

Jus Cogens and Obligations Erga Omnes

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1. The concept of *jus cogens*

The notion of peremptory norms in international law is reminiscent of the distinction in Roman law between *jus strictum* (strict law) and *jus dispositivum* (voluntary law), as well as the natural law thinking of the seventeenth and eighteenth century, according to which certain rules existed independent of the will of states and law makers.¹ It found its way into positive international law through Article 53 of the Vienna Convention on the Law of Treaties of 1969 (VCLT).² As is well known, this article determines that

“[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

In addition, Article 64 of the VCLT declares that “[if] a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

The definition in the VCLT was influenced, in particular, by the work of Albert Verdross who himself was strongly influenced by natural law. In accordance with Verdross’ line of reasoning general principles of morality or public policy common to the legal orders of civilized states would constitute a limitation to contradicting treaty obligations.³ In his view immoral treaties would include those preventing the maintenance of law and order

¹ International Law Commission, Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.682, 13 April 2006, para 361. [herein after Fragmentation Report].

² Reprinted in 8 *International Legal Materials* (1969) 679 *et seq.*

³ Alfred von Verdross, ‘Forbidden Treaties in International Law’, 31 *American Journal of International Law* (1937) 572. See also Albert Verdross, ‘Jus Dispositivum and Jus Cogens in International Law’, 60 *American Journal of International Law* (1966), 56. He further suggested that customary rules of international law such as freedom of the high seas, would invalidate treaties in which two or more states excluded other states from the use of the high seas. But see Dinah Shelton, ‘Normative Hierarchy in International Law’, 100 *American Journal of International Law* (2006) 298. She accurately points out that that it is unclear why one would need to the notion of peremptory norms under these circumstances. The *pacta tertiis* rule, according to which states cannot limit the rights of third states without their consent, has long been established in customary international law. It is also codified in the Art. 34 and Art. 35VCLT.

within a state, defense against external attack, care for the bodily and spiritual welfare of citizens, as well as the protection of foreigners abroad.⁴

The definition in Article 53 VCLT does not identify any norms having peremptory status. This relates to the fact that at the time of its adoption the concept was regarded with suspicion by some western countries (notably France⁵), while enjoying more support amongst the (then) socialist and newly independent states.⁶ Art. 53 VCLT was thus negotiated to leave it to the ‘international community as a whole’ to identify those international law norms belonging to the category of *jus cogens*. In essence this implies that a particular norm is first recognized as customary international law, whereafter the international community of states as a whole further agrees that it is a norm from which no derogation is permitted.⁷ A peremptory norm would therefore be subject to ‘double acceptance’ by the international community of states as a whole.⁸

This threshold for gaining peremptory status is high, for although it does not require a consensus amongst all states (and one single state would not be able to block the recognition of a peremptory norm), it does require the acceptance of a large majority of states.⁹ The fact that complete consensus amongst states is not a requirement for the emergence of a peremptory norm further implies that the (very small number of) states not in agreement can nonetheless be bound against their will by the peremptory obligation.¹⁰ For example, the claim of South Africa’s government that it was a persistent objector to the prohibition of

⁴ Verdross (Forbidden Treaties) n 3 574; Shelton n 3 299.

⁵ France has still not ratified the VCLT in large part due to opposition to *jus cogens*.

⁶ Eric Suy, ‘Article 53 Treaties conflicting with a peremptory norm of general international law (‘*jus cogens*’), in Olivier Corten & Pierre Klein (eds), *The Vienna Convention on the Law of Treaties A Commentary Volume II* (Oxford University Press, Oxford, 2011) 1225. Under the Soviet international law doctrine the principles of peaceful coexistence, which also found their way into the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV) of 24 October 1970, were regarded as peremptory in nature. See also Jure Vidmar, ‘Norm Conflicts and Hierarchy in International Law: Towards a Vertical International System?’, in Erika de Wet & Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press, 2012) 26; Christine Chinkin, ‘Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution’, in 64 *Finnish Yearbook of International Law* (2006) 68.

⁷ Shelton n 3 300. It is of course possible that a norm of *jus cogens* finds its way into a treaty, as is the case with most of the obligations on the ILC’s list referred to in (the text leading up to) n 13.

⁸ Vidmar n 6 25.

⁹ Elsewhere this author has argued that *jus cogens* norms would be obligations *erga omnes*, i.e. would have effect towards the international community as a whole (to be understood as states and other subjects of international law). See Erika de Wet, ‘The International Constitutional Order’, 55 *International and Comparative Law Quarterly* (2006) 61; Support for this position can be found in *Barcelona Traction, Light and Power Company Ltd* (Second Phase) ICJ Rep 1970 32. Although the ICJ did not expressly refer to *ius cogens* it implied as much by the types of norms it mentioned as examples of *erga omnes* norms (i.e. prohibition of unilateral use of force, genocide and the prohibition of slavery and racial discrimination). For an analysis of the relationship between *ius cogens* and *erga omnes* obligations, see the contribution of Olivier de Schutter in this Handbook.

¹⁰ Vidmar, n 6 26.

racial discrimination and apartheid was universally rejected with the argument that peremptory law does not exempt persistent objectors.¹¹ In the case of a peremptory norm the will of an individual state can be overruled by the collective will, underpinned by shared values, of the international community of states.¹²

2. The content of *jus cogens*

Since the late 1990s increased acceptance of the concept of *jus cogens* can be observed in doctrine, the case law of international courts and tribunals and the work of the United Nations International Law Commission (ILC). According to the ILC, the most frequently cited candidates for *jus cogens* status include (a) the prohibition of aggressive use of force; (b) the right to self-defense; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and *apartheid*, and (i) the prohibition of hostilities directed at civilian population (“basic rules of international humanitarian law”).¹³

This list features predominantly human rights obligations and, as will be discussed below, in particular the prohibition of genocide and the prohibition of torture. These prohibitions have been widely recognized by judicial bodies as constituting *jus cogens*. Some decisions and judgments have also extended the list of human rights that have acquired peremptory status beyond what is included in the ILC’s list. A common feature of most of these decisions is the absence of any systematic reference to state practice and/or *opinio juris* to buttress the conclusion that the norm(s) in question are *jus cogens*.

This lack of supporting evidence was apparent, for example, when the International Court of Justice (ICJ) for the first time explicitly referred to *jus cogens* in a majority opinion.¹⁴ In the 2006 decision *Democratic Republic of Congo v Rwanda*, pertaining to armed activities on the territory of the Congo,¹⁵ the ICJ described genocide as ‘assuredly’ being a peremptory norm of general international law, without engaging in any analysis of

¹¹ Vidmar n 6 26.

¹² See Shelton n 3 299, who also notes that the notion of *jus cogens* deviates from the notion of a strictly voluntarist view of international law.

¹³ Fragmentation report n 1 para 374. See also International Law Commission, Draft Articles on State Responsibility, Commentary on Article 40, paras. 4-6 in *Official Records of the General Assembly, Fifth-sixth Session (A/56/10)* 283-284; *ibid*, Draft articles on the Responsibility of International Organizations with Commentaries, *Yearbook of the International Law Commission* (United Nations 2011), commentary to Art. 26.

¹⁴ In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, 1986 ICJ Rep 14, 100, para 190 (27 June) the court did not explicitly refer to *jus cogens* norms, even though this is often claimed. Instead the ICJ referred to some rules of international humanitarian law as ‘intransgressible’ principles of customary international law. Shelton n 3 305.

¹⁵ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep 6, 32.

state practice.¹⁶ The same lack of systematic analysis could be witnessed in the *Furundzija*¹⁷ and *Al Adsani*¹⁸ decisions of, respectively, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the European Court of Human Rights (ECtHR), when concluding that the prohibition of torture constitutes a *jus cogens* norm.

The 2003 advisory opinion of the Inter-American Court of Human Rights (IACtHR) on undocumented migrants¹⁹ cited nineteen treaties and fourteen soft law instruments in an attempt to illustrate the ‘universal acceptance’ of the obligation of non-discrimination.²⁰ However, in support of its conclusion that the obligation also enjoyed peremptory status the IACtHR seemed to have relied on natural law. It linked equality before the law to the dignity of the individual, claiming that all persons have attributes inherent to their human dignity that may not be disregarded by those in power.²¹ The Inter-American Commission on Human Rights has also relied on natural law in motivating its position that the right to life has *jus cogens* status. It stated that *jus cogens* derives from a higher order of norms established in ancient times and which cannot be contravened by the laws of man or of nations.²²

The Inter-American Commission on Human Rights further suggested, without additional analysis, that non-derogable treaty rights constitute an important starting point for identifying *jus cogens* norms.²³ On one hand the quality of non-derogability does suggest that the right in question has special significance.²⁴ For example, the prohibition of slavery and torture, which are generally regarded as peremptory norms, are also recognized as non-derogable in the International Covenant on Civil and Political Rights of 1966 (ICCPR), the European Convention of Human Rights and Fundamental Freedoms of 1950 (ECHR) and the

¹⁶ Shelton n 3 306.

¹⁷ *Prosecutor v Anto Furundzija*, Case no. IT-95-17/1-T10, Trial Chamber, Judgment, 10 December 1998, para 153.

¹⁸ *Al-Adsani v United Kingdom*, Appl. No. 35763/97, ECtHR, 21 November 2001, para 55, 34 EHRR 11, 2002.

¹⁹ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion, Inter American Court of Human Rights (ser A) No 18 (2003).

²⁰ *Undocumented Migrants* opinion n 19 para 99; Shelton n 3 310.

²¹ *Undocumented Migrants* opinion n 19 paras 45, 73, 99. See also the position of the Inter-American Commission of Human Rights, *ibid* para. 47, which intervened in the case. It submitted that the principle of non-discrimination constitutes *jus cogens*, given its ‘fundamental importance’ in all international laws, despite admitting that the international community has not yet reached consensus on prohibiting discrimination based on motives other than racial discrimination. See also Shelton n 3 310.

²² *Victims of the Tugboat “13 de Marzo” v. Cuba*, case 11.436, Inter-American Commission on Human Rights, Report No. 47/96, OEA/Ser.L/V/II.95, doc 7 rev par 79 (1996).

²³ See *Michael Domingues (United States)*, Case 12.285, Inter-American Commission of Human Rights, Report No. 62/62, OEA/Ser.L/V/II.117, doc.1, rev.1 para 49 (2003); Shelton n 3 314..

²⁴ The Human Rights Committee, General Comment No. 29: States of Emergency (article 4); 2001/08/31 CCPR/C/21/Rev.1/Add.11 described the proclamation of certain rights as being of a non-derogable nature as a recognition in part of their peremptory character. But see Harmen van der Wilt, ‘On the Hierarchy between Extradition and Human Rights’, in De Wet & Vidmar n 6 at 154. He suggests that the non-derogable (absolute) quality of a norm such as the prohibition of torture gives it a special quality as a result of which the (additional) qualification of *jus cogens* would have little added value.

