuring peace and stability within their regions (section IV.A.).

However, PTC I refused to endorse the legal justification and the political exigency invoked by African states. Most notably, the PTC proclaimed that ‘the principle in international law is that immunity of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court’. This ruling seems to have concerned and indeed frustrated African states, who have argued that ‘article 98(1) was included in the Rome Statute (...) out of recognition that the Statute is not capable of removing an immunity which international law grants’ (section IV.B.). In its most recent decisions, the Assembly has reiterated the expressed concerns and frustrations about the judgement of PTC I on the alleged competing obligations and interests of, in particular, the African States Parties to the Court (section IV.C.).

This section will analyse the specific context in which these concerns and frustrations have been advanced. The purpose of this analysis is to uncover which legitimacy conception(s) can best explain what these concerns and frustrations might imply for the sociological legitimacy of the Court (section IV.D.).

IV.A. Non-cooperation

On 3 July 2009, the Assembly decided that the ‘AU Member States shall not cooperate pursuant to the provision of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender [of President Al-Bashir]’, because the Security Council had not acted upon its deferral

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request. One year later, in July 2010, the Assembly reiterated its non-cooperation decision, but also ‘[requested] the Member States to balance, where applicable, their obligations to the AU with their obligations to the ICC’. Prior to these decisions, African states had not referred to article 98 and for that matter to President Al-Bashir’s personal immunity under international law as a Head of State. Article 98 was only invoked by the Assembly when a legal justification for the non-cooperation was sought for. Besides this legal justification, the Assembly found support for its decisions in the impediments that the arrest warrants posed to the ongoing peace process in Sudan.

In July 2011, the Assembly invoked the same legal justification and a similar political exigency to support the first-time visits of President Al-Bashir to Chad, Kenya and Djibouti. According to the Assembly, ‘Chad, Kenya and Djibouti were discharging their obligations under (...) Article 98 of the Rome Statute as well as acting in pursuit of peace and stability in their respective regions’ by receiving President Al-Bashir. The Assembly argued that the decisions of African States Parties not to cooperate with the Court and to welcome Al-Bashir on their territory would find legal justification under article 98(1) of the Rome Statute and political exigency in their interests in peace and stability.

IV.B. Immunities and the Rome Statute

The legal justification offered by the Assembly for its non-cooperation decisions and for the visits of President Al-Bashir to African States Parties of the Court raises a complex legal question, which concerns the immunity of a serving Head of State (President Al-Bashir) from the criminal jurisdiction of an international court (The ICC) to which the respective state (Sudan) is not a party. This question was side-stepped by PTC I when it issued the first arrest warrant against President Al-Bashir. On 4 March 2009, the PTC simply considered that ‘the current position of Omar Al-Bashir as Head of a state which is not a party to the Statute, has no effect on the Court’s jurisdiction over the present


case’.  In support, PTC I referred to article 27(2) of the Rome Statute, which states that ‘immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person’.

However, article 27(2) only determines that the Court may exercise jurisdiction over a serving Head of State and as such ‘does not exhaust the immunity question’. After all, as long as President Al-Bashir does not surrender himself to the Court, he has to be arrested by the national authorities of a State Party or a non-state party, before the Court can exercise its jurisdiction over him. In this regard, it is striking that the PTC did not address the implications of article 98(1) of the Rome Statute for the arrest warrant(s). This provision states ‘that the Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity’.

At first sight, this second provision contradicts article 27(2) of the Rome Statute. However, commentators have explained that these two provisions likely ‘apply at different stages’. According to this interpretation, article 27(2) would relinquish all immunities in relation to a request of the Court concerning the nationals, representatives or officials of a State Party. In contrast, article 98(1) would keep intact the immunities under international law for non-state parties.  


297 Ibidem.


299 Note that article 98(1) was also not discussed in the decision of the PTC to issue a second arrest warrant for President Al-Bashir. Pre-Trial Chamber I, ‘Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir’ (12 July 2010), as available at: < http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>.


301 Dapo Akande, ‘International Law Immunities and the International Criminal Court’, American Journal of International Law 98 (2004) 419-426. Akande, ‘The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir’s Immunities’, 337-338. (He notes: ‘one way of reconciling the tension between the two provision is to take the position that Article 27 removes immunity with respect to the Court and applies only to actions by the Court, but that Article 98 preserves those same immunities with respect to action to be taken by national authorities. However, the better view is that Article 27 removes immunities, even with respect to action taken by national authorities, where those authorities are acting in response o a request by the Court. (...) in summary such a position is warranted because reading Article 27 as applying only to action by the Court would render parts of that provision practically meaningless’).
Only in three situations would the Court be able to proceed, despite article 98(1), with a request for the surrender of a Head of State from a non-state party. In the first place, this would be possible when the respective non-state party would have waived the immunity. Secondly, article 98(1) could be outplayed when the respective official would no longer be serving in the capacity of Head of State. After all, under international law there are only personal and no functional immunities for international crimes. Thirdly, the Court could proceed when the Security Council would have lifted the immunity by adopting a resolution to that effect under Chapter VII of the UN Charter. The requested state would then be obliged to comply under article 25 of the UN Charter with the arrest warrant. In fact, according to some commentators, the Security Council lifted the immunity of President Al-Bashir by obliging Sudan to cooperate with the Court. 302 However, other commentators have strongly questioned such an interpretation of Security Council resolution 1593. 303

In November 2009, the ASP ignored this scholarly debate as well as a request of the African States Parties to the Court to address the inherent tension between article 27(2) and article 98(1) of the Rome Statute. 304 After that, the alleged personal immunity of President Al-Bashir was also not explicitly considered in the decisions of PTC I to inform the Security Council about his visits to Chad and Kenya in August 2010. The PTC only noted that Security Council resolution 1593 had ‘urged all states and concerned regional and other international organizations to cooperate fully’ [with the

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302 See for example: Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 557. (They state that: ‘one might argue that the Security Council can only order States to relinquish immunities vis-à-vis Tribunals of its own creation but not vis-à-vis a treaty creation such as the ICC. However, no such limitation may be found in Articles 41 and 42 of the Charter. (...) [Another] possible counter-argument [against the claim that the Security Council can lift immunity before the ICC] is to concede (...) that in the Darfur situation [ the Council did not order all member states to cooperate fully]. Because of US concerns about the ICC, the Security Council in resolution 1593 did not issue an order to all member states; instead it only order ‘the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully’, and ‘urged’ other States and organizations to cooperate fully. Nonetheless, if the analysis given above is correct, the narrower focus of the obligation does not change the outcome. If a state Party were requested to surrender Al-Bashir to the Court, Sudan would qualify as a ‘third State’ under Article 98(1), but because of the Chapter VIVI order to Sudan to cooperate, Sudan would have the same obligations as a State party and hence would not have an immunity under international law opposable to the surrender request.’).

303 See for example: Paola Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, *Journal of International Criminal Justice* 7 (2009) 330-331. (she argues that: ‘while the decision taken by the ICTY or ICTR on judicial cooperation are decision which derive their binding force directly from a decision of the Security Council under Chapter VII (...) this is not the case for the ICC. The obligations of states parties to cooperate with the ICC are and remain ‘only’ treaty obligations, irrespective of how the jurisdiction of the court has been triggered, including in the case of a Security Council referral. Furthermore she adds that ‘the language of [Security Council] resolution [1593] could not have been clearer: Sudan and the parties to the conflict are obliged to cooperate with the ICC by virtue of a decision of the Security Council, while other states are simply urged to do so.’).

304 See above, Chapter 3, section V.
Court’, but the PTC did not explain whether the Security Council had indeed lifted the personal immunity of President Al-Bashir.\textsuperscript{305}

At last, the alleged personal immunity of President Al-Bashir was addressed by PTC I in its decisions on Al-Bashir’s second visit to Chad and his first visit to Malawi in 2011. In these decisions, the PTC ruled that ‘there is an inherent tension between articles 27(2) and 98(1) of the Statute’ and that Malawi, Chad, ‘and by extension the [AU], are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Request’.\textsuperscript{306} The main argument which the PTC advanced in support for this ruling was that ‘customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes’.\textsuperscript{307} Therefore, article 98(1) of the Rome Statute would not apply because ‘there is no conflict between [the] obligations [of the African States Parties] towards the Court and [their] obligations under customary international law’.\textsuperscript{308}

In other words, the PTC did not answer the question whether the Security Council had removed the personal immunity of President Al-Bashir. Instead, PTC I bypassed article 98(1) and thereby the legal justification given for the decisions of the AU Assembly not to cooperate with the arrest warrants issued against President Al-Bashir. For this purpose, the PTC ruled that under the current stand of customary international law, such personal immunities are irrelevant for the jurisdiction of the Court and for the requirement of States Parties to the Court to cooperate with the arrest warrants.


\textsuperscript{306} Pre-Trial Chamber I, ‘Decision on Malawi’, par. 37. Pre-Trial Chamber I, ‘Decision on Chad’, par. 13.

\textsuperscript{307} Pre-Trial Chamber I, ‘Decision on Malawi’, par. 38–43. Pre-Trial Chamber I, ‘Decision on Chad’, par. 14. The Court provides the following arguments for this interpretation of the current stand of international customary law: First, (..) immunity for Heads of State before international court has been rejected time and time again dating all the way back to World War I. (..) Second, there has been an increase in Head of State prosecutions by international courts in the last decade. (..) Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising "its jurisdiction over persons for the most serious crimes of international concern". It is facially inconsistent for [Malawi/Chad] to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute [Malawi/Chad] has ratified. (..) For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes’.

\textsuperscript{308} Pre-Trial Chamber I, ‘Decision on Malawi’, par. 37. Pre-Trial Chamber I, ‘Decision on Chad’, par. 14.
In response to this ruling, the AU Commission issued a particularly firm press statement on 9 January 2012, which explained why it could not agree on legal grounds with the findings of PTC I. In the first place, the Commission argued that PTC I’s ruling purported ‘to change customary international law in relation to [personal immunity]’. According to the Commission, ‘article 98(1) was included in the Rome Statute (...) out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute (...), because immunities of State officials are rights of the State concerned and a treaty only binds parties to the treaty’. Contrary to the opinion of PTC I, international customary law would still accord absolute immunity to ‘senior serving officials, ratione personae, from foreign domestic jurisdiction (and from arrest) (...) even when the official is accused of committing an international crime’. In support, the Commission referred to the Arrest Warrant case in which the ICJ stated that ‘it [had] been unable to ‘deduce (...) that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected of having committed war crimes and crimes against humanity’.

Secondly, the Commission proclaimed that the Security Council had ‘not lifted President Bashir’s immunity’. Although PTC I had not addressed this issue, the press statement made clear that ‘such lifting should have been explicit’ and that a ‘mere referral of a “situation” by the [Security Council] to the ICC or requesting a state to cooperate with the ICC cannot be interpreted as lifting immunities granted under international law’. In light of all this, article 98(1) would still apply and

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310 Ibidem.

311 Ibidem.

312 Ibidem. Note that the PTC also addressed the Arrest Warrant case and concluded that the dictum of the ICJ was ‘concerned solely with immunity across national jurisdictions. The ICJ majority referenced the international tribunal provisions addressing immunity, including article 27 of the Statute, and concluded that these provisions “do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.” The ICJ majority discussion of customary international law immunity is therefore distinct from the present circumstances, as here an international court is seeking arrest for international crimes. This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state’s ability to engage in international action. Cassese emphasised that this danger does not arise with international courts and tribunals, which are “totally independent of states and subject to strict rules of impartiality”’. Pre-Trial Chamber I, ‘Decision on Malawi’, par. 34. Pre-Trial Chamber I, ‘Decision on Chad’, par. 13.

313 Ibidem.

314 Ibidem.
could as such justify the obligations of AU member states under article 23(2) of the AU Constitutive Act not to cooperate with the arrest warrants issued against President Al-Bashir.

Besides the legal justification, which emphasized the competing obligations of, in particular, the African States Parties to the Court, the Commission also reiterated the competing interests of African states. The press statement noted that ‘the AU believes that issues of peace and justice should be addressed comprehensively and in a holistic manner and [that the AU] will [therefore] continue to pursue in respect of The Sudan the interconnected, mutually interdependent and equally desirable objectives of peace, justice and reconciliation’. In this way, the Commission reinvoked the political exigency which the Assembly advanced earlier to support its non-cooperation decisions with the arrest warrant and to welcome the decisions of African States Parties to the Court to receive President Al-Bashir on their territory.

On 30 January 2012, the Assembly reaffirmed these decisions and endorsed the statements of the Commission in response to the ruling of PTC I. In its resolution, the Assembly ‘[reaffirmed its] understanding that Article 98(1) was included in the Rome Statute (..) out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and [that] by referring the situation in Darfur to the ICC, the UN Security Council [had] intended that the Rome Statute would be applicable’. Unmistakably, African states did not agree with the PTC’s interpretation of customary international law with regard to the personal immunities of state officials. Most importantly, because the interpretation of PTC I would render ‘Article 98 of the Rome statute redundant, non-operational and meaningless’ and as such would misrepresent the competing obligations and interests of, in particular, the African states Parties to the Court. The resolutions of the Assembly and the communiqués of the Commission made abundantly clear that African states were concerned and indeed frustrated about the response of PTC I to their proclaimed competing obligations and interests. These expressed concerns and frustrations were perhaps not so much related to the origins of the authority of the PTC or the decision-making process, but more to the decision itself.

315 Ibidem.


IV.C. The most recent decisions of the Assembly

In July 2012, the Assembly reconfirmed these possible concerns and frustrations of African states about the ruling of PTC I. First of all, the Assembly ‘[endorsed] the recommendation of the Meeting of Ministers of Justice/Attorneys General to approach the [ICJ], through the [UN General Assembly] for seeking an advisory opinion on the question of immunities under international law, of Heads of State and senior state officials from States that are not parties to the Rome Statute of the ICC’. ³¹⁸ With this decision, the Assembly reemphasized that the African states continue to disagree with PTC I’s interpretation of customary international law in light of the ICJ’s dictum in the Arrest Warrant case.

Furthermore, the Assembly decided to ‘[encourage] for effective reliance on Article 98 [(2)] of the Rome Statute, [the] African State Parties to the Rome Statute (..) and African non-State Parties to consider concluding bilateral agreements on the immunities of their Senior State officials’. ³¹⁹ The logic for this decision seems clear-cut: if article 98(1) could not provide the intended legal justification, than international agreements under article 98(2) of the Rome Statute, pursuant to which the consent of a sending state is required to surrender a person of that state to the Court, could withhold the Court from proceeding with a request for surrender.

Nonetheless, on closer look, this second decision is quite remarkable. As noted above, the United States concluded bilateral agreements under article 98(2) of the Rome Statute with many countries to express its hostility towards the Court and to ensure that its nationals would not be investigated or prosecuted by the Court. ³²⁰ Under the threat of suspending military and financial aid, the United States ‘convinced’ almost a hundred governments, including 27 African States Parties to the Court ³²¹ and 14 other African states ³²², to sign and ratify such bilateral immunity agreements with


³¹⁹ Ibidem.


³²¹ Benin (who actually noted when voting in favour of Security Council resolution 1593 that the text of the resolution ‘contained a provision of immunity from jurisdiction, which runs counter to the spirit of the Rome Statute), Botswana (one of the view African states that opposed the decision of the Assembly not to cooperate with the arrest warrants issued against President Al-Bashir), Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Comoros, Congo, DRC, Djibouti, Gabon, Gambia, Ghana, Guinea, Lesotho, Liberia, Madagascar, Malawi, Mauritius, Nigeria, Senegal, Seychelles, Sierra Leone, Tunisia, Uganda and Zambia. Mali, Namibia, Niger, South Africa and Tanzania were the only African States Parties to the Court who did not conclude a bilateral immunity agreement with the United States.

³²² Angola, Cameroon, Côte D’Ivoire, Egypt, Equatorial Guinea, Eritrea, Guinea Bissau, Mauritania, Morocco (is not a member state of the AU), Mozambique, Rwanda, São Tomé and Príncipe, Swaziland and Togo.
the United States. By encouraging African states to sign and ratify bilateral immunity agreements under article 98(2), the Assembly hinted to the (former) American hostility towards the Court. Apart from the questions whether such agreements will indeed be concluded and whether these would be accepted by the Court, the most recent decision of the Assembly clearly reemphasized the proclaimed concerns and frustrations of African states about the ruling of PTC I.