Inter-American Convention on Human Rights (IACHR). On the other hand the lists of non-derogable rights in the three conventions are not identical, with the IACHR in particular containing a very extensive list.²⁵

Overlap exists only in relation to the right to life (prohibition of the arbitrary deprivation of life), the prohibition of torture, inhuman and degrading punishment, the prohibition of slavery and the prohibition of retroactive application of criminal offences. While a case can be made that (most of) these rights have acquired preemptory status, it is doubtful whether this could be said of the other rights listed as non-derogable in one or more of these instruments, such as the prohibition against imprisonment for breach of a contractual obligation (non-derogable according to ICCPR), or the right to a name or the right to a nationality (non-derogable according to the IACHR). In essence therefore the depiction of a right as non-derogable in an international human rights instrument would be a factor to be taken into account when determining whether it has acquired *jus cogens*, but is not in itself decisive.²⁶

The same natural law approach present in the above decisions underpinned the sweeping approach of the (then still) Court of First Instance (CFI) of the European Union in the first *Kadi* decision.²⁷ The case concerned the targeted sanctioning of individuals suspected of involvement with Al Qaeda by the United Nations Security Council in accordance with Security Council Resolution 1267 of 15 October (1999) and subsequent resolutions, without the possibility of a fair trial.²⁸ According to the CFI it followed from Articles 25 and 103 of the Charter that United Nations Security Council obligations prevailed

²⁵ Art. 4 (2) ICCPR recognizes as non-derogable: Art 6 (the right to life); Art 7 (prohibition of torture, inhuman or degrading treatment); Art 8(1) and (2) (prohibition of slavery); Art 11 (prohibition of imprisonment for contractual obligations); Art 15 (prevention of retroactive application of criminal offences); Art 16 (the right to recognition as a person before the law); and Art 18 (freedom of thought, conscience and religion). Art 15 ECHR recognizes as non-derogable: Art. 2 (right to life); Art 3 (prohibition of torture, inhuman or degrading treatment); Art. 4(1) (prohibition of slavery); and Art 7 (prevention of retroactive application of criminal offences). Art 27 (2) IACHR recognizes as non-derogable: Art 3 (right to recognition before the law), Art 4 (right to life), Art 5 (prevention of torture, inhumane or degrading treatment), Art 6 (prohibition of slavery), Article 9 (prevention of retroactive application of criminal offences); Art 12 (freedom of conscience and religion); Art 17 (rights of the family); Art 18 (right to a name); Art 19 (rights of the child); Art 20 (right to nationality); and Art 23 (right to participate in Government); or the judicial guarantees essential for the protection of such rights.

²⁶ The Human Rights Committee has similarly assessed the quality of non-derogable rights in its General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 1994/11/04, CCPR/C/21/Rev.1/Add.6, General Comment No 24. In par. 10 it noted that the non-derogable character of a right does not necessarily mean that it is absolute and exempt from reservations.

²⁷ Case T-315/01, *Kadi v Council and Commission* [2005] ECR II-3649.

²⁸ See Erika de Wet, 'Human Rights Considerations and the Enforcement of Targeted Sanctions in Europe: The Emergence of Core Standards of Judicial Protection for overview and analysis of literature' in Bardo Fassbender (ed) *Securing Human Rights? Achievements and Challenges of the UN Security Council* (Oxford University Press, Oxford, 2011) 141 ff.

over any other conflicting obligation of international treaty law. In addition, the CFI did not have the right in cases appropriately before it to examine (incidentally) the legality of Security Council resolutions.²⁹ At the same time the CFI claimed that an exception existed to these principles in respect to *jus cogens* obligations. It would have the right to review (incidentally) the legality of Security Council Resolutions which conflicted with *jus cogens* obligations, as these obligations were binding on all subjects of international law including the organs of the United Nations.³⁰

In determining which norms constitute *jus cogens*, the CFI seemed to have relied on a natural law argument, according to which the United Nations Charter itself presupposed the existence of mandatory principles of international law, in particular the protection of the fundamental rights of the human person. By following this line of argument, the CFI elevated the entire body of human rights law to the peremptory level from which neither states nor the organs of the United Nations may derogate.³¹ However, any expectation that this sweeping approach would result in effective judicial and other human rights protection for the targeted individuals was immediately quashed by the fact that the CFI also seemed to have elevated the limitations attached to the rights in question to the peremptory level.³² As a result, the CFI granted the Security Council extensive discretion in limiting (inter alia) the rights to a fair trial and the right to property, and concluded that no violation of any *jus cogens* obligation occurred through the UN's listing procedure.³³ Although the CFI's decision was overturned by the European Court of Justice (ECJ) on appeal, the ECJ did not engage with or explicitly overturn the CFI's *jus cogens* reasoning. Instead, the ECJ followed a dualist approach in the sense that it granted judicial protection exclusively on the basis of European Union law, which it treated as a domestic (in the sense of autonomous) legal system.³⁴ As the *jus cogens*

²⁹ *Kadi* decision, n 27, paras 181-183 and paras 224-225; see also Shelton n 3 311.

³⁰ *Kadi* decision, n 27 para 226; It is now accepted in doctrine and practice that the United Nations Security Council is bound by *jus cogens*. However, the challenge remains to determine which norms would constitute *jus cogens* and therefore bind the Council. See extensively Antonios Tzanakopoulos, 'Collective Security and Human Rights', in Erika de Wet & Jure Vidmar n 6 49 ff.

³¹ *Kadi* decision, n 27 para 231; Shelton n 3 312. Compare also *Youssef Nada v State Secretariat for Economic Affairs and Federal Department of Economic Affairs, Administrative appeal judgment*, Case No 1A 45/2007; BGE 133 II 450, 14 November 2007, para 7.3; ILDC 461 (CH 2007). In this instance, the court followed the reasoning of the *Kadi* decision, but limited the range of peremptory norms – without any explanation – to the right to life, the protection from torture and humiliating treatment, the freedom from slavery and human trafficking, the prohibition on collective punishment, the principle of personal responsibility in criminal prosecution, and the principle of non-refoulement. It did not include in its list the right to a fair trial.

³² See also Carlo Focarelli, 'Promotional *Jus Cogens*: A Critical Appraisal of *Jus Cogens*' Legal Effects', 77 *Nordic Journal of International Law* (2008) 436.

³³ *Kadi* decision, n 27 paras 286, 288; Shelton n 3 312.

³⁴ See Joined Cases C-402/05 P and C-402/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*, OJ 2008 C 285/2.

reasoning of the CFI remained untouched, its ghost may continue to haunt debate over the content of *jus cogens*.

The vague natural law arguments of the courts above combined with their scant reliance on state practice arguably poses one of the biggest threats to the credibility of peremptory norms as representing the core values of the international community as a whole.³⁵ The decisions open the door to the inclusion of a wide variety of arbitrarily selected norms on the *jus cogens* list and for potential abuse by courts, states and other actors claiming to serve the interests of the international community.³⁶

3. The practical impact of *jus cogens*

An overview of case law, some of which is cited below,³⁷ reveals that despite the categorical fashion in which some judicial bodies acknowledge the peremptory status of certain norms, very few judgments have thus far given extensive effect to the normative ambition of *jus cogens*.³⁸ This reluctance can be evidenced in the limited role that peremptory norms play in the resolution of norm conflicts before international and domestic judicial bodies. This applies to norm conflicts between treaty obligations, which constitute the original context in which Article 53 VCLT developed,³⁹ as well as norm conflicts between treaty and customary obligations.

In general, judges do not seem to be convinced that peremptory norms would have the legal effects that the various protagonists of the cause attribute to them.⁴⁰ This follows inter alia from the narrow scope of most peremptory obligations, as well as the fact that courts rely on conflict avoidance techniques that obscures the relevance or added value of the peremptory status of (one of) the norms in question. The question also arises why one would need to rely on the ‘special’ character of *jus cogens*, when a similar result could be achieved by relying on ‘ordinary’ customary international law.

*3.1. Limiting the scope of *jus cogens* norms*

³⁵ Shelton n 3 313; Andrea Bianchi ‘Human Rights and the Magic of Jus Cogens’, 19 *European Journal of International Law* (2008) 506.

³⁶ Focarelli n 32 440; Chinkin n 6 68. For a critique on the notion of universal values see also Koskeniemi, Martti. ‘International Law in Europe: between Tradition and Renewal’, 16 *European Journal of International Law* (2005) 112 ff.

³⁷ For an extensive overview see Erika de Wet & Jure Vidmar (eds) n 6.

³⁸ Jutta Brunnée, ‘The Prohibition on Torture: Driving Jus Cogens Home?’, 104 *Proceedings of the Annual Meeting of the American Society of International Law* (2010) 454.

³⁹ Some authors regard the application of *jus cogens* outside of the treaty context as an over-extension of its original role. Andreas Zimmermann, ‘Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks’, 16 *Michigan Journal of International Law* (1995) 438; Wladyslaw Czaplinski, ‘Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments’, 23 *Polish Yearbook of International Law* (1999) 88.

⁴⁰ Brunnée, n 38 455.

In accordance with Article 53 VCLT, a treaty is null and void if it is concluded in conflict with a peremptory norm of general international law (i.e. *jus cogens*). To give a concrete example, a treaty between two countries aimed at committing genocide against a particular ethnic group on one or both of their territories would be null and void. The states parties would also have to eliminate as far as possible the consequences of acts performed in reliance of provisions in conflict with the peremptory norm, and should bring their mutual relations in conformity with the peremptory norm.⁴¹ Where a treaty itself does not violate a *jus cogens* norm, but the execution of certain obligations under the treaty would have such effect, the state is relieved from giving effect to the obligation in question. The treaty itself would, however, not be null and void. For example, the obligations existing under an extradition treaty would fall away if it resulted in the extradition of a person to a country where he or she faced torture.⁴² The treaty itself would nonetheless remain intact.⁴³

In practice, however, the main threat to *jus cogens* norms does not result from (particular obligations within) bilateral or multilateral treaties, but from acts of state organs or officials towards individuals or groups on their territory.⁴⁴ In these circumstances norm conflicts can arise which are sometimes perceived as existing between a peremptory norm and a norm under customary international law. A pertinent example concerns the violation of the prohibition of torture, which can result in proceedings in foreign courts against the state in which the torture took place, or against (a) state official(s) involved in its commission. The court would then be confronted with the norm conflict between the torture victim's right to a court (e.g. under Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms of 1950) and the obligation under customary international law to provide immunity to foreign states and their officials. Closer scrutiny reveals that there is no direct conflict

⁴¹ VCLT n 2, Art. 71; see also A.J.J. de Hoogh, 'The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective', 42 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1991) 190.

⁴² After 9 September 2011 there have been allegations of agreements between the USA and Egypt, facilitating the transport of detainees from the USA to Egypt where they were subjected to torture during interrogation. See Erika de Wet, 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law' 15 *European Journal of International Law* (2004) 99.

⁴³ De Wet n 42 99-100. The Swiss Federal Supreme Court has asserted that non-refoulement in itself constitutes *jus cogens*, The Canadian, Kenyan and New Zealand courts for their part have been less inclined to adopt this view. See *Spring v. Switzerland*, Federal Supreme Court, 126 II 145-169, ILDC 351 (CH 2000); *Ktaer Abbas Habib Al Qutaifi and Another v. Union of India and Others*, Gujarat High Court, 1999 CRI.L.J. 919, par. 18; *Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* [2002] SCC 1; *Adel Mohammed Abdulkadir Al-dahas v Commissioner of Police et al*, High Court of Kenya, Misc. Crim. Appli.; 684 of 2003 [2003] e-KLR and Misc. Civ. Appli. 1546 of 2004 [2007] e-KLR; *Attorney-General v. Zaoui et al*, [2005] NZSC 38, para 51; Van der Wilt n 24 154.

⁴⁴ Theoder Meron, 'On a Hierarchy of International Human Rights', 80 *American Journal of International Law* (1986) 14.

between the law of immunity and *jus cogens*, as the normative scope of the peremptory obligation only encompasses the prohibition of torture as such (the negative obligation not to engage in torture).⁴⁵ It does not yet encompass an ancillary obligation to deny immunity.⁴⁶ Put another way, access to a court is not seen as a peremptory norm.