IV.D. Competing obligations and interests & the sociological legitimacy of the Court

What might all these expressed concerns and frustrations about the competing obligations and interests of African states imply for the sociological legitimacy of the Court? A cynical observer would perhaps conclude that African states have not sufficiently internalized or socialized the emerging norm that immunity of either former or sitting Heads of State cannot be invoked to oppose prosecution for international crimes. From this perspective, the advanced concerns and frustrations would be best explained by the first component of actor-based legitimacy, which emphasizes that perceived or assumed legitimacy can derive from the internalization of norms underlying the rules of international law and decisions from international institutions.

However, such a conclusion would be incomplete, because it would ignore the fact that many African states have rejected the personal and functional immunity of state officials, including former or sitting Heads of States. They have done so by signing the Rome Statute (article 27(2)), by supporting the prosecution of former and sitting Heads of African States (most notably, the prosecution of Mengistu Haile Mariam, Charles Taylor and Hissène Habré) and by adopting domestic legislation that curtails such immunities. 323

Furthermore, it should be reminded that the Assembly did not, in principle, invoke the personal immunity of President Al-Bashir. Instead, article 98(1) and for that matter the personal immunity of President Al-Bashir only showed up in the resolutions of the Assembly as a legal justification for the Assembly’s successive decisions that African states will not cooperate with the arrest warrants and are free to receive President Al-Bashir on their territory. When PTC I side-stepped this legal justification as well as the proclaimed political exigency for the travels of President Al-Bashir, namely the profound interest of African states in peace and stability within their region, African states began to express their concerns and frustrations about the competing obligations and interests of, in particular, the African States Parties to the Court. In other words, their proclaimed

concerns and frustrations were directed against the decisions of PTC I and not necessarily against the emerging norm that immunity of either former or sitting Heads of State cannot be invoked to oppose prosecution for international crimes.

In light of all this, the expressed concerns and frustrations of African states about their competing obligations and interests are perhaps best explained by the outcome-based conception of sociological legitimacy. This conception argues that perceived or assumed legitimacy does not mainly derive from the source, the internalization or the underlying process of a rule or decision, but especially from the outcomes or output of international law and international institutions.

In this case, the African states might have perceived the rulings of the PTC as inappropriate and undesirable outcomes because they would render article 98(1) of the Rome Statute ‘redundant, non-operational and meaningless’. For African states and by extension the AU, article 98(1) had an important function to fulfil, namely to justify their decisions not to cooperate with the arrest warrants and to endorse the visits of President Al-Bashir to African States Parties to the Court. In this regard, the motivations of African states to take certain decisions do not matter so much. What matters is that article 98(1) had political and legal relevance for African states and that the rulings of PTC I now obstructed the effective application of article 98(1). By downplaying that relevance, the rulings of PTC I might have had a negative effect upon the sociological legitimacy of the Court.

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324 African Union Commission, ‘Press Release: on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan’ (9 January 2012), as available at: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>.
V. Peace concerns

Most of the relevant resolutions and communiqués of the AUPSC, the Assembly and the AU Commission have stressed the concerns of African states about the negative implications of the arrest warrants issued against President Al-Bashir for all efforts intending to bring peace to Darfur, Sudan and the wider region. In a similar vein, African states opposed the warrant of arrest issued by PTC I against Muammar Gaddafi in June 2011, because this warrant would ‘seriously [complicate] the efforts aimed at finding a negotiated political solution to the crisis in Libya’. However, apparently to the frustration of African states, the Security Council and the Prosecutor did not act upon these proclaimed peace concerns (sub-section V.A.).

This section analyses the specific contexts in which African states expressed their peace concerns and proclaimed their frustrations about the unwillingness or inability of the Security Council and the Prosecutor to address them. The purpose of this analysis is to find out which legitimacy conception(s) can best explain what these possible concerns and frustrations of African states might imply for the sociological legitimacy of the Court (sub-sections V.B. and V.C.).

V.A. Peace and justice

On 11 July 2008, the AUPSC issued a press statement following a briefing of the Deputy Prosecutor of the ICC ‘on some of the activities of the ICC’. Herein the AUPSC ‘reaffirmed the commitment of the AU to combating impunity, in conformity with the relevant provisions of the AU Constitutive Act’, but also ‘expressed its strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace’. With this statement, the AUPSC did not only anticipate to the Prosecutor’s application for an arrest warrant against President Al-Bashir, but also called to mind that justice can sometimes conflict with peace.

327 Ibidem.
328 For a long time, such alleged conflicts between peace and justice have been ground of debate for proponents of realpolitik and defenders of judicial accountability. However, this scholarly debate seems to have smoothen down a bit and now can hardly be described any longer in terms of ‘political realists’ and ‘judicial romanticists’ (these categories are derived from: Payam Akhavan, ‘Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism’, Human Rights Quarterly 31 (2009) 624-630.). The initial standoff between realpolitik and judicial accountability has proven wrong. The experiences of the Ad-Hoc tribunals and more recently the ICC have learned that international investigations and prosecutions
In its first resolution after the actual application of the Prosecutor on 14 July 2008, the AUPSC reiterated its earlier press statement and ‘[expressed] its conviction, that in view of the delicate nature of the processes underway in the Sudan, approval by the [PTC] of the application (...) could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a result, may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region’. According to the AUPSC, justice would conflict with peace if the PTC would indeed issue an arrest warrant against President Al-Bashir. For this reason, the AUPSC requested the Security Council to defer the proceedings initiated against President Al-Bashir under article 16 of the Rome Statute. However, as discussed above (section II), the Security Council did not act upon this request, which was reiterated by various AU organs at many later occasions.

In July 2009, the Assembly went a step further in expressing its peace concerns by ‘[noting] with grave concern the unfortunate consequences that the indictment has had on the delicate peace process underway in the Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur’. These developments as well as the persistent unwillingness or inability of the Security Council to address their peace concerns were invoked by the Assembly to justify its decision that African states would not cooperate with the Court on the arrest and surrender of President Al-Bashir. African states openly opposed the Court under the banner of peace concerns.

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After this decision, African states continued to emphasize that the arrest warrants had a jeopardizing effect on the efforts aimed at finding a peaceful solution to the crisis in Darfur, Sudan and the wider region in order to press for a deferral under article 16 of the Rome Statute. Moreover, the proclaimed peace concerns were also invoked to challenge the actions of the Prosecutor (section III), to justify the visits of President Al-Bashir to four African States Parties to the Court (section IV) and to oppose the arrest warrants issued against Muammar Gaddafi on 27 June 2011. In this way, the proclaimed conflict between peace and justice became the main political exigency which the African states advanced to justify their opposition towards the Court as well as the main reason invoked by African states to challenge the actions of the Security Council and the Prosecutor.

In short, African states seem to have expressed their concerns (1) about the negative implications of the arrest warrants issued against President Al-Bashir and Muammar Gaddafi on efforts aimed at finding peaceful solutions to ongoing conflicts and their frustrations (2) about the unwillingness or inability of the Security Council and the Prosecutor to address their peace concerns.

V.B. Peace concerns or legitimacy politics?

The difficulty of analysing the invoked political exigency is that peace concerns, as Charles Jalloh has pointed out, are easier to make than they are to prove.\(^{331}\) Indeed, the question rises to what extent genuine peace concerns, whatever they exactly might have been, motivated the African states to request the Security Council to defer the proceedings initiated against President Al-Bashir and Colonel Gaddafi, to decide not to cooperate with the Court on these warrants and to openly challenge some of the actions of the Prosecutor? Such questions about legitimacy concerns versus legitimacy politics, i.e. the deliberate attempt to diminish the sociological legitimacy of rules, decision or decision-makers, are impossible to answer in a conclusive manner. However, the specific contexts in which the peace concerns have been advanced, indicate that there are reasons to believe that African states were indeed to some extent motivated by, what can be called, genuine peace concerns in deciding to oppose the Court.

In the first place, the advanced peace concerns might have been genuine, because African states lost or perceived to lose control over the conflict management processes in Sudan and Libya due to the involvement of the Court. Prior to the Prosecutor’s applications for arrest warrants against President Al-Bashir and Colonel Gaddafi, African states were actively seeking negotiated political

solutions for the respective situations. Whether such solutions were within reach or nothing but political fata morganas does not necessarily matter much. African states might still have felt that the arrest warrants curtailed their (future) influence over the conflict management processes. For example, in response to the arrest warrants, parties involved in the negotiations could put additional demands on the negotiation table, like an unconditional amnesty or an active role in a government of national unity, which the Court would probably not accept in exchange for a peaceful conclusion of the conflict. As such, the warrants could place the African states in a difficult position when trying to reach a negotiated political solution to end the hostilities.

Secondly, the specific contexts in which the visits of President Al-Bashir to four African States Parties of the Court took place, give reason to believe, that some of these states were indeed motivated by a profound interest in peace and stability within the region when deciding to welcome President Al-Bashir on their territory. Most notably, the government of Chad, who initially refused to support the decision of the AU Assembly not to cooperate with the arrest warrants issued against President Al-Bashir, welcomed him (twice) with the intention to end the long-lasting proxy war between Sudan and Chad. After Idriss Deby, the President of Chad, had visited Khartoum in February 2010, he invited President Al-Bashir to travel to N’Djamena. This visit took place in July 2010 and marked the end of long hostilities between Sudan and Chad. Unmistakably, Chad had a profound interest in peace and stability within their region, which might have motivated its government to invite President Al-Bashir.

Despite these two contextual observations, it is not more than likely that other interests have motivated African states as well to oppose the Court. These interests might have included political or economic advantages gained by supporting President Al-Bashir or Colonel Gaddafi and the fear that other African leaders would have to appear before the Court. Moreover, the ‘blind-making desire’ to find pan-African solutions for African problems might have stimulated African states not to cooperate with the arrest and surrender of President Al-Bashir. However, albeit these other possible interests, for the above-mentioned reasons one cannot exclude genuine peace concerns from a prominent place on the agenda.

332 For now, it is not necessary to discuss these attempts to find African solutions for African problems in more detail. What is important here, is that the AU played or was intending to play a leading role in the conflict management of the related conflicts. For an analysis of the involvement of the AU in Darfur and Sudan, see for example: Alex de Waal ed., War in Darfur and the Search for peace (Cambridge 2007). Christina Badescu and Linnea Bergholm, ‘The African Union’, in: ‘David Ross Black and Paul D. Williams ed., The international politics of mass atrocities: the case of Darfur (London 2010) 100-118.

333 See above, Chapter 3, Sections VII and XI.

this list of relevant factors. In other words, the possibility that the advanced peace concerns of African states have, intentionally or not, disguised other (strategic) interests, this does not imply that all proclaimed peace concerns were disingenuous.

Furthermore, apart from the question whether African states were indeed to some extent genuinely motivated by peace concerns in opposing the Court, African states have also expressed their frustration about the unwillingness or inability of the Security Council and the Prosecutor to address their proclaimed concerns. In this regard, it does not necessarily matter why the African states advanced these concerns. What matters, as explained above (sections II & III), is that they demanded the Security Council and the Prosecutor to seriously consider their concerns. Even if their peace concerns were mainly a form of legitimacy politics, something which can be doubted, then still the inability or unwillingness of the Security Council and the Prosecutor to address their concerns might have been perceived or assumed as inappropriate.

V.C. Peace concerns & the sociological legitimacy of the Court

What might all these contextual observations on the expressed peace concerns of African states imply for the sociological legitimacy of the Court? First of all, if there are indeed reasons to believe, as argued above, that African states were to some extent genuinely concerned about the negative peace effects of the arrest warrants issued against President Al-Bashir and Colonel Gaddafi, this might negatively reflect upon the Court as well as upon its rules and decisions. Although the Preamble of the Rome Statute proclaimed that the Court would ‘contribute to the prevention of [grave crimes that threaten the peace, security and well-being of the world]’, according to African states, the Court’s involvement in the Sudan and Libya situations had exactly the opposite effect. The warrants of arrest issued against the leaders of these two states would have jeopardized the efforts aimed at findings peaceful solutions for the related conflicts.

What this might imply for the sociological legitimacy of the Court, can perhaps be best explained by the outcome-based conception of sociological legitimacy. This conception argues that perceived or assumed legitimacy does not mainly derive from the source, the internalization or the underlying decision-making process of a rule or decision, but from the outcomes or output of international law and international institutions. African states might have perceived or assumed the Court as well as its rules and decisions as inappropriate, because they failed to contribute to peaceful solutions for long-lasting conflicts. In fact, African states might have felt that the involvement of the Court has had a negative effect on their peace negotiations.

Second of all, apart from the question whether African states were indeed to some extent genuinely motivated by peace concerns in opposing the Court, African states have also expressed their
frustration about the unwillingness or inability of the Security Council and the Prosecutor to address their proclaimed concerns. As explained above (sections II & III), this frustration can perhaps be best explained by the first component of process-based legitimacy, which stresses the importance of the legitimate deliberation of rules and decisions. From the perspective of African states the Security Council and the Prosecutor might not have addressed their peace concerns in an appropriate manner.

In short, the expressed peace concerns of African states might relate in two ways to the sociological legitimacy of the Court. In the first place, they might imply that African states question the desirability of the outcomes or output of the Court. Secondly, the proclaimed frustration about the inability or unwillingness of the Security Council and the Prosecutor to address their peace concerns might imply that African states did not perceive the decision-making process of the Prosecutor and the Security Council as appropriate.
VI. Double standards

When PTC I issued the first arrest warrant against him, President Al-Bashir told thousands of cheering supporters in Khartoum that he would not ‘kneel’ to ‘colonialists’ and that he stood ready to battle ‘against this new colonialism’. This was not the first and certainly not the last time that an African leader spoke in terms of colonialism and imperialism to justify the opposition of its state against the Court. For example, eight months earlier, when the Prosecutor announced his application for the arrest warrant, the President of Rwanda, Paul Kagame proclaimed that the Court was ‘put in place only for African countries’ and that Rwanda could not ‘be part of [such] colonialism, slavery and imperialism’.

In contrast to these two self-justifications, most African states have not been willing to use neo-colonial rhetoric in challenging the rules and decisions of the Court. In fact, the resolutions and communiqués of the various AU organs have almost completely refrained from using such language in stressing the above-mentioned four concerns and frustrations of African states about the Court. However, one communiqué of the AUPSC and two press releases of the AU Commission have hinted that many other African states, including the African States Parties to the Court, might actually have been concerned and perhaps frustrated about the alleged double standards of the Court.

This section analyses the specific contexts in which African states seemed to have given expression to such concerns and perhaps frustrations about the possible double standards of the Court. Moreover, and perhaps more importantly, this section will also consider the specific contexts in which African states have not referred to the alleged double standards of the Court (sub-section VI.A.). The purpose of this analysis, is to uncover what the implications of these expressed hints to the possible double standards of the Court might be for its sociological legitimacy.

VI.A. The (un)articulated double standards of the Court

A few months prior to the indictment of President Al-Bashir, Lekha Sriram wrote that ‘the claim that African states are being treated as guinea pigs, or that the ICC is in some sense neo-colonial, is a bit difficult to source, because while it is a concern that has been aired in conferences and diplomatic circles, it is seldom articulated fully or in print’. Interestingly though, in response to the Prosecutor’s

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336 AFP, ‘Rwanda's Kagame says ICC targeting poor, African countries’ (31 July 2008), as available at: <http://afp.google.com/article/ALeqM5ilwB_Zg00Jx3N9hSX-Wu8zEyQGig>.

application for an arrest warrant against President Al-Bashir the AUPSC, in which the African States Parties to the Court had a majority, apparently did articulate this claim. By ‘[stressing] the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standards’, the AUPSC at least hinted that the Court applied inappropriate and perhaps even neo-colonial double standards in prosecuting the Sudanese President.\textsuperscript{338}

After this first response to the Prosecutor’s application, the AUPSC did not refer to alleged double standards of the Court again. In its next decision of 22 September 2008, the AUSPC ‘stressed the need for international justice to be conducted in a transparent and fair manner’, but did not add that this was necessary to avoid ‘any perception of double standards’.\textsuperscript{339} Presumably, the respective African states had vested their hope on further deliberations in the Security Council with regard to their deferral request under article 16 of the Rome Statute and were much aware that they would only pour oil on the fire by challenging the alleged double standards of the Court.