In recent Italian decisions pertaining to immunities, notably *Ferrini* and *Lozano*, the courts gave significant weight to the values underpinning *jus cogens* obligations and the need for enforcing these obligations and the values that they represent effectively.⁴⁷ This result oriented argument, which then results in the lifting of immunity and potential widening of the scope of the peremptory norm, was also inherent in the minority decision in the *Al Adsani* case of the ECtHR.⁴⁸ However, these cases remain exceptions to the rule and are not yet representative of the case law of international or domestic jurisdictions. In fact, when the *Ferrini* case subsequently culminated in proceedings between Germany and Italy before the ICJ in 2012, the ICJ explicitly rejected this line of argument. The ICJ saw no basis for the proposition that a rule lacking the status of *jus cogens* may not be applied even if that would hinder the enforcement of a *jus cogens* norm.⁴⁹

In this context one may also recall the reluctance of the ICJ to accept the *effet util* argument in relation to its own jurisdiction in the *Congo v. Rwanda* decision. The ICJ was not prepared to accept that the *jus cogens* characterization of the prohibition of genocide could in itself provide a basis for jurisdiction. It concluded that a reservation to its jurisdiction cannot be judged invalid on the ground that it withholds jurisdiction over *jus cogens* violations. Rwanda's exclusion of the ICJ's jurisdiction through a reservation to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 only excluded a particular method of dispute and had no bearing on that country's substantive obligations concerning the prohibition of genocide. The prohibition of genocide is a matter

⁴⁵ Vidmar n 6 36.

⁴⁶ *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, paras 44-45; *Al-Adsani* decision n 18 para 61; *Bouzari v. Iran*, 243 D.L.R. (4th) 406, ILDC 175 (CA 2004) para 90.; *Schreiber v. Germany and Canada* [2002] 3 S.C.R. 269, ILDC 60 (CA 2002).

⁴⁷ *Ferrini v. Germany*, No. 5044/04, 87 (2004) *Rivista di diritto internazionale* 539, ILDC 19 (IT 2004), 128 ILR 659 (11 March 2004); *Criminal Proceedings against Milde*, No 1072/09, 92 (2009) *Rivista di diritto internazionale* 618, ILDC 1224 (IT 2009). *Lozano v. Italy*, Appeal Judgment Case No 31171/2008, ILDC 1085 (IT 2008); see also *Lord Millet in R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* (No 3) [2000] 1 AC 147, [1999] 2 All ER 97 at 177. See also Riccardo Pavoni, 'Human Rights and the Immunities of Foreign States and International Organizations', in De Wet & Vidmar n 6 86-87.

⁴⁸ *Al-Adsani* decision n 18, Joint Dissenting Opinion of Judges Rozakis and Caflisch, Joined by Judges Wildhaber, Costa, Cabral Barreto and Vajic, para 3. A similar approach was supported in the obiter dictum statement of the ICTZ in the *Furundzija* decision no 16 paras 155-157.

⁴⁹ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, [2012] ICJ, par. 95, available at <http://www.icj-cij.org/docket/files/143/16883.pdf>. See also Philippa Webb, 'Human Rights and the Immunities of State Officials', in De Wet & Vidmar, n 6 122-123.

distinct from jurisdiction over disputes pertaining to genocide and there is no peremptory norm in international law that would oblige a state to accept the ICJ's jurisdiction in a case involving genocide.⁵⁰

The above mentioned examples pertaining to the perceived conflict between the prohibition of torture and immunities exposes what is arguably one of the most important reasons for the limited impact of peremptory norms in all types of norm conflicts, namely the narrow scope that judicial bodies tend to attribute to them. Most judicial bodies, whether international or domestic have the inclination to avoid or reduce norm conflict through interpretation. By limiting the scope of a *jus cogens* obligation, the judicial body in question reduces the possibility of a norm conflict arising between a peremptory obligation and any other obligation. This necessarily also reduces the impact of peremptory norms on norm conflict resolution and their ability to provide effective protection for the values which they represent.

Another illuminating example in this context concerns diplomatic assurances in extradition law.⁵¹ Courts have allowed extradition to countries known for engaging in torture practices in instances where the receiving country has given an assurance that this would not occur in relation to the specific extraditee.⁵² The conflict between the obligation to extradite and the rule prohibiting refoulement is thereby prevented by narrowing down the scope (including the absolute character) of the prohibition. The latter is only triggered if the extraditing state agrees to send a person to a requesting state notorious for torture practices *without* having received assurances that the extraditee will not be subjected to torture. The prohibition therefore does not apply broadly in the sense that extradition to such a state is always prohibited. In the process, the absolute character of the prohibition of torture itself may also be undermined, as the extraditee might still be tortured, if the diplomatic assurances are not honoured subsequent to the extradition.⁵³ Similarly, when faced with extradition or deportation requests courts tend to apply a high threshold when determining what constitutes

⁵⁰ *Congo v Rwanda* decision n 15 paras 67, 69; Shelton n 3 307.

⁵¹ Van der Wilt n 24 164 ff.

⁵² *Al Moayed v. Germany*, ECtHR, Appl. No 35865/03, 20 February 2007, para 67 ff; *Judge v. Canada* (829/1998) 5 August 2002, UN doc. CCPR/C/78/D/829/1998, para 10.9; *United States v. Burns* [2001], 1 SCR 283; *Mohamed and another v President of the Republic of South Africa and others*, 2001 (3) SA 893 (CC) ILDC 284 (ZA 2001)\ para 3.1.1; *Short v. The Netherlands*, 1990 NJ 1991, 249.

⁵³ Similarly, in the area of refugee law, states have defined refugee status in a very narrow manner. As a result, the duty not to refoule under the 1951 Refugee Convention rarely arises. See Geoff Gilbert, 'Human Rights, Refugees and Other Displaced Persons in International Law', in De Wet & Vidmar n 6 190.

torture, inhuman or degrading treatment⁵⁴, as well as evidentiary proof that the risk to the individual is specific and personal.⁵⁵ These requirements can result in further narrowing the scope of the peremptory prohibition.

3.2. (Other) techniques for resorting to *jus cogens*

In addition to techniques of interpretation that affect the substance (scope) of conflicting rights and obligations, courts also engage in formalistic techniques of conflict avoidance that by implication avoid the need to give full effect to the applicable peremptory norm. One such technique consists of distinguishing substantive and procedural law, in particular as applied in relation to the law of immunities.⁵⁶ In making and applying this distinction, obligations pertaining to immunities cannot conflict with the *jus cogens* norm encompassed in the prohibition of torture, as the former is a matter of procedural law while the latter constitutes substantive law.⁵⁷ By insisting that no conflict can exist between procedural and substantive norms, the court avoids the need to deal openly with the issue of norm conflicts and, by extension, the relevance of the higher status of peremptory norms in resolving the conflict.

Another formalistic conflict avoidance mechanism applied in relation to the law of immunities concerns the distinction between private and official acts, when the immunity *ratione materiae* of state official is concerned. By arguing that crimes under international law (such as the prohibition of torture) cannot constitute ‘official’ acts, but must be qualified as ‘private acts’ of the individual the act in question is excluded from the scope of the *immunity*

⁵⁴ For example, in *R (on the application of Bary) v. Secretary of State for the Home Department* [2009] WL 2392232; the House of Lords did not, under the circumstances, accept harsh prison conditions combined with the possibility of life without parole in a Florida prison as a bar to extradition.

⁵⁵ See for example, United Nations Committee against Torture, *Chipana v. Venezuela*, CAT/C/21/D/110/1998, para 3; United Nations Human Rights Committee, 31 July 2008, *Maksudov, Rakhimov, Tashbaev and Pirmatov v. Kyrgyzstan*, CCPR/C/93/D 1461, 1462 and 1447/2006, para 12.4; *Saadi v. Italy*, ECtHR, Appl. No. 37201/06, 27 February 2008, paras 138, 139.

⁵⁶ Domestic cases that upheld immunity *ratione personae* of state officials and (implicitly) supported the procedural-substantive distinction include inter alia *Affaire Kadhaï*, Judgment No 1414 (Court de Cassation, 13 March 2001) 125 ILR 508-510; Court de Cassation (Chambre Criminelle) 19 January 2010, *L'Association Fédération Nationale des victimes d'accidents collectifs 'Fenvac sos catastrophe', L'association des familles des victimes du 'Joala'*, Arrêt No 09-84.818; *The Hague City Party and ors v The Netherlands and ors*, Interlocutory Proceedings, KG 05/432, ILDC 849 (NL 2005); *Bow Street Magistrates' Court, Re Mofaz*, First Instance unreported (12 February 2004), ILDC 97 (UK 2004); *Bow Street Magistrates' Court, Re Mugabe*, First Instance unreported (14 January 2004), ILDC 96 (UK 2004); *Res Sharon and Yaron* Final Appeal, no p 02 1139 F/1 (Court de Cassation, 12 February 2003), ILDC 5 (BE 2003).

⁵⁷ See generally Webb n 49 118; Pavoni n 47 74. This line of argument was also followed by the ICJ in the *Jurisdictional Immunities* case n 49, par 93: “Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.”

ratione. As a result, a norm conflict with the right to access to court or the right to a remedy will not arise.⁵⁸ However, it is doubtful whether the labelling of torture as a private act is convincing, since the treaty definition of torture is limited to acts of state officials⁵⁹ and such acts almost invariably involve the support of the state apparatus which should also incur state responsibility.⁶⁰ Of particular importance for the current analysis is the fact that the *jus cogens* status of the prohibition of torture was not relied on for excluding *immunity ratione*, as no norm conflict involving a peremptory norm was acknowledged.

3.3. Resorting to 'ordinary' custom instead of *jus cogens*

A further factor that may account for the limited impact of peremptory norms in judicial practice would be the fact that the 'ordinary' customary status of a (human rights) norm can usually suffice in protecting the human rights interests at stake. For example, one could argue that in relation to the prohibition of torture an exception has developed under customary international law, in accordance with which state immunity does not apply before foreign courts.⁶¹ If one accepted that such a customary exception is recognized, states would - unless they were persistent objectors at the time the customary exception developed - be bound by it, regardless of whether the exception also has acquired *jus cogens* status.⁶²

Support for this line of reasoning can be found in the *Distomo* decision of the Greek Supreme Court (*Areios Pagos*) that concerned a compensation claim for the massacre of 218 civilians and the destruction of their property by members of the SS in June 1944.⁶³ The Supreme Court claimed the existence of a new rule of customary international law, in accordance with which states could not rely on sovereign immunity for those violations of international law which its organs committed while present in the territory of the forum state. The Court thus seemed to rely on the existence of a *customary international* exception to sovereign immunity in instances where the forum state coincided with the state on whose

⁵⁸ See inter alia Lord Hutton in *Pinochet (No 3)* n 47; *Bouterse*, Judgment on Appeal, HR 00749/01 CW 2323; ILDC 80 (NL 2001) para 4.2., Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Merits)* [2002] ICJ Rep 3, para 85.

⁵⁹ The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, art. 1, defines torture as prohibited acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Text available at <http://www2.ohchr.org/english/law/cat.htm> (accessed 23 March 2012).

⁶⁰ Webb n 49 119-120.

⁶¹ De Wet n 42 108.

⁶² See Gilbert n 53 88.

⁶³ *Germany v Prefecture of Voiotia*, representing 118 persons from Distomo village, Petition on cassation against default, no 11/2000, Judgment of 4 May 2000, 49 Nomiko Vima (Law Tribune) 2000, pp 212-229; ILDC 287 (GR 2000).

territory the illegal behavior occurred, rather than on the hierarchical nature and scope of the prohibition against torture.⁶⁴

In addition, the threshold for recognizing a right or obligation as constituting customary law is lower than that of *jus cogens*. Focusing on the customary nature of the rights and obligations in question rather than their *jus cogens* character could therefore be equally if not more effective. Moreover, as this author has argued elsewhere, by bypassing ordinary customary law in favor of arguing for *jus cogens*, litigants and scholars give the impression that customary law has no value in itself. This could severely undermine the binding force of international law in general. This criticism touches on one of the major controversies in relation to the recognition of a hierarchy of norms in international law, namely the fear that the recognition of superior norms will engender back-sliding on commitments already assumed and a devaluation of norms that fail to achieve the elevated ranking.⁶⁵ On the other hand, it might be overly pessimistic to assume that such an undesirable outcome would necessarily follow from the recognition of a hierarchy of norms in international law. To the extent that the full realization of peremptory norms would also depend on the realization of non-peremptory norms of international law, the recognition of a hierarchy of norms could actually serve as a catalyst for a better realization of international law in general.⁶⁶

4. The relationship between *jus cogens* and *erga omnes*

4.1. Identifying erga omnes norms

The concept of *erga omnes* was introduced into positive law by the ICJ in the *Barcelona traction* case of 1970, when determining that *erga omnes* obligations are the concern of all states. In view of the importance of the obligations involved, all states can be held to have a

⁶⁴ But see *Germany v Margellos*, Petition for cassation, Special Supreme Court (Anotato Eidiko Dikastirio) 6/2002, Judgment of 17 Septmeber 2002, Government Gazette; 1 AED 11–19, 3 March 2003; ILDC 87 (GR 2002). In this decision the Supreme Special Court determined that such an exception was not supported by a wide-spread and consisted state practice, regardless of whether the acts constituted a violation of *jus cogens* norms or not. The ICJ took a similar position in the *Jurisdictional Immunities* case n 49, par 78, at least in relation to acts committed on the territory of the forum state by the armed forces of a foreign state. It concluded that customary international law continued to require that a state be accorded immunity in proceedings for torts allegedly committed on the territory of another state by its armed forces and other organs of State in the course of conducting an armed conflict.