However, after the Security Council had failed to live-up to these expectations, there was no new majority in either the AUPSC or the Assembly that questioned the Court’s equal standards. Even in the summer of 2009, when reports warned for a mass withdrawal of the African States Parties to the Court and Kofi Annan opposed the views of some African leaders that ‘international justice as represented by the [ICC] is an imposition, if not a plot, by the industrialized West’, the Assembly did not refer to the possible double standards of the Court.\textsuperscript{340} Likewise, until today, the African States Parties to the Court have not raised this issue in one of the yearly debates of the ASP.\textsuperscript{341}

In contrast, the AU Commission has referred to the alleged double standards of the Court in two press releases. In the first place, in response to the August 2010 decisions of PTC I to inform the Security Council about the visits of President Al-Bashir to Chad and Kenya, the AU Commission proclaimed that the AU ‘shall oppose the pretensions and double standards that are evident from the

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\textsuperscript{340} See above, fn. 139-140.

\textsuperscript{341} For their contributions to the General Debate during the successive sessions of the ASP, see: International Criminal Court, ‘Assembly of States Parties - General Debate’, as available at: <http://www.icc-cpi.int/Menus/ASP/Sessions/GeneralDebate/>. 
statements being made about the two countries’. 342 Secondly, in reaction to the December 2011 decisions of PTC I on the visits of President Al-Bashir to Chad and Malawi, the Commission stressed that the AU ‘shall oppose any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa’. 343

What is important to note about these two press release, is that the Assembly followed the Commission in condemning the respective decisions of PTC I. However, the Heads of State and Government did so in reference to the competing obligations and interests of African states and did not cast doubt upon the equal standards of the Court. For whatever reasons, a majority of the African states did not consider it appropriate to challenge these standards in the resolutions and communiqués of the AUPSC and the Assembly in the same way as the Commission had done.

VI.B. Double standards & the sociological legitimacy of the Court

What do all these contextual observations indicate for the sociological legitimacy of the Court? To start, it should be emphasized that after the AUPSC expressed its agitation about the Prosecutor’s application for an arrest warrant against President Al-Bashir by hinting at the inappropriate and perhaps even neo-colonial standards of the Court, most African states have not been willing to criticize the rules and decisions of the Court in this manner. In contrast to for example Paul Kagame and President Al-Bashir himself, the later resolutions and communiqués of the AUPSC and the Assembly have not referred to the alleged double-standards of the Court.

How can this be explained? In the first place, African states might have been more concerned and frustrated about other issues, like the disobliging Security Council and the inappropriate actions of the Prosecutor, than about the alleged double standards of the Court. Indeed, if these standards were an

342 African Union Commission, ‘Press release: on the decision of the Pre-Trial Chamber of the ICC informing the UN Security Council and the Assembly of the State Parties to the Rome Statute about the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya’ (29 August 2010), as available at: <https://docs.google.com/viewer?url=http://www.africaunion.org/root/ua/actualites/2010/aout/press%20release%2520on%2520the%2520presence%2520of%2520president%2520albashir%2520in%2520chad%2520and%2520malawi%2520&hl=en&gl=us>

343 African Union Commission, ‘Press Release: on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan’ (9 January 2012), as available at: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>.
important reason for African states to oppose the Court, one might wonder why not one of the African states Parties decided to confront the Court with this perceived or assumed inequality.

Secondly, in the specific contexts in which individual African states and the AU Commission have articulated the alleged double standards of the Court, it seems that their statements served a rhetorical purpose as well. In case of the press releases of the AU Commission, it is clear that the statements of the Commission were to present a firm response of a ‘unified’ AU against the decisions of PTC I. Presumably, the officials of the Commission and in particular its Chairman, Jean Ping, who is a well-known criticizer of the Court, found it necessary to raise the flag of double standards, with its insinuations to neo-colonialism, to create this image for the outside world. However, in the later session of the Assembly, the majority of the African states did not find it desirable to provide such self-justification for the opposition of African states against the decision of PTC I. Instead, they attempted to present a unified AU by emphasizing the competing obligations and interests of African states.

What should be pointed out, however, is that although the resolutions and communiqués of the Assembly and the AUPSC do not indicate that many African states were seriously concerned and frustrated about the possible double standards of the Court, this does not necessarily imply that African states were not at all concerned and frustrated about these standards. Indeed, several commentators have stressed that there are considerable reasons for African states to be seriously concerned and frustrated about the double standards underlying the Court’s prosecutorial focus on Africa.\footnote{344 See in particular: A. Anghie & B. Chimni, ‘Third world approaches to International law and individual responsibility in conflicts’, Chinese Journal of International Law 2 (2003) 88; Mahmood Mamdani, ‘The New Humanitarian Order’, The Nation (29 September 2008), as available at: < http://www.thenation.com/article/new-humanitarian-order#>. Kamari Clarke, ‘Rethinking Africa through its Exclusions: The Politics of NamingCriminal Responsibility’, Anthropological Quarterly 83.3 (2010) 625-651. Ifeou Eberechi, “‘Rounding Up the Usual Suspects’: Exclusion, Selectivity, and Impunity in the Enforcement of International Criminal Justice and the African Union’s Emerging Resistance’, African Journal of Legal Studies 4 (2011) 51-84.}

For example, Charles Jalloh has referred to the exceptionalism’ of the United States with regard to the Court and to the article 98(2) agreements which were forced upon almost all African states under the threat of losing their financial, military and humanitarian aid from the United States.\footnote{345 Jalloh, ‘Regionalizing International Criminal Law?’, 493.}

In fact, the few African states, like South Africa, who have refused to promise that American nationals would not be handed over to the Court, were denied American support for a number of years. In the meantime, the United States has been one of the strongest antagonists, as noted above (section II), of a Security Council deferral of the proceedings initiated against President Al-Bashir. According to Jalloh,
this paradox ‘undoubtedly [reinforced] the historic division between the North and South whereby powerful states are perceived as being let off the hook of prosecution while the weakest links are targeted in Africa’. 346

However, although this thesis can agree that there might be reasons for African states to be seriously concerned and indeed frustrated about the alleged double standards of the Court, one cannot overlook that the resolutions and communiqués of the Assembly and the AUPSC have not expressed such concerns. This suggests that the alleged double standards of the Court have not been one of the main concerns of African states with regard to the Court. Based on this interpretation of the hints of the AUPSC and the recent references of the Commission to the alleged double standards of the Court, this thesis expects that the possible concerns and frustrations of African states about these standards, will likely not have far-reaching implications for the Court's sociological legitimacy.

346 Ibidem, 495.
VII. The wider political space of African states

This thesis attempts to understand what the expressed concerns and frustrations of African states about the Court might imply for its sociological legitimacy. For this purpose, the previous sections have analysed the specific contexts in which they have been advanced. This contextual analysis has indicated that the proclaimed concerns and frustrations cannot be explained by one particular conception of sociological legitimacy. Instead, with the exception of the alleged double standards of the Court, they seem related to the different components of both the process- and the outcome-based conceptions of sociological legitimacy. That is to say, African states appear mainly concerned and frustrated about the Court for the following two reasons. In the first place, because they do not consider the process through which the rules and decisions of the Court have been adopted and enforced as fully appropriate; and secondly, because the outcomes of these rules and decisions have not been what African states expected or desired from the Court.

These findings bring this thesis already close to its conclusions, but no yet close enough to make reasonable assumptions about what the mounting tension between African states and the Court might imply for the sociological legitimacy of the Court. As explained in the first chapter, besides the specific contexts in which African states have given expression to their possible concerns and frustrations about the Court, the wider political space in which African states operate, deserves attention as well. What are relevant facets of this wider political space (sub-section VII.A.) and how might they relate to the expressed concerns and frustrations of African states about the Court (sub-section VII.B.)? These are the two questions that this section will focus upon. Subsequently, the following section will conclude this third chapter by presenting reasonable assumptions about what the expressed concerns and frustrations might imply for the Court’s sociological legitimacy.

Unmistakably, it goes far beyond the ambit of this thesis, to provide a comprehensive overview of all possible relevant facets of the wider political space of African states. Therefore, this section will only highlight a few relevant facets of this wider political space, which are considered important to understand how African states might have perceived or assumed the Court as well as its rules and decisions. In this regard, especially the significant role that African states have allotted to the AU in developing pan-African solutions for African problems will be addressed.

VII.A. Pan-African solutions for African problems

On 9 July 2002, the African Union was formally inaugurated in Durban, South Africa, where the African states committed themselves ‘to take all the necessary actions to give unwavering support to all the Union’s initiatives aimed at promoting peace, security, stability, sustainable development,
democracy and human rights within [their] continent’. This commitment of African states to the progressive agenda of the AU’s Constitutive Act, with human rights placed at its core, can be understood on at least two levels.