⁶⁵ De Wet n 42 118-119. See generally for a critique of hierarchy in international law Prosper Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* (1983) 413 ff.

⁶⁶ The *jus cogens* dimension of a particular norm could, through its moral appeal, accelerate the development of state practice and *opinio juris* required for the emergence of a new customary international obligation. See Focarelli, n 32 449, 457.

legal interest in their protection.⁶⁷ This concept of obligations that are directed towards the international community as a whole further finds recognition in the law of state responsibility. In the Articles on State Responsibility of 2001, the International Law Commission (ILC) drew a distinction between breaches of bilateral obligations and obligations of a collective interest nature, which include obligations towards the international community as a whole.⁶⁸ Breaches of a bilateral nature include situations where the performance of an obligation involves two individual states, even though the treaty framework or customary rule in question establishes obligations applicable to all states (parties).⁶⁹ In such an instance the nature of the obligations stemming from the multilateral treaty or customary rule can be described as “bundles of bilateral obligations”.⁷⁰ An example in point would be Article 22 of the Vienna Convention on Diplomatic Relations of 1961, where the obligation to protect the premises of a diplomatic mission is owed by the individual receiving state to the individual sending state.⁷¹

Breaches of a collective nature concern obligations that have been established for the protection of the collective interest of a group of states (*erga omnes partes*) or indeed of the international community as a whole (*erga omnes*).⁷² Concrete examples of *erga omnes (partes)* obligations can be found in particular in human rights treaties. Obligations stemming from regional or universal human rights treaties would have *erga omnes partes* effect towards other States parties, as well as *erga omnes* effect to the extent that they have been recognized as customary international law.⁷³ The same would apply to the obligations articulated in the Statute of the International Criminal Court (ICC) and which grant the ICC jurisdiction over the most serious crimes of concern to the ‘international community as a whole’, namely genocide, crimes against humanity and war crimes.

⁶⁷ *Barcelona Traction, Light and Power Company Ltd* (Second Phase) ICJ Rep 1970 3, 32; See also *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, 102; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136, 199.

⁶⁸ See Art 42 and Art 48 of the Articles on State Responsibility available in James Crawford *The International Law Commission’s Articles on State Responsibility* (Cambridge University Press Cambridge 2002) 257.

⁶⁹ Crawford n 68 257.

⁷⁰ *Ibid* 258.

⁷¹ See *United States Diplomatic and Consular Staff in Tehran* ICJ Rep 1980 3 ff; see also Crawford n 68 257-58.

⁷² Crawford n 68 277.

⁷³ Pierre-Marie Dupuy ‘L’unité de l’ordre juridique international’, 297 *Recueil des Cours de l’académie de droit international* (2002) 382, 384; Crawford n 68 277-8; International Law Institute, *The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States*, Resolution adopted during the Session of Santiago de Compostela 1989 Art 1 available at <http://www.idi-iil.org/>. See Human Rights Committee General Comment No 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 of 26 May 2004 para 2.

Particularly relevant for the current contribution is the question if and to what extent *jus cogens* and *erga omnes* obligations overlap. The *Barcelona Traction* decision of the ICJ provides authority for the conclusion that *jus cogens* obligations would have *erga omnes* effect.⁷⁴ Without expressly referring to *jus cogens* the ICJ implied as much by the types of obligations it mentioned as examples of *erga omnes* norms. These included the out-lawing of the unilateral use of force, genocide and the prohibition of slavery and racial discrimination. Given the fact that these same prohibitions are widely regarded as being of a peremptory nature, it follows that when an obligation is recognized as one from which no derogation is permitted due to its fundamental nature, all states (and other subjects of international law) have a legal interest in its protection.⁷⁵

One should be careful however, not to assume that the opposite also applies namely that all *erga omnes* obligations necessarily also have *jus cogens* status.⁷⁶ For example, the human rights obligations contained in the ICCPR and ICESCR would arguably all have *erga omnes* effect to the extent that they have acquired customary international law status.⁷⁷ Their collective interest nature gives the international community as a whole an interest in their performance and reflects that they amount to more than mere “bundles of bilateral obligations”. At the same time, this fact does not in and of itself elevate all *erga omnes* human rights obligations to peremptory norms. The peremptory character of the prohibition of for example genocide and torture resulted from their specific recognition as such by a large majority of states.

4.2. *The implications of erga omnes status for the enforcement of jus cogens obligations*

Having determined that *jus cogens* obligations possess *erga omnes* status, one needs to reflect on the implications of such overlap. In particular, the question arises whether the legal interest that all states would have in the protection of the *jus cogens* obligations could contribute to their more effective enforcement. The first avenue through which *erga omnes*

⁷⁴ *Barcelona Traction* decision n 67 32.

⁷⁵ Ibid; Jochen A. Frowein ‘Collective Enforcement of International Obligations’, 47 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (1987) 71; Karl Zemanek, ‘New Trends in the Enforcement of *erga omnes* Obligations’, 4 *Max Planck Yearbook of United Nations Law* (2000) 6-7. See generally on the relationship between *jus cogens* and *erga omnes* obligations Cherif Bassiouni, ‘International Crimes: Jus Cogens and Obligations Erga Omnes’ 59 *Law and Contemporary Problems* (1996) 63 ff; André De Hoogh ‘The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective’, 42 *Österreichische Zeitschrift für öffentliches und Völkerrecht* (1991) 183 ff; Claudia Annacker ‘The Legal Regime of Erga Omnes Obligations in International Law’, 46 *Austrian Journal of Public International Law* (1994) 131 ff.

⁷⁶ Dupuy n 73 385.

⁷⁷ Those rights in the ICCPR and ICESCR which have not yet acquired customary status would nonetheless have *erga omnes partes* effect towards other states parties.

status can impact the enforcement of peremptory norms concerns Article 48 of the Articles on State Responsibility, which has created a system of responsibility for serious violations of international obligations towards the international community as a whole (*erga omnes*). In accordance with Article 48, states other than injured states are entitled to invoke responsibility where that obligation breached is owed to the international community as a whole. When invoking responsibility in this fashion, the invoking state may claim from the responsible state cessation of the internationally wrongful act, as well as performance of the obligation or reparation in the interest of the beneficiaries.

Second, there are indications that the ICJ may increasingly be confronted with contentious proceedings concerning the protection of peremptory norms, due to the evolving impact of the concept of *erga omnes* on the nature of the ‘legal interest’ that states need to show for purposes of standing before the ICJ. As is well known, the ICJ gave a very restricted interpretation of ‘legal interest’ in the *South West Africa* decision of 1966. It was unwilling to assume that a state may have a legal interest in vindicating a principle of international law where it has not suffered material damages – unless this was explicitly provided for in an international text or instrument.⁷⁸

In the 1995 *Case Concerning East Timor (Portugal v Australia)* there were implicit indications that the ICJ may have broadened its understanding of ‘legal interest’, despite the fact that it declined to rule on whether Australia had behaved unlawful in concluding a treaty with Indonesia pertaining to the East Timorese continental shelf (while East Timor was de facto administered by Indonesia). Although Portugal and Australia had accepted the ICJ’s compulsory jurisdiction in accordance with Article 36(2) of the ICJ Statute, a ruling in this case would simultaneously have resulted in a ruling on the lawfulness of the behaviour of a third state (Indonesia), which had not consented to the ICJ’s jurisdiction. This in turn would have constituted a violation of the ICJ Statute which only foresees jurisdiction in instances where states had voluntarily subjected themselves to it.⁷⁹

In reaching this conclusion the ICJ acknowledged the *erga omnes* status of the right to self-determination and in particular also the right of self-determination of the East-Timorese people.⁸⁰ The ICJ nonetheless underscored that regardless of the nature of the obligations invoked, it could only rule on the lawfulness of the conduct of a state which had consented to

⁷⁸ *South West Africa* Second Phase (Judgment) ICJ Rep 1966 para 44. At para 88 the ICJ further underscored that its Statute did not provide for an *actio popularis* that would allow any members of the international community to initiate proceedings in vindicating the violation of community interests.

⁷⁹ *East Timor* decision n 67 102.

⁸⁰ *East Timor* decision n 67 102-03.

its jurisdiction.⁸¹ The ICJ's thus made clear that the *erga omnes* status of a right did not in and of itself oblige states to accept its jurisdiction. However, implicit in the ICJ's argument was the assumption that had Indonesia accepted the ICJ's jurisdiction, Portugal would have been able to invoke the right of self-determination of the East Timorese people against Indonesia before the ICJ. Portugal would thus have had a legal interest in the protection of the right of self-determination of the East-Timorese people, on the basis of the *erga omnes* character of this right. This in turn constituted an implicit recognition of a broadening of the notion of 'legal interest' for the purposes of standing before the ICJ statute.

An expanded notion of 'legal interest' has since been endorsed explicitly in the decision on *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, also known as the *Habré* case.⁸² In deciding whether Senegal has breached its obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (the Convention against Torture), in accordance with which it either had to prosecute former Chadian President Hissène Habré without delay or had to extradite him, the issue of Belgium's standing before the ICJ arose. Belgium relied both on the compromissary clause in Article 30(1) of the Convention against Torture and on the declarations made by both parties under Article 36(2) of the ICJ Statute.⁸³

In confirming Belgium's standing the ICJ determined that all state parties to the Convention against Torture had a common interest in compliance with the obligation to initiate prosecution by the state on whose territory an alleged offender was present. That common interest implies that the obligations in question are owed by any state party to all the other states parties to the Convention. All the states parties have a 'legal interest' in the protection of these 'obligations *erga omnes partes*'.⁸⁴ Therefore, each state party to the Convention can make a claim concerning the cessation of an alleged breach by another state party, without proving any special interest.⁸⁵

It is noteworthy that this broadened notion of 'legal interest' for the purposes of standing first and foremost concerns states parties to the Convention against Torture. The ICJ

⁸¹ *East Timor* case n 67 102.

⁸² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, IJC 20 July 2012, available at www.icj-cij.org. See also *Armed Activities on the Territory of the Congo* n 15, separate opinion of Judge Simma, par. 38 ff. See also Alain Pellet 'The Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?' (2001) 32 *Netherlands Yearbook of International Law* (2001) 77.

⁸³ *Habré* decision no 82 para 42.

⁸⁴ *Habré* decision n 82 para 68.

⁸⁵ *Habré* decision n 82 para 69.

tailored its decisions towards the common interest of the parties to the Convention and explicitly referred to *erga omnes partes* obligations. It remains to be seen whether the ICJ would also allow standing in situations where states base their claims exclusively on the fact that torture is also forbidden and criminalized under customary international law, as a result of which all states would have a legal interest in its cessation and prosecution. Such a claim would then be based on the *erga omnes* proper character of the prohibition of torture. A claim of this nature would however only have a chance of succeeding between states which have both accepted the compulsory jurisdiction of the ICJ in terms of Article 36(2) of the ICJ Statute.⁸⁶ In the *Habré* decision the court refrained from addressing this issue and focused instead on the fact that both Senegal and Belgium are parties to the Convention against Torture.