In the first place, the establishment of the AU was a response to the evolving and contradictory pressures on African states after, in particular, the end of the Cold-War. Although, this is not the place to discuss these pressures in detail, it cannot be overlooked that African states found themselves, in the words of Phillip Huxtable, ‘at a critical juncture’ in the course of the 1990’s, because they increasingly became part of ‘an arena where different forms of spatialisation are competing’. The emergence of this arena can be ascribed to the ‘accelerated processes of globalisation’ and the generally ‘weak institutionalisation’ of the post-Cold War African states, which gave non-state actors free play in large parts of Africa. This has allowed some of these non-state actors, including multinational corporations, international financial institutions and international NGO’s, but also new socio-political elites, warlords, (sub-) regional communities and informal trade networks, to challenge African states as the major regimes of territorialisation.

Secondly, the creation of the AU, with its progressive agenda, was an expression of the enduring quest of Pan-Africanism to forge closer relations between African states as well as between African peoples within the continent. This ‘ideological movement’ departs from the intellectual heritage of, among others, W.E.B. Du Bois and Kwame Nkrumah, and recognizes the ‘fragmented

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351 Ibidem.

352 Maluwa, ‘From the organisation of African Unity to the African Union: rethinking the framework for inter-state cooperation in Africa in the era of globalisation’, 53.
nature of the existence of Africans, their marginalisation and alienation whether in their own continent or in the diaspora[s]. Like the struggle against colonialism and its legacy inspired the creation of the OAU, the desire to find pan-African solutions for the common problems of African states in the twenty-first century, has been an important source of inspiration for the establishment of the AU.

However, beyond Pan-Africanist ‘platitudes’ about reaching pan-African solutions for common problems, no agreement was reached between the respective African states on the actual solutions that the AU would devise. In resemblance to its predecessor, who had seen strong divisions among its founders between states favouring a far-reaching political union and those preferring a loose association, the member states of the newly-born AU had very different ideas about the implementation of the progressive human rights agenda that was placed at the core of its Constitutive Act. For all African states, this Act provided ‘a guide map of where Africa [wanted] to go’, but they disagreed on what would be the best approach and the right pace for the AU in pursuing this guide map.

During its first ten years, the AU has shown that it will not uphold the absolute protection of sovereignty in the same manner as the OAU has done. Nonetheless, the tendency of its member states to support fellow African states has remained. Although article 4(m) of the AU Constitutive Act proclaims that the AU shall function in accordance ‘with respect for democratic principles, human rights, the rule of law and good governance’, many of its member states have no serious agenda on how to comply with such ‘continental standards’. Moreover, despite the fact that article 4(h) of the AU Constitutive Act allows ‘the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances’ like war crimes, crimes against humanity and genocide, the Heads of States and Governments of the AU’s member states have proven reluctant to


358 To be more precise, article 4(h) reads that the Union has the right ‘to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the
set aside the ‘old’ norms of absolute sovereignty for the ‘new’ norms of the progressive human rights agenda of the AU Constitutive Act.\(^{359}\)

Do not understand this wrongly, the AU has certainly not turned away from conflict situations were such ‘grave circumstances’ occurred or were about to occur. In contrast, the AU has been very active, especially in comparison to the OAU, in promoting peaceful and sustainable settlements for such conflicts, both between as well as within the territories of its member states.\(^{360}\) However, in forging pan-African solutions for these conflicts, like it did for example in Sudan and Libya, the AU has been confronted with a profound tension between, on the one hand, its progressive human rights agenda and, on the other hand, the tendency of its member states to respect each other’s sovereignty.

This tension indicates that the notion of pan-African solutions for African problems, as proclaimed by African states as well as the AU, is a complex one. To be more precise, this notion brings together some of the contradicting and evolving facets of the wider political space in which African state operate in the twenty-first century. Most notably, the proclaimed notion of pan-African solutions for African problems refers both to the evolving and contradictory pressures on African states (i.e. the African problems) as well to the apparent conflict between the ‘old’ norms of absolute sovereignty and the ‘new’ norms of the progressive human rights agenda of the AU Constitutive Act (i.e. the pan-African solutions).

What is important for the purpose of this thesis, is to understand how these contradicting and evolving facets of the wider political space relate to the expressed concerns and frustrations of African states about the Court. That is to say, whether the Court as well as its rules and decisions have been perceived or assumed as supporting or undermining the complex endeavour of African states to find pan-African solutions for the common problems which they face in the twenty-first century.

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VII.B. How the Court has (not) contributed to pan-African solutions for African problems

Initially, the first Permanent International Criminal Court seemed to fit quite well into this endeavour. In this regard, it may be reminded that African states had a significant say in drafting the Rome Statute and that when the Court first opened its doors, almost one-third of the required sixty ratifications came from African states. Moreover, in the years that followed, the relationship between African states and the Court intensified, when the governments of Uganda, the DRC and the CAR saw a companion, if not a friend, in the Court and decided to refer three situations on their own territory to the Prosecutor.

What cannot be ignored about the resulting investigations and prosecutions, is that in all the three situations, the Prosecutor only pressed charges against alleged warlords, i.e. the leaders of prominent non-state actors who pose serious challenges to many African states. As such, the Court formed certainly no obstacle to the desired pan-African solutions for common African problems. In contrast, during its early years the Court seemed to become a major contributor to these solutions in addressing some of the evolving and contradictory pressures that confront African states in the twenty-first century. At the same time, the Court carefully circumvented the tension between the ‘old’ norms of absolute sovereignty and the ‘new’ norms of the progressive human rights agenda of the AU Constitutive Act by departing from self-referrals instead of, for example, proprio motu investigations.

361 In the Uganda situation, the Prosecutor has successfully applied for arrest warrants against the (deputy) commanders of the Lord’s Resistance Army. The military encounter between the Ugandan military forces and the LRA have ravaged the Northern part of Uganda over the last twenty years. During this period, the region’s civilian population has been terrorized by this semi-religious military group under the leadership of the self-pronounced prophet Joseph Kony, whose only discernible political demand is to found a state ruled by the Ten Commandments. See for example: Kasaija Phillip Apuuli, ‘The ICC Arrest Warrants for the Lord’s Resistance Army Leaders and Peace Prospects for Northern Uganda’, Journal of International Criminal Justice 4 (2006) 179-187.

In the CAR situation, the Prosecutor has successfully applied for an arrest warrant against Jean-Pierre Bemba Gombo, who was not only one of the four vice-presidents in the transitional government of the DRC from 17 July 2003 to December 2006, but the Movement for the Liberation of Congo (MLC), a rebel group which later became a political party. In 2002, the then President of the CAR, Ange-Félix Patassé invited the MLC to help his troops in preventing a coup. After the Patassé was ousted in March 2003, the new CAR government turned against Bemba and the MLC. On the complex background of the Bemba case, see for example: Kasaija Phillip Apuuli, ‘The implications of the arrest of Jean Pierre Bemba by the International Criminal Court’, East African Journal of Peace and Human Rights 14.2 (2008) 247-265.

In the DRC situation, the Prosecutor has successfully applied for arrest warrants against six alleged commanders of the Force Patriotique pour la Libération du Congo (FPLC), the Force de Résistance Patriotique en Ituri (FRPI), Front des Nationalistes et Intégrationnistes (FNI), the Congrès National pour la Défense du Peuple (CNPD) and the Forces Démocratiques pour la Libération du Rwanda- Forces Combattants Anancunguzi (FDLR-FCA), which are non-state actors that have opposed the government of the DRC as well as the governments of the neighbouring states of Rwanda and Uganda. On the complexities of the DRC situation, see for example: Mahnoush H. Arsanjani and William Michael Reisman, ‘The International Criminal Court and the Congo: from Theory to Reality’, in: Leida Nadya Sadat and Michael P. Scharf ed., The theory and practice of international criminal law: essays in honor of M. Cherif Bassiouni (Leiden 2008) 325-346.
Nonetheless, in the first situation where the Court’s investigations and prosecutions were not based on a self-referral, the majority of the AU’s member states proved willing to support the Court as well. So much became clear from the adoption of Security Council Resolution 1593, which referred the situation in Darfur to the Prosecutor. Two of the three non-permanent African member states of the Security Council voted in favour of this resolution, despite the fact that Sudan was not a party to the Rome Statute and strongly opposed the referral by the Security Council. One of the main reasons invoked by respectively Tanzania and Benin for supporting the referral, was that the resolution ‘[recognized] the proposal by Nigeria [made by President Obasanjo on behalf of the AU] regarding the need to provide national healing and reconciliation in Sudan, in cooperation with the AU and the international community, as appropriate’. That is to say, according to these states, the referral fitted into the complex endeavour of the AU to find pan-African solutions for common African problems.