It is also unclear whether the *jus cogens* status of the prohibition of torture had a decisive impact on the ICJ's decision. Although it did refer in passing to the peremptory nature of the prohibition of torture,⁸⁷ this did not feature in relation to its reasoning pertaining to the *erga omnes partes* nature of the obligations in the Convention against Torture. Instead, it based the common legal interest of countries in prosecuting torture on the shared values embodied in the Convention.⁸⁸ One can therefore argue that since all human rights treaty obligations constitute obligations *erga omnes partes*,⁸⁹ this expanded notion of 'legal interest' could facilitate standing before the ICJ in relating to disputes between states that are based on a human rights treaty containing a promissory clause that accepts the IJC's jurisdiction.

In essence therefore it seems that the ICJ has accepted that the common interest ('community oriented character') underpinning peremptory human rights obligations - and perhaps also other human rights obligations which have not yet acquired peremptory status - constitutes a sufficient 'legal interest' for the purpose of standing before the IJC. However, this standing would only come into play once it is clear that the states in question have also consented to the ICJ's jurisdiction. This would notably be the case where the peremptory or other human rights obligations form the object of a treaty ratified by all parties to the dispute and which provides for the jurisdiction of the IJC in relation to disputes concerning the treaty's interpretation or application.

⁸⁶ The ICJ can only exercise jurisdiction over disputes if and to the extent that states have accepted its jurisdiction in accordance with Art 36(1) or Art 36(2) of the ICJ Statute. This condition is not affected by the broadening of the notion of 'legal interest'.

⁸⁷ *Habré* decision n 82 para 99.

⁸⁸ *Habré* decision n 82 para 68.

⁸⁹ See text leading up to n 73.

Furthermore, where no such treaty is in place between states parties, but they have nonetheless accepted the compulsory jurisdiction of the ICJ in terms of Article 36(2) of the ICJ Statute, another avenue for standing may exist. This would be where the claim between these parties is based on the customary nature of a particular human rights obligation, i.e. the *erga omnes* proper character of the particular human rights norm.

5. The relevance of *jus cogens* within the domestic legal order

From the perspective of domestic law, reliance on peremptory norms is sometimes used in an attempt to ensure that international law is not set aside by domestic law. In many common law countries, incorporated treaties and customary international law have a status equivalent to that of ordinary national legislation.⁹⁰ The legislature can therefore set aside international law by enacting inconsistent domestic legislation (the state remains responsible on the international level in accordance with the principles of state responsibility). By emphasizing the peremptory nature of a norm, litigators (in particular in the United States) have attempted to avoid these constitutional ramifications, however without success thus far.⁹¹

A more reliable way of protecting *jus cogens* norms of international law within the domestic legal order would be provide constitutional recognition of them. This was done in Switzerland in the revised Swiss Federal Constitution of 1999.⁹² A new provision explicitly states that no People's Initiative (referendum) aimed at constitutional amendment may be in conflict with the norms of *jus cogens*.⁹³ Any initiative that is in violation of *jus cogens* has to be invalidated by the Swiss authorities.⁹⁴ Such explicit recognition can serve as an "emergency break" aimed at securing respect for core international obligations at all times.

⁹⁰ Shelton n 3 315.

⁹¹ Shelton n 3 315.

⁹² For a discussion, see Daniel Thürer 'Verfassungsrecht und Völkerrecht', in Daniel Thürer et al (eds.), *Verfassungsrecht der Schweiz* (2001) 179-205 and sources quoted there.

⁹³ The text of the Swiss Federal Constitution is available at <http://www.admin.ch/ch/d/sr/101/index.html> (accessed 23 March 2012). The relevant clauses reads as follows:

"Artikel 139 Volksinitiative auf Teilrevision der Bundesverfassung

3. Verletzt die Initiative die Einheit der Form, die Einheit der Materie oder zwingendes Völkerrecht, so erklärt die Bundesverfassung sie für ganz oder teilweise ungültig"

"Artikel 193 Totalrevision

4. Die zwingenden Bestimmungen des Völkerrechts dürfen nicht verletzt werden."

"Artikel 194 Teilrevision

2. Die Teilrevision muss die Einheit der Materie wahren und darf die zwingenden Bestimmungen des Völkerrechts nicht verletzen."

⁹⁴ In fact, already in 1996, three years before the formal anchoring of *jus cogens* in the Swiss Federal Constitution, both chambers of the Swiss Federal Parliament invalidated a People's Initiative (*Volksinitiative*) that proposed a constitutional amendment that violated the prohibition of *refoulement*, which in Switzerland is acknowledged as a peremptory norm. See fn 43. See also *Bundesbeschluss über die Volksinitiative 'für eine vernünftige Asylpolitik'*, 14 March 1996, BBl 1996 I 1355. The People's Initiative, which was submitted to the

The Swiss Federal Supreme Court has taken the position that in the case of conflicting obligations arising from national and international law respectively, the latter enjoys precedence, unless the national legislature explicitly intended to adopt contradicting legislation.⁹⁵ This approach is therefore similar to the one followed in many common law countries in the sense that within the domestic legal order the democratic will of the people is placed above international law. However, through the explicit constitutional protection of *jus cogens* the core values of the international community remain beyond the reach of the will of the people (unless the constitution itself is amended to reverse this position).⁹⁶

6. Concluding remarks

The above analysis has illustrated that there is increasing formal recognition in state practice and doctrine of a hierarchy of norms in international law in the form of *jus cogens*. This in turn implies increased recognition of core values, especially on fundamental human rights, shared by the international community of states. However, at the same time the international consensus regarding the number of *jus cogens* norms, their scope and their utility as mechanism for norm conflict resolution remain disputed. Practice has illustrated that the recognition of the peremptory status of a particular norm is no guarantee for effective enforcement of the norm and the values it represents. It also remains unclear if and to what extent peremptory norms can provide protection beyond what is also guaranteed by ordinary customary and/ or treaty law. It is therefore fair to conclude that the jury is still out on whether increased recognition of human rights norms as peremptory norms in international law is bound to enhance their effective enforcement internationally and domestically. Although it cannot be said anymore that *jus cogens* is ‘[the] vehicle that hardly ever leaves the garage’ (as it is increasingly invoked in international and domestic litigation),⁹⁷ its excursions into the open has not yet resulted in a change of the rules of the road.

federal authorities in July 1992, inter alia proposed a constitutional clause determining that asylum seekers who entered the country illegally would be deported summarily and without the possibility of appeal. See discussion in de Wet n 42 101-102.

⁹⁵ The so called “*Schubert-Praxis*” was introduced in BGE 99 1b 39 and affirmed in BGE 111 V 201; BGE 112 II 13; BGE 116 IV 269 and BGE 117 IV 128. The *Schubert* case concerned the potential conflict of legislation regulating the acquiring of property in Switzerland by persons abroad with a Swiss-Austrian bilateral agreement. See also Thürer n 92 189-190; Thomas Cottier & Maya Hertig, ‘Das Völkerrecht in der neuen Bundesverfassung: Stellung und Auswirkung’, in Ulrich Zimmerli (ed.), *Die neue Bundesverfassung. Konsequenzen für Praxis und Wissenschaft* (2000) 13 ff.

⁹⁶ Although some Swiss authors suggest that the notion of peremptory norms should be interpreted broadly on the national level, the Swiss federal Supreme Court has not yet followed this approach. Instead, it limits the range of peremptory norms to those most frequently cited in international law. See *Nada* decision n 31, as well as *A v Federal Department of Economic Affairs*, administrative first instance judgment, No 2A 783/2006; 23 January 2008, para 8.2; ILDC 1200 (CH 2008).

⁹⁷ Ian Brownlie, ‘Comment’, in Antonio Cassese and JHH Weiler (eds), *Change and Stability in International Law-Making* (Berlin, de Gruyter, 1988) 110; see also Alain Pellet, ‘Comments in Response to Christine Chinkin

Selected Bibliography

Bianchi, Andrea. 'Human Rights and the Magic of Jus Cogens', 19 *European Journal of International Law* (2008) 491-508.

Byers, Michael. 'Conceptualising the relationship between Jus Cogens and Erga Omnes Rules', 66 *Nordic Journal of International Law* (1997) 211-239.

Chinkin, Christine. 'Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution', in 64 *Finnish Yearbook of International Law* (2006) 63-82.

Czaplinski, Wladyslaw. 'Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments', 23 *Polish Yearbook of International Law* (1999) 87-97.

De Wet, Erika. 'The prohibition of torture as an international norm of jus cogens and its implications for national and customary law' 15 *European Journal of International Law* (2004) 97-121.

De Wet, Erika & Vidmar, Jure (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford, Oxford University Press, 2012).

Dupuy, Pierre-Marie, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: a Response to Martti Koskenniemi', 16 *European Journal of International Law* (2005) 131-137.

Focarelli, Carlo. 'Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' Legal Effects', 77 *Nordic Journal of International Law* (2008) 429-459.

and in Defense of Jus Cogens as the Best Bastion against the Excesses of Fragmentation', in 17 *Finnish Yearbook of International Law* (2006) 85.

Hannikainen, Lauri. *Peremptory norms (jus cogens) in international law: historical development, criteria, present status* (Helsinki, Finnish Lawyers' Publishing Company, 1988).

Kadelbach, Stefan. *Zwingendes Völkerrecht* (Berlin, Dunker & Humblot, 1992).

Kolb, Robert. 'Théorie du ius cogens international', 36 *Revue belge de droit international* (2003) 5-55.

Koskenniemi, Martti. 'International Law in Europe: between Tradition and Renewal', 16 *European Journal of International Law* (2005) 112-124.

Meron, Theodor. 'On a Hierarchy of International Human Rights', 80 *American Journal of International Law* (1986) 1-23.

Oeter, Stefan. 'Ius cogens" und der Schutz der Menschenrechte', in Breitenmoser Stephan et al (eds), *Human rights, democracy and the rule of law: liber amicorum Luzius Wildhaber* (Baden-Baden, Nomos, 2007) 499-521.

Shelton, Dinah. 'Normative Hierarchy in International Law', 100 *American Journal of International Law* (2006) 291-323.

Seiderman, Ian. *Hierarchy in international law: the human rights dimension* (Antwerp, Intersentia, 2001).

Tams, Christian. *Enforcing obligations erga omnes in international law* (Cambridge, Cambridge University Press, 2005).

Tams, Christian. 'Schwierigkeiten mit dem Ius Cogens', 40 *Archiv des Völkerrechts* (2002), 331-349.

Verdross, Albert. 'Forbidden Treaties in International Law', 31 *American Journal of International Law* (1937) 571-577.

Verdross, Albert. 'Jus Dispositivum and Jus Cogens in International Law', 60 *American Journal of International Law* (1966), 55-63.

Weil, Prosper. 'Towards Relative Normativity in International Law', 77 *American Journal of International Law* (1983) 413- 442.

The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions?

Mbori Otieno H.*

1. Introduction

A completely new creature unprecedented before in international law is emerging in Africa. The African Court of Justice and Human Rights (ACJHR) (herein after referred to as the Merged Court) will also have a criminal chamber to try international crimes. The mandate of the court will be tripartite and this article seeks to analyse this latest facet; the introduction of an international criminal chamber.

Expansion of the jurisdiction of the ACJHR will see the merger of state-level and individual-level criminal accountability mechanism for human rights violations on an international scale.¹ The infraction between the African Union (AU) and the International Criminal Court (ICC),² was arguably warranted by the latter's issuance of arrest warrants against sitting African heads of state and senior government officials.³ These developments induced the AU to take 'retaliatory' measures which culminated in conferring international criminal jurisdiction on its court.⁴

This article seeks to answer three interrelated research questions: First, what effect will the extension of the jurisdiction of the Merged Court have on international criminal justice in Africa?, second, will the Merged Court with jurisdiction on international crimes offer an alternative to the already discredited International Criminal Court (ICC) in Africa? and lastly is

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¹ Kathryn Sikkink, 'From State Responsibility to Individual Criminal Accountability: A new Regulatory Model for Core Human Rights Violations' in Walter Mattli & Ngaire Woods, eds, *The Politics of Global Regulation* (Princeton University Press 2009).

² Claus Kieß, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case', (2009) 7 *Journal of International Criminal Justice*, 297; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7 *Journal of International Criminal Justice*, 312; Tom Ginsburg, 'The Clash of Commitments at the International Criminal Court', (2009) 9 *Chicago Journal of International Law*, 499; Andrew T. Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide', (2008) 6 *Journal of International Criminal Justice*, 829; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 *Journal of International Criminal Justice*, 333.

³ *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Case No. ICC-01/11-01/11; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11. On 22 November 2011, Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi due to his death. Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, Gaddafi (ICC-01/09-01/11), Pre-Trial Chamber I, 22 November 2011, available at <www.icc-cpi.int/iccdocs/doc/doc1274559.pdf>.

⁴ Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) *Netherlands International Law Review*, 28.

the African Union capable of financing a court with a three pronged mandate that includes international crimes. This article makes a general contribution to the debate on whether Africa can offer African solutions to African problems. It specifically focuses on the international crimes mandate that has been introduced under the African Court of Justice and Human Rights. The first part of this article focuses on the origins of the idea on the African system having an international crimes court. The second part focuses on the international crimes chamber of the African court its jurisdiction, composition and structure. The third part of this article focuses on the Draft Merged court and its amendments and whether the protocol will be adopted ad ratified. The article then concludes that Africa might not be ready for this extension of jurisdiction of the Merged court to try international crimes as this stance will take away the gains already made in the African Human rights scene.

1.1 The origins of Extending the Jurisdiction of the African Court of Justice and Human Rights

The African Union (AU) is determined to establish a criminal chamber within the inactive structure of the African Court of Justice and Human Rights (hereinafter the merged court).⁵ In its summit held in Addis Ababa in February 2009, the AU Assembly took decision Assembly/AU/Dec. 292 (XV).⁶ It requested the African Union Commission (AU Commission), in consultation with the African Commission on Human and Peoples' Rights (the African Commission) to assess the implications of recognizing the jurisdiction of the African Court to try international crimes.

In its decision (Assembly/AU/Dec. 292 (XV))⁷ of July 2010 the AU Assembly requested the African Union Commission (AU Commission) to finalize the study on the implications of extending the jurisdiction of the African Court to cover international crimes, and to submit, through the Executive Council, a report thereon to the regular session of the AU Assembly scheduled for January 2011. To implement the AU decisions stated above, the AU Commission engaged consultants to examine the implications of extending the jurisdiction of the African court to international crimes. The consultants were to draft a Protocol for the establishment of the Criminal Chamber within the African Court. The consultants led by Mr Donald Deya of the Pan African Lawyers Union (PALU) completed their study and submitted it to the AU Commission. Annexed to the study was the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.⁸ In August 2010 and 8-12 November 2010,

⁵ Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 Journal of International Criminal Justice, 1067; Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (2012) AfricLaw at <<http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213>> (accessed 10 April 2014).

⁶ Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/606 (XVII).

⁷ Ibid.

⁸ Fifth Meeting of Government Experts on Legal Instruments on the Transformation of the AU Commission in AU Authority and on the Review of the Protocols relating to the Pan African Parliament and the African Court on Human and Peoples' Rights, ACJHR-PA/4(II) Rev.2.

the AU Commission organized two workshops at Midrand, South Africa, to validate the findings of the study.⁹

In its summit of 30 June to 1 July 2011 held at Malabo, Equatorial Guinea, the AU Assembly adopted decision (Assembly/AU/Dec. 366 (XVII)).¹⁰ In this decision the Assembly requested the AU Commission to actively pursue the implementation of the AU Assembly decisions on the African Court being empowered to try serious international crimes committed on African soil and report to the AU Assembly.

In May 2012, the African Union ‘Government Experts and Ministers of Justice/Attorneys General on Legal Matters’ adopted the AU- Final Court Protocol- As adopted by the ministers 17 May 2012.¹¹ In January 2013, the Summit of the Assembly of African Heads of State did not adopt the Draft protocol. It made recommendations that the AU Commission should further consider the meaning of ‘popular uprisings’, which was excluded from the jurisdiction of the court. The Assembly also asked the Commission to report on the financial and structural implication of extending the court’s jurisdiction to international crimes.¹²

The consultants from PALU in collaboration with the African Commission have organized a number of meetings with stakeholders, including the existing African Court on Human and Peoples’ Rights to consider the Draft protocol. In December 2013, the African Commission organized a brainstorming meeting of experts in Arusha, Tanzania, to discuss the pending issues which includes the definition of the crime of “unconstitutional change of government” (UCG), and the financial implication of extending the jurisdiction of the court.¹³

The AU Assembly will be bent towards adopting the Draft protocol due to the recent developments in the continent. The trials of the Kenyan head of state Hon Uhuru Kenyatta and his deputy Hon William Samoei Ruto will have a strong bearing on this question. It is therefore plausible to speculate that the Assembly will adopt the Draft Protocol.

1.2 Prelude to the Criminal Chamber in the African Court

Arguably, there is one major factor that led to the establishment of the Criminal Chamber within the African Court. This is the flimsy reason that Africans were being tried in foreign imperialistic

⁹ Chacha Bhoke Murungu (n 1), 1068.

¹⁰ Decision on the Implementation of the Assembly Decision on the International Criminal Court (Doc. EX.CL/670 (XIX)).

¹¹ Amending Merged Court Protocol, Exp/Min/IV/Rev. 7, 15 May 2012.

¹² Ademola Abass (n 4), 29.

¹³ Journalist for Justice, ‘Briefing note on the Extension of the Jurisdiction of the African Court on Human Rights and People’s Rights to deal with criminal matters’ (2014) at <<http://www.jfjustice.net/briefing-note-on-the-extension-of-the-jurisdiction-of-the-african-court-on-human-and-peoples-rights-to-deal-with-criminal-matters/>> (accessed 10 April 2014).

courts. This was being done either by domestic courts of some European states, especially France, the UK, Spain and Belgium, or the International Criminal Court (ICC).¹⁴

1.2.1 Long Term and Immediate Factors for the Establishment of the Criminal Chamber

The long term factors include the indictment of African state officials before the domestic courts of Europe, the ICC and the International Court of Justice (ICJ) which all involve African state officials.

Former Libyan president, Muammar Qaddafi was indicted in France for torture and conspiracy to commit torture and terrorist acts. The court of Cassation of France ironically rendered its judgement in favour of Qaddafi.¹⁵ The former Mauritanian President Maaouya Ould Sid'Ahmed Taya was also indicted in France in 2005.¹⁶ Rwandan state officials have also indictments in relation to international crimes committed in Rwanda in 1994. In 2007, a French judge, Jean-Louis Bruguiere, indicted Rwandan state and military officials for their alleged roles in the 1994 Rwandan genocide.¹⁷ In early 2009, a court in Paris issued indictments against five serving heads African presidents alleging corruption. The five included: Denis Sassou Nguesso of Congo; Obiang Nguema of Equatorial Guinea; Omar Bongo of Gabon; Blaise Compaore of Burkina Faso and Eduardo Dos Santos of Angola.¹⁸

The immediate cause is arguably relates to criminal proceedings against the sitting head of Sudan, Omar Al-Bashir, the sitting head of state in Kenya Uhuru Kenyatta and his deputy William Samoei Ruto. Following these indictments the AU reacted and decided, first, not to cooperate with the ICC, second to initiate steps towards establishment of a criminal chamber in the African Court and lastly petition the Security Council (SC) for deferral of the cases against the Kenyan officials.

1.3 The International Criminal Law Chamber of the African Court

The African Court of Justice and Human Rights will have an international crimes chamber. This chamber will be specifically dedicated to the prosecution of individuals with the highest criminal responsibility on international crimes committed on African soil. This part considers the Draft Protocol on the merged court as amended to introduce a criminal chamber.

1.3.1 General Matters

Article 1 of the Draft Protocol on the African Court of Justice and Human and Peoples' Rights¹⁹ refers to the Court, which is conferred with international criminal jurisdiction, as 'the African

¹⁴ Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice*, 1068.

¹⁵ *SOS Attentats et Beatrice Castelnau d'Esnault c. Gadafy*, 125 *International Law Reports* 490, 508, 13 March 2001

¹⁶ *International Federation of Human Rights Defenders (FIDH) and Others v. Ould Dah*, 8 July 2002, Court of Appeal of Nimes, 1 July 2005 (Nimes Assize Court, France).

¹⁷ Chacha Bhoke Murungu, (n 14), 1069.

¹⁸ *Ibid.*

¹⁹ Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (Tuesday 15 May 2012) Exp/Min/IV/Rev.7, art 8.

Court of Justice and Human and *Peoples'* Rights. The word *peoples'* has been introduced on the previous name African Court of Justice and Human Rights. This inclusion is important. Art 2 of the 'Merger Protocol' applied to the court a nomenclature that dispensed with the word 'people' giving the impression that the merged court would only deal with 'human' rights. The inclusion of "peoples'" was an ingenious feature of the African Charter on Human and Peoples' Rights, which forms the basis of the human rights jurisdiction of the court.

This anomaly dealt with, the next problem is on whether the court's international crimes jurisdiction should be captured in its name to give a real picture of its character. In describing the court as a 'Court of justice and Human and Peoples' Rights' the provision obviates the international criminal jurisdiction of the court.²⁰ Ademola suggests that the name of the court should ideally be 'the African Court of Justice, Human and Peoples' Rights and International Crimes.'²¹ This name is obviously something of a mouthful and shortening risks denying it its real character. A shorter version would be the African Criminal, Justice, Human and Peoples' Rights Court.

1.3.2 Jurisdiction

Article 3 of the Draft Protocol confers the African Court;

“with original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the statute annexed hereto.

Judicial jurisdiction refers to the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.²² The International Criminal Court (ICC) has jurisdiction over the most serious crimes of concern to the international community as a whole.²³ These crimes are genocide, war crimes, crimes against humanity and the crime of aggression.²⁴ The African Court will have jurisdiction over similar crimes but some other crimes have also been introduced. Article 28A of the Draft Protocol provides that the International Criminal Law Section of the Court shall have power to try persons for the following crimes: Genocide, Crimes against Humanity, War Crimes, The Crime of Unconstitutional Change of Government, Piracy, Terrorism, Mercenarism, Corruption, Money Laundering, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Illicit Exploitation of Natural Resources and the Crime of Aggression.²⁵ These crimes are further elucidated under the draft protocol.²⁶

²⁰ Ademola Abass (n 4), 32.

²¹ Ibid.

²² Bryn A. Garner (ed), *The Black's Law Dictionary* (9thed, West Publishing Co, 2009), 929.

²³ The Rome Statute of the International Criminal Court, 1 July 2002, A/CONF.183/9 (1998). Art 13 (b), art 5.

²⁴ Ibid.

²⁵ Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (n 14), art 28A.

²⁶ Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (n 14), art 28B, 28C, 28D, 28E, 28G, 28H, 28I, 28I *Bis*, 28K, 28L, 28L *Bis*, 28M and 28N.

The ICC has jurisdiction over individual natural persons. These individuals are individually responsible and liable for punishment under the statute. These includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime so long as they bear the highest responsibility in the commission of the said crimes. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.²⁷ The Draft African Court Protocol in art 28N also provides that offences are committed by any person who in relation to any of the crimes or offences provided incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the statute. Paragraph II and III of article 28N provides aiders, abettors and accessors are to be held culpable under the protocol.