At the same time, Algeria’s opposition against resolution 1593, underlined the inherent tension between the ‘old’ norms of absolute sovereignty and the ‘new’ norms of the progressive human rights agenda of the AU Constitutive Act. Clearly, the African states disagreed on the circumstances under which the sovereignty of AU member states could be set aside in favour of the desired protection and promotion of ‘peace, security, stability, sustainable development, democracy and human rights’ within the African continent. Three years later, when the Prosecutor applied for an arrest warrant against President Al-Bashir on 14 July 2008, that tension came to the surface in full disclosure.

Essentially, this prosecutorial decision confronted African states, for the first time, with a Court that did not ‘respect’, but simply ignored their complex endeavour to find pan-African solutions for African problems. What followed in response, looked like an attempt of the AU and its member states to come up - again - with a pan-African solution for the whole situation; a solution that would stand the test of both the ‘old’ and the ‘new’ norms as well as a solution that would be acceptable to the entire community of African states. For this purpose, the fifteen member states of the AUPSC, including nine states who had ratified the Rome Statute, decided to request the Security Council ‘to defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interests of victims and justice’.

362 See above, fn. 111.


However, the Security Council proved divided on the matter and disappointed the African states by only taking notice of their deferral request in Security Council resolution 1828. So much for the first attempt of African states to find a pan-African solution for the whole situation that arose after the Prosecutor’s application for an arrest warrant against President Al-Bashir. In hindsight, the failure of this first attempt turned out to be the forerunner of more bitter disappointments for African states with regard to the Court.

As explained in the previous sections, the concerns and frustrations which African states have expressed about the Court after the failed deferral request, might relate to both the process through which the rules and decisions of the Court have been adopted and enforced, as well as to the inappropriate outcomes of these rules and decisions. What should be added here, is that when considering the proclaimed concerns and frustrations in light of the complex endeavour of African states to find pan-African solutions for their common problems, one cannot overlook that both in the decision-making process as well as in the outcomes of the rules and decisions of the Court, this complex endeavour was not well-represented.

In the first place, African states might have been concerned and frustrated about the decision-making process of the Security Council under article 16 of the Rome Statute, because this process did not properly consider the common problems of African states nor their complex endeavour to find pan-African solutions for these problems. In fact, after the adoption of Security Council resolution 1828, the Security Council simply ignored all appeals of African states to the political escape clause of the Rome Statute with regard to the proceedings instigated against President Al-Bashir and later the prosecutions initiated in relation to the Kenya and Libya situations.

In this way, the Security Council gave a cold shoulder to, in particular, the expressed peace concerns of African states, despite the fact that the scourge of conflict has been, without doubt, one of the most pressing problems of African states. Moreover, the Security Council disregarded the pan-African solutions which the AU forged for the respective situations. For example, with regard to the Darfur situation, the AUPSC established the AU High Level Panel on Darfur, which came up with the so-called Mbeki report ‘on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed [in Darfur]’. The pan-African solutions that, for example, this report offered, were at the least seriously complicated by the inability or unwillingness of the Security Council to further deliberate upon the deferral request.

Secondly, the Prosecutor’s interpretation of his prosecutorial discretion under article 53, which is the provision that allows the Prosecutor to suspend investigations or prosecutions in the interests of justice, might also have debarred the complex endeavour of African states to find pan-African solutions for their common problems. Because the Prosecutor decided not to consider peace concerns or for that matter any political implications of its actions, African states had no one to turn to with their peace concerns and their pan-African solutions except for the Security Council who had proven unable or unwilling to embark upon this task. Clearly, this political reality appears to have concerned and indeed frustrated African states. On top of all this, the Prosecutor made, in the eyes of African states, ‘egregiously, unacceptable, rude and condescending statements’ in attempting to give persuasive reasons for prosecuting President Al-Bashir. Unmistakably, this has contributed to the negative image of African states about the first Prosecutor of the Court.

Thirdly, from the perspective of African states, the outcomes of the rules and decisions of the Court might have neglected their common problems as well. According to African states, the arrest warrants issued against President Al-Bashir and later against Colonel Gaddafi seriously risked jeopardizing efforts aimed at finding peaceful solutions for the related conflicts. That is to say, the outcomes of the rules and decisions of the Court would not ‘[contribute] to the prevention of [grave crimes that threaten the peace, security and well-being of the world]’, but would actually deteriorate the common problems of African states. While the Court was first a partner in challenging such problems, the Court might now have been perceived to make these problems grow worse.

Finally, the outcomes of the rules and decisions of the Court might also have been perceived as downplaying the efforts of African states to come up with pan-African solutions for these problems. So much can be derived, in particular, from the expressed concerns and frustrations of African states about their alleged competing obligations and interests. After the Prosecutor’s application for an arrest warrant against Al-Bashir, he continued to fulfil his function as President of Sudan. As such, he remained the most important actor in Sudan’s foreign relations. In order to adequately address, among other diplomatic issues, the deteriorating situation in Darfur, the conflict with South-Sudan and the initial hostilities between Sudan and Chad, the AU and individual African states required his support or at least cooperation. Partly for this reason, President Al-Bashir was welcomed on the territory of many African and Arab states, including four African States Parties to the Court. The Assembly justified these visits, as a sort of temporary pan-African solution, by invoking article 98(1) of the


367 As derived from the Preamble to the Rome Statute, see also above, Chapter 3, Sub-section V.C.
Rome Statute and by referring to the profound interests of these states in ensuring peace and stability within their regions.

However, the PTC refused to endorse the legal justification as well as the political exigency invoked by African states. In this way, the PTC rejected the temporary pan-African solution not to cooperate with the arrest and surrender of President Al-Bashir and to stand up for individual African states who deemed it politically necessary to welcome him on their territory. Since both the Security Council and the Prosecutor had proven completely unable or unwilling to offer a helping hand, this decision of the PTC may have obstructed the complex endeavour to find pan-African solutions in such a manner, that it would now be better to speak of a mission impossible to reach these pan-African solutions.

In short, the complex endeavour of African states to seek pan-African solutions for their common problems might have been debarred, from the perspective of African states, by the process through which the rules and decisions of the Court have been adopted and enforced, as well as by the outcomes of these rules and decisions. Although its early years indicated that the Court could become a major contributor to the desired pan-African solutions by addressing some of the evolving and contradictory pressures that confront African states in the twenty-first century; since July 2008 the Court might have been perceived or assumed as merely an obstructing force in reaching such solutions. This is how the highlighted facets of the wider political space in which African states operate, might relate to the expressed concerns and frustrations of Africans states about the Court.
VIII. Conclusion: reasonable assumptions about the sociological legitimacy of the Court

After the Prosecutor’s application for an arrest warrant against President Al-Bashir in July 2008, African states expressed their concerns and indeed frustrations about the (1) the disobliging Security Council, (2) the inappropriate actions of the Prosecutor, (3) the competing obligations and interests of African states, (4) the jeopardizing effects of the Court’s involvement with ongoing peace efforts and (5) the alleged double standards of the Court. This thesis intends to explain what these proclaimed concerns and frustrations might imply for the sociological legitimacy of the Court. For this purpose, this chapter has addressed the specific contexts in which the five concerns and frustrations were advanced, and has highlighted a number of relevant facets of the wider political space in which African states operate.

The findings for the expressed concerns and frustrations are relatively unequivocal and can, at least for analytical purposes, be merged into two reasonable assumptions about the legitimacy perceptions and assumptions of African states with regard to Court. First of all, African states have likely not perceived or assumed the process through which the rules and decisions of the Court have been adopted and enforced as desirable, proper and appropriate. The Security Council did not further deliberate upon the deferral requests of African states under article 16, while the Prosecutor proved unwilling to follow a peace-including approach in exercising his prosecutorial discretion under article 53 of the Rome Statute. On top of that, the Prosecutor made, in the eyes of African states, ‘egregiously, unacceptable, rude and condescending statements’ in attempting to give persuasive reasons for prosecuting President Al-Bashir.