Article 46B of the Draft Protocol provides for individual criminal responsibility. Interestingly paragraph 2 of this article provides that the official position of any accused person, whether as Head of State or Government, Minister or as a responsible government official shall not relieve them of criminal responsibility nor mitigate punishment. The move by President Uhuru Kenyatta and his deputy William Samoei Ruto to petition for immunity as sitting heads of state and government official throws cold water on this provision.

The ICC was created with the consent of the states who themselves will be subject to its jurisdiction. The African Court of Justice and Human Rights is also being created by willing African states with a strong leaning towards ensuring African solutions to African problems. The states will have agreed that it is crimes committed on their territory, or by their nationals, that may be prosecuted.²⁸

The ICC just like other international tribunals has power to determine its own jurisdiction (its *compétence de la compétence*).²⁹ Art 19 (1) of the statute provides that “the court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with art 17.” It is a well-established principle that the International Court of Justice (ICJ) for instance has the right to determine its own jurisdiction. The ICC has in principle applied this principle on satisfying or justifying? its jurisdiction in the Decision on the Prosecutor’s application for summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussiein Ali³⁰ and in the Decision

²⁷ The Rome Statute, art 25, 26, 27 & 28.

²⁸ Williams A Schabas, *An Introduction to the International Criminal Court* (2nd ed, Cambridge: Cambridge University Press, 2004), 67; Draft Protocol on the African Court of Justice and Human and Peoples’ Rights, (n 14), art 46E.

²⁹ Mohamed Sameh, *The Role of the International Court of Justice as the Principle Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003), 103.

³⁰ Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis KirimiMuthaura, UhuruMuigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1, para. 9.

pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo.³¹

1.3.3 Admissibility: A court of “last resort” or a “court of first recourse?”

The Rome statute distinguishes matters of jurisdiction and admissibility. Jurisdiction as per the Rome statute refers to the legal parameters of the court’s operation in terms of subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).³² The question of admissibility on the other hand arises on a later stage, and seeks to establish whether matters over which the court properly has jurisdiction should be litigated before it.³³ To a large extent matters of jurisdiction are questions of whether the court should consider a situation in which a crime has been committed, whereas admissibility is concerned with the process of identification of “case”.³⁴ The Draft Protocol of African Court also captures issues of admissibility in art 46H. The jurisdiction of the court is stated to be complimentary to that of the National Courts and courts of the Regional Economic Communities (RECs) where specifically provided by the communities. The court adheres to the principle of inability and unwillingness at national level.

International criminal tribunal statutes usually perform a balancing act between such courts and national courts of State parties. The principle of complementarity, which usually embodies this relationship, is recognised in art 17 of the Rome Statute. The underlying policy reason is to ensure that international tribunals remain essentially courts of “last resort.” Article 17 of the Rome Statute states that a case shall be inadmissible by the ICC except where, *inter alia* the decision of a state that has jurisdiction is based on a “unwillingness or inability... to genuinely prosecute.” Article 46(2)(b) of the Draft Protocol reflects this sentiment by providing for inadmissibility except where “the decision resulted from the unwillingness or inability of the state to prosecute.” The Draft protocol omits the word *genuinely*. This will have the effect of lowering the evidentiary standard of “inability to prosecute.” This has the potential of opening floodgates for opportunistic states which will effectively turn the court to a court of “first recourse.”³⁵

1.3.4 Structure and Administration of the Court

The Draft Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter Draft Protocol) amends art 2 of the Protocol on the Statute of the

³¹ Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 24.

³² *Prosecutor v. Thomas Lubanga Dyilo*, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772.

³³ Williams A Schabas (n 23), 68.

³⁴ Ruth B. Phillips. ‘The International Criminal Court Statute: Jurisdiction and Admissibility’, (1999) 10 Criminal Law Forum 61 at 71.

³⁵ Ademola Abass (n 4), 44.

African Court of Justice and Human Rights (hereinafter African Court protocol) to include the following as the organs of the court:

- (a). The Presidency
- (b). The Office of the Prosecutor;
- (c). The Registry

Article 16 of the Statute of the court, which previously referred to the ‘Structure of the Court’, has now been amended to read ‘Section of the court’, and provides that;

- (1) The Court shall have three (3) Sections: A General Affairs Section. A Human and Peoples’ Rights Section and an International Criminal Law Section;
- (2) The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
- (3) The allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules.’

This inclusion is in tandem with the extension of the mandate of the court to include international criminal justice. The International Criminal Court (ICC) is composed of the following organs:

- (a). The Presidency
- (b). The Appeals Division, a Trial Division and a Pre-Trial Division
- (c). The Office of the Prosecutor
- (d). The registry³⁶

There are striking similarities between the two entities. While the ICC has more organs than the African Court of Justice and Human Rights, this deficiency is covered in article 16 of the statute by the International Criminal Law section of the court having three (3) chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber. It almost feels as the drafters of the Draft Protocol were using the Rome Statute as a reference script.

1.3.5 The Composition of the Court

The Court will consist of sixteen (16) judges who are nationals of state parties.³⁷ The judges are appointed upon recommendation of the court and the Assembly may, review the number of judges.³⁸ The court shall not, at any one time, have more than one judge from a single member state. Just like in the former African Court of Justice, the court does not adhere to the principle of one member state, one judge. The International Criminal Court (ICC) applies the same principle by providing for eighteen (18) judges.³⁹ The eighteen judges of the court are elected by the

³⁶ The Rome Statute (n18), art 34.

³⁷ *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, at: <<http://www.refworld.org/docid/4937f0ac2.html>> (accessed 14 April 2014), chapter II, article 3.

³⁸ *Ibid.*

³⁹ The Rome Statute (n18), art 34.

Assembly of state Parties, whom three make up the Presidency.⁴⁰ The ICC Statute just like the African Court of Justice and Human Rights stipulates that there be only one judge of with one nationality at any given time. Art 34 (5) of the Rome Statute requires that the judges be of “high moral character, impartiality and integrity’ a phraseology that is rather typical of international instruments.⁴¹ Surprisingly the Protocol to the statute of the African Court of Justice and Human Rights does not have such phraseology. This anomaly is corrected by the Draft Protocol in article 3 on amendments requiring that the court be composed of impartial and independent judges elected from persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults or recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.

The ICC judges have to be qualified for appointment to the highest judicial offices in their respective states.⁴² The judges are to have excellent knowledge of and be fluent in at least one of the working languages of the court, namely, English or French. Article 32 of the African Court protocol requires that the official languages of the court be the official languages of the African Union (AU). The official languages of the African Union and all its institutions shall be Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language.⁴³ The sheer number of the languages that can be used in the court is worrying. The issue of whether all these languages have to be represented is also not settled in the African Court statute. The Rome also stipulates the degree of expertise in the subject matter of the court. It creates two categories of candidates, those with criminal law experience and those with international law experience. Specific reference is made to international humanitarian law and the law of human rights.⁴⁴ This is similar to the provisions on the Draft Protocol of the African court that introduces amendments. The Protocol on the statute of the African Court of Justice just like the Rome statute require that state parties take into account the need to ensure representation of the principal legal systems of the world or in case of Africa equitable geographic representation.⁴⁵

1.3.6 Procedure for election of Judges

Article 6 of the African Court Protocol provides that for the purpose of election, the chairperson of the African Commission shall establish two alphabetical lists of candidates. List A contains the names of candidates having recognized competence and experience in international law and List B contains the names of candidates possessing recognized competence and experience in Human Rights Law. At the first election eight (8) Judges shall be elected from amongst the

⁴⁰ Williams A Schabas, *An Introduction to the International Criminal Court* (2nd ed, Cambridge: Cambridge University Press, 2004), 177.

⁴¹ Statute of the International Court of Justice, art 2.

⁴² Rome Statute, art 36 (3).

⁴³ African Union, *Protocol on Amendment to the Constitutive Act of the African Union*, 11 July 2003, at:<<http://www.refworld.org/docid/493fe67d2.html>> (accessed 14 April 2014), art 11.

⁴⁴ *Ibid*, art 35 (3) (b) (ii).

⁴⁵ Rome Statute, art 8 (a), (i), (ii) and (ii), Protocol on the Statute of the African Court of Justice and Human Rights, chapter II, art 4.

candidates of list A and eight (8) from among the candidates of list B. The election shall be organized in a way as to maintain the same proportion of judges elected on the two lists. The Chairperson of the African Commission is charged with the mandate of communicating the two lists to member states, at least thirty (30) days before the ordinary Session of the Assembly or of the Council, during which elections shall take place. The ICC follows somewhat similar procedure in art 36 (5).

Article 7 of the Protocol provides that the judges shall be elected by the Executive Council, and appointed by the Assembly. The election is through secret ballot by two-thirds majority of the member state with voting rights, from among the candidate provided for in article 6. Candidates who obtain the two-thirds majority and the highest number of votes shall be elected. However, if several rounds of election are required, the candidates with the least number of votes shall withdraw. The Rome Statute requires that individual candidates garner a two-thirds majority of States Parties present votes. In order to obtain an equitable geographic representation, it was agreed that each state would be required to vote for at least three candidates from five UN regions, namely Africa, Asia, Eastern Europe, Latin America and Caribbean and the 'Western Europe and other'. In the election of judges the Assembly is required to ensure equitable gender representation.

1.3.7 Eligibility to Submit cases to the AU Court-Competencies

Article 29 of the African Court Protocol provides for the entities that are entitled to submit case before the court. They include:

- (a). State parties to the protocol
- (b). The Assembly, the parliament and other organs of the Union authorized by the assembly
- (c). A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.

Article 30 provides for other entities may be able to submit cases before the court. These include entities whose rights have been guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the state parties concerned. They include:

- (a). State parties to the present Protocol;
- (b). the African Commission on Human and Peoples; Rights;
- (c). the African Committee of Experts on the Rights and welfare of the Child;
- (d). African intergovernmental Organizations accredited to the Union or its organs;
- (e). African National Human Rights Institutions;
- (f). Individuals or relevant Non-Governmental Organizations accredited to the African Union or its organs, subject to the provisions of article 8 of the Protocol.

The Draft Protocol amends article 29 by including “the Peace and Security Council” and includes paragraph (d) as the office of the Prosecutor. The Draft protocol replaces paragraph (f) of the African court statute with African individuals or African Non- Governmental Organizations with observer status with the African union or its organs or institutions, but only with regard to a state that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made Declaration in accordance with article 8(3) of the Protocol. Article 8(3) requires that any member states that would allow NGOs and individuals should make a declaration and the said article.

1.3.8 Applicable Law

Article 31 of the African Court Protocol states that the applicable law before the court shall be:

- (a). The Constitutive Act;
- (b). International treaties, whether general or particular, ratified by the contesting States
- (c). International custom, as evidence of general practice accepted as law
- (d). The general principles of law recognized universally or by African States
- (e). Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;
- (f). Any other law relevant to the determination of the case.

Paragraph 2 of the same article provides that the article shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Draft Protocol does not introduce any changes to this article. The article has great similarities to article 38 of the ICJ Statute on sources of law.

4.1 Will the Draft Protocol be adopted and ratified?

African states are notoriously quick to adopt treaties, but excruciatingly slow to ratify them.⁴⁶ Two factors have influenced this situation. First the subject-matter of the treaty, second the, the perception that certain treaties threaten sovereignty. These factors will be considered in turn. The African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.⁴⁷

⁴⁶ The AU has acknowledged this problem, see the Report of Meeting of Experts on the Review of the Organisation of African Unity/African Union (OAU/AU) Treaties held from 18 to 20 May 2004, in Addis Ababa, Ethiopia, OAU/AU Treaties/Exp-PRC/Rpt(I) Rev. 1.

⁴⁷ African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, at: <<http://www.refworld.org/docid/493fe36a2.html>> (accessed 15 April 2014).