In this way, the Prosecutor and the Security Council might also have obstructed the complex endeavour of African states to find pan-African solutions for their common problems. This quest requires African states and by extension the AU to balance between the ‘old’ norms of absolute sovereignty and the ‘new’ norms of the progressive human rights agenda of the AU’s Constitutive Act. However, without any possibility to appeal successfully to one of the political escape clauses of the Rome Statute, such balancing with regard to the Court would become a knotty problem. That is to say, there remains no room for African states to maneuver. Of course, one can respond, that this is exactly the purpose of international criminal law; no one should escape what justice demands. However, consider as well that impunity is but one of many challenges on the African continent and that there is not one absolute conception of what justice demands.

Second of all, African states have likely not perceived or assumed the outcomes of the rules and decisions of the Court as desirable, proper and appropriate. Immediately following the Prosecutor’s application for an arrest warrant against President Al-Bashir, African states began to express the concern that the involvement of the Court might complicate efforts aimed at finding a peaceful pan-African solution to the related conflict(s). Those same peace concerns were advanced when the PTC issued an arrest warrant against Colonel Gadhafi in the summer of 2011. Unmistakably, if there are indeed reasons to think, as noted above, that African states were or continue to be genuinely concerned about the negative peace effects of the Court’s actions, such concerns would have very significant implications for the outcome-based legitimacy of the Court.

In this regard, one must take into account that most parts of Africa have seen the scourge of conflict alive and well-kicking over the last two decades, while today considerable parts of Africa remain haunted by unremitting conflicts. This is just to say, that African states their have reasons to be concerned about regional peace and stability, in particular in light of the evolving and contradictory pressures that African states face in the twenty-first century. In its early years, the Court seemed to be a companion, if not a friend, of African states in addressing some of these pressures like, in particular, the warlords which lead prominent non-state actors that pose serious challenges to many African states. However, since 2008, the Court might itself have been perceived or assumed as one of the evolving and contradictory forces that pressure on the shoulders of African states.

Besides the peace concerns of African states, the outcome-based legitimacy of the Court might also have been tarnished by the decisions of PTC I to condemn the visits of President Al-Bashir to four African States Parties of the Court in 2010 and 2011. In these decisions, the PTC set aside the political exigency and in particular the legal justification that African states had invoked to support their decision not to cooperate with the Court on the arrest and surrender of President Al-Bashir and to vindicate his visits to African States Parties of the Court.

According to the Assembly, ‘article 98(1) was included in the Rome Statute (..) out of recognition that the Statute is not capable of removing an immunity which international law grants’. Therefore, the African States Parties of the Court would not be obliged to cooperate with the Court on the arrest and surrender of Al-Bashir, because he would enjoy personal immunity under international law as being the President of Sudan. However, the decisions of PTC I opposed this reasoning and rendered, in the words of the AU Commission, article 98(1) ‘redundant, non-operational and

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meaningless’, while this provision had actually a very meaningful function to fulfil for African states.\(^{370}\)

After the Security Council and the Prosecutor had left no room for African states to maneuver, article 98(1) was like a last straw that the PTC decided to take away. In this way, the PTC might have completely obstructed the complex endeavour of African states to find pan-African solutions for their common problems. This could also explain the more recent decisions of the Assembly, in which African states announced that they would seek an advisory opinion of the ICJ on the question of immunities under international law, and that they will consider concluding bilateral agreements under article 98(2) of the Rome Statute. Clearly, many African states appear very concerned and indeed frustrated about the decisions of the PTC. This supports the second reasonable assumption that African states have likely not perceived or assumed the outcomes of the rules and decisions of the Court as desirable, proper and appropriate

When taken together, the two reasonable assumptions imply that the sociological legitimacy of the Court is vulnerable, if not already seriously damaged. The perceptions or assumptions of many African states - about the inappropriate process through which the Court has adopted and enforced its rules and decisions as well as the undesired outcomes of these rules and decisions - indicate that these states will be less inclined to support the Court as well as its rules and decisions.

In this regard, it is important to remind that the Court is like a giant, to paraphrase late judge Antonio Cassese, who has no arms or legs, and who therefore needs artificial limbs to walk and work.\(^{371}\) Clearly, state authorities are to act as the Court’s artificial limbs. Without the cooperation of states, the Court is effectively nowhere. Moreover, the Court has mainly walked and worked with and within African states over the last ten years. As noted, all the Court’s current investigations and prosecutions deal with atrocities committed on African soil. What happens if African states will completely refuse to support the Court? Probably this would jeopardize the survival of the Court.

Luckily, however, most African states, and in particular the thirty-three African States Parties of the Court, have not yet regarded the Court as a dead loss. Apart from the discussed opposition against the decision-making process and the outcomes of the Court, which relate in particular to the proceedings initiated against President Al-Bashir as well as the Kenya and Libya situations, many

\(^{370}\) African Union Commission, ‘Press Release: on the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan’ (9 January 2012), as available at: <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf>.

\(^{371}\) Antonio Cassese, ‘Address as President of the International Criminal Tribunal for the Former Yugoslavia to the General Assembly of the United Nations’ (7 November 1995), as available at: <http://www.undemocracy.com/generalassembly_50/meeting_52/pg001-bk02>
African states have continued their cooperation with the Court. Moreover, none of the African States Parties to the Court has withdrawn from the Rome Statute. In particular, the support of African states for the investigations and prosecutions with regard to the self-referred situations has been ongoing. Clearly, the survival of the Court is not yet at stake.

Nevertheless, current and forthcoming investigations and prosecutions that will bring the discussed concerns and frustrations of African states about the Court back to mind, will likely not receive the desired and much required support from African states. This means that investigations and prosecutions that do not circumvent the tension between the ‘old’ norms of absolute sovereignty and the ‘new’ human rights norms of the AU Constitutive Act might very well run into a ‘unified’ block of African states. This is how the diminished sociological legitimacy of the Court might complicate its current and future investigations and prosecutions.
The mounting tension between African states and the first permanent International Criminal Court casts a dark shadow over its tenth anniversary. Since the Prosecutor’s application for an arrest warrant against the Sudanese President Omar Al-Bashir in July 2008, African states have expressed their concerns and indeed frustrations about the Court. The purpose of this thesis has been to explain what these proclaimed concerns and frustrations might imply for the sociological legitimacy of the Court.

In contrast to most preceding studies on sociological legitimacy in the international realm, this thesis has embarked upon this task by analysing the actual perceptions and assumptions of African states. Unmistakably, these perceptions and assumptions are subjective qualities and are not readily accessible for outside-observers. However, although scholars cannot made conclusive statements about the legitimacy perceptions and assumptions of African states, they can come up with reasonable assumptions about what African states perceive or assume as legitimate and what this might imply for the sociological legitimacy of the Court. This thesis has proposed that such reasonable assumptions can be derived from (1) the specific contexts in which African states have expressed their concerns and frustrations about the Court and (2) from the wider political space in which African states operate.

The findings of this contextual analysis are alarming. In the first place, African states have likely not perceived or assumed the process through which the rules and decisions of the Court have been adopted and enforced as appropriate. This might be explained by the unwillingness or inability of the Security Council and the Prosecutor to address the concerns of African states about the prosecution of President Al-Bashir and later about the proceedings initiated in relation to the Kenya and Libya situations. Secondly, African states have likely not perceived or assumed the outcomes of the rules and decisions of the Court as desirable, because these outcomes completely obstructed the complex endeavour of African states to find pan-African solutions for the related conflicts. Taken together, these two reasonable assumptions imply that the sociological legitimacy of the Court is vulnerable, if not already seriously damaged. This means that African states might be less inclined to support the current and forthcoming investigations and prosecutions of the Court.

In this regard, it should be remind that the Court can only investigate and prosecute a handful of concurrent cases and is heavily depended on states to exercise its jurisdiction. In other words, the Court’s sociological legitimacy is not a luxury but a lifeline. It cannot be emphasized enough, that if states do not perceive or assume the Court as well as its rules and decisions as legitimate, the ICC will probably not succeed in concluding any investigations or prosecutions. That is why the mounting tension between African states and the Court rightfully provokes critical questions at its tenth birthday party about whether the ICC has proven to receive worldwide support from all relevant audiences.
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