2.1 Source of a treaty

Practice of African states over the past three decades reveals that treaties that emanate from the UN stand a better chance of ratification than those from Africa. This is so even when both treaties address the same issue and the African one is adopted first. African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.⁴⁸ By 2013, the total number of ratifications stands at 33 or roughly 60% of the total AU membership, nine years after adoption of the Convention. In comparison, the United Nations Convention against Corruption (UNCAC) was adopted on 31 October 2003, only three months after the adoption of the AUCPCC, and entered into force on 14 December 2005, eight months before the AU Convention entered into force. By 2013, 48 AU member states had ratified the UNCAC as opposed to 33 that have ratified the AUCPCC.⁴⁹ Even for countries that have ratified both conventions, the time lapse between the ratifications show that the UNAC was ratified more rapidly.

Another classic example is the United Nations Convention on the Rights of the Child, adopted on 20 November 1989 and entered into force on 2 September 1990. This was after ten (10) months of its adoption. It is regarded as one of the most successful treaties of all time.⁵⁰ All Africa states except Somalia and the Sahrawi Arab Republic are parties to the Convention. The African Charter on the Rights and Welfare of the Child was adopted on 11 July 1990.⁵¹ It entered into force on 29 November 1999, more than nine years after its adoption.

Based on the above stated examples, the adoption and ratification of the draft protocol will have some time lapse before adoption as it emanates for the AU. Subject-matter of a treaty

As a general rule, a state is more likely to ratify a treaty if the treaty embodies a positive norm or represents a value subscribed to by many states.⁵² The near universal ratification of the UN Convention on the Rights of the Child show that issues concerning children resonate with a vast majority of states.⁵³ Prosecution of international crimes encapsulates the aspiration of many African states and should, as a matter of fact inspire quick and wide ratification. The Protocol however suffers the deficiency of criminalizing corruption and unconstitutional changes of government, offences whose prosecution African leaders are unlikely to enthusiastically embrace.⁵⁴

⁴⁸ Ademola Abass (n 4), 38.

⁴⁹ See List of Countries, which have signed, ratified/acceded to the AUCPCC, available at <www.au.int/en/sites/default/files/corruption.pdf> (accessed 15 April 2014).

⁵⁰ UN, *Convention on the Rights of the Child*, New York, 20 November 1989, 1577 UNTS, 3; (1989) 28 International Legal Materials, 1448, entered into force 2 September 1990

⁵¹ *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

⁵² Harold H. Koh, 'Internalization through Socialization', (2005) 54 *Duke Law Journal*, 975.

⁵³ Oona A. Hathaway, 'Between Power and Principles: An Integrated Theory of International Law', (2005) 72 *University of Chicago Law Review*, 469.

⁵⁴ Ademola Abass (n 4), 39.

2.2 Treaties that ‘threaten’ the sovereignty of African states

Every treaty inevitably relinquishes a states’ sovereignty for the collective good of the treaty. African states have claimed that the Rome Statute violates their sovereignty because it authorizes the prosecution of African leaders in The Hague. This claim flies on the face of voluntary signing and ratification of the treaty. The question that the UA??? has failed to consider is why African states will sign such a treaty only to have their leaders facing similar accusation at the regional court.

Ademola however argues that the Draft Protocol has a very low probability of ratification and if ratified, the court’’ international criminal jurisdiction will be dead on arrival.⁵⁵ Despite African states’ willingness to have the perpetrators of human rights violations held accountable, most heads of state are still not ready to be subjected to the same courts whose judges are appointed by those heads of state and who, in most cases are beneficiaries of the state.

4.2 Can an Unratified treaty be amended?

The Draft protocol which forms the bulk of this part, purports to amend the Protocol on the Statute of the African Court of Justice, Human and Peoples’ Rights, that is the 2008 Protocol that merged the African Court of Human and Peoples’ Rights (1998) and the African Court of Justice. The protocol had not yet entered into force at the time the Draft amendments were proposed. As of 31 January 2014, only five AU states had ratified the protocol.⁵⁶ The question then arises, ‘Can a protocol which has not been ratified be amended?’

Amendments are permissible only to international legal instruments that have already entered into force.⁵⁷ The Vienna Convention on the law of treaties contemplates amendments for treaties that have already entered into force.⁵⁸ The rationale is that amendments are warranted by the operationalization of a treaty. Amendments serve to reduce, increase, expedite or slow down the obligations of its state parties. It is necessary that amendments to already ratified treaties be accepted or ratified by all State parties to a treaty.⁵⁹ There are many instances where states accept unratified amendments. These are referred to as “tacit amendments.” These are however different from “amending unratified treaties.”⁶⁰ Amending unratified treaties denotes the attempt to amend a treaty which in itself, has not entered into force.

⁵⁵ Ibid, 42.

⁵⁶ List of Countries which have signed, Ratified/Acceded to the protocol on the Statute of the African Court of Justice and Human Rights <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf> accessed on 17 February 2013).

⁵⁷ ⁵⁷ Ademola Abass (n 4), 45.

⁵⁸ *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, UNTS, vol. 1155, 331 (entry into force 27 January 1980), art 39, 40 & 41.

⁵⁹ Ibid, art 39.

⁶⁰ Oona A. Hathaway, *et al.*, ‘Tacit Amendments’, 15 November 2011, at <www.law.yale.edu/documents/pdf/cglc/TacitAmendments.pdf> (accessed 12 February 2014).

The danger of the AU undertaking such an endeavour is that states that have already ratified that treaty may renege. In context the three states that had already the ratified the Merged Court Protocol before the amendments may withdraw from the treaty. This is more so since the AU did not consult its member states before proposing the amendments.

4.3 Recommendations on the formation of the Merged Court

There have been all kinds of suspicions on the motives behind the merger and extension of the jurisdiction of the African Court of Justice and Human Rights to cover international crimes. Proposals for the restructuring of the African disputes and human rights institution begun with proposals by former Nigerian president and chairperson of the Assembly of the AU Olusegun Obasanjo.⁶¹ In 2004 Obasanjo urged the AU to guard against the “danger of proliferation of organs of the organization.”⁶²

The extension of the merged courts’ jurisdiction has faced numerous obstacles, both legal and practical. The Coalition for the Effective African Court on Human and Peoples’ Rights (CEAC) focuses on the obstacles the court will face.⁶³ The obstacles identified include the absence of:

- (a). an instrument creating crimes within the jurisdiction of such a court, enumerating the elements of crimes within the scope of the court and punishment for them and establishing the procedure for proceedings with respect to such crimes. This however has been partly handled by the Draft Protocol;
- (b). a regional system of enforcement and co-operation in criminal matters;
- (c). a permanent continental court or tribunal;
- (d). a clear regional norm of compliance with judicial decisions; and
- (e). any assurance that there can be agreement on any or all of the issues above.

This part will offer recommendations on the Merged African Court of Justice and Human Rights and its extension of its jurisdiction to international crimes. The recommendation will be two pronged; firstly the establishment of two separate courts is suggested and secondly in case the AU has already kissed the horse and it cannot move back, recommendation will be made on how to improve the current system. Lastly the chapter will make a conclusion to the study.

⁶¹ Coalition for and Effective African Court on Human and Peoples; Rights at http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=7&Itemid=26&limitstart=8 (accessed on 9 May 2014).

⁶² Chidi Anselm Odinkalu, ‘Concerning the Criminal Jurisdiction of the African Court: A response to Stephen Lamony’ (2012) African Arguments at <http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/> (accessed 9 May 2014).

⁶³ Coalition for the Effective African Court on Human and Peoples’ Rights (CEAC), ‘Implications of the African Court of Human and Peoples’ Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes-an opinion’ (2009) CEAC, Darfur Consortium; EALS, ICLC, OSJI, PALU, SALC WABA

4.1 A way out: A separate court for international criminal justice⁶⁴

This article supports Prof Viljoen's suggestion that whatever the arguments for or against an African court with jurisdiction over international crimes, such jurisdiction should vest in a separate judicial entity, distinct from the two sections that are foreseen under the Merged Court Protocol. This suggests having two separate courts. The Draft Protocol with amendments has not yet entered into force and African states still have a chance to retrace their steps.

The establishment of an African Court with international crimes jurisdiction has the potential of being a setback to existing human rights protection.⁶⁵ The problems discussed in chapter four (4) can be avoided only if the African Human Rights Court, or the future African Court of Justice and Human Rights, is allowed to exist or be established independently from any judicial institution dedicated to criminal justice.

Such an approach would also avoid the legal hiccups on which the Amended Merged Court Protocol seems to be built.⁶⁶ The question may be posed how a Protocol that is not yet in force can be amended.⁶⁷ This technical complexity can be dodged if the merged Court (consisting of two sections) and the African Criminal Court are treated as separate structures, each with its own distinct legal basis. One of the main reasons why the Amending Merged Protocol is such a maze of complexity is the fact that it amends a treaty that is yet to come into legal being.⁶⁸

4.1.1 African states should take lead in prosecuting international crimes rather than diluting the mandate of an over-stretched regional court⁶⁹

Lamony argues that the problem of the AU when it comes to international criminal justice is its conflicting view on the interactions between peace and security.⁷⁰ While the AU sees international criminal justice as impediment to peace, and the two mutually exclusive, the ICC meanwhile stands for justice for victims irrespective of the situation.

The Rome Statute of the International Criminal Court was adopted at a diplomatic Conference in Rome on 17 July 1998 and came into 1 July 2002. On 14 January 1999 Senegal was the first

⁶⁴ Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (2012) *AfricLaw* at <<http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213>> (accessed 10 April 2014).

⁶⁵ *Ibid.*

⁶⁶ Amending Merged Court Protocol, Exp/Min/IV/Rev. 7, 15 May 2012.

⁶⁷ Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) *Netherlands International Law Review*, 35.

⁶⁸ Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (n 64).

⁶⁹ Stephen Lamony, 'African Court not ready for International Crimes' (2012) *African Arguments* at <http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/> (accessed 9 May 2014).

⁷⁰ *Ibid.*

African state to ratify the Rome Statute.⁷¹ As of 9 May 2014 122 countries were state parties to the Rome Statute of the International Criminal Court. Out of this thirty four (34) are African states.⁷² Africa has the largest number of state parties to the Rome Statute. This number does not however reflect when it comes to support to the court.⁷³

The turbulent relationship between the AU and the ICC started in July 2008 when prosecutor Luis Moreno Ocampo applied for a warrant of arrest for Omar Al-Bashir, the sitting president of the Republic of Sudan. Al-Bashir was charged with committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan. The ICC Pre-Trial Chamber I issued the arrest warrant against Al Bashir.⁷⁴ Meeting shortly after the decision, the AU Peace and Security Council (PSC) issued a communiqué which lamented against the implication of the decision for the peace process in Sudan.⁷⁵ In the same communiqué, the PSC requested the UN Security Council to exercise its powers under art 16 of the Rome Statute to defer the indictment and arrest of Al-Bashir. Consequently on 3 July 2009 at its 13th Annual Summit the Assembly of Heads of State and Government held in Sirte, Libya, the AU decided not to cooperate with the ICC in facilitating the arrest of Al-Bashir. This signified the first clash of wills between the AU and the ICC. The ICC is currently implicated in impacting upon the dynamics of peace-building in the countries in which prosecutions are pending or ongoing.⁷⁶ The argument has been that ICC would have the potential to disrupt in-country peace-building initiatives are not appropriately sequenced.

The AU maintained its position on non-cooperation on its 18th Ordinary Session of the Assembly of the Assembly of AU heads of State and Government held in Addis Ababa, Ethiopia on Kenya and Sudan.⁷⁷ Some African governments have raised the contention that the ICC does not apply the law universally yet it is a universal court.⁷⁸ This would be true particularly in situations where jurisdiction of the court does not apply to some countries that are actively engaged and

⁷¹ International Commission of Jurists, 'Senegal: Senegal is the First State to Ratify the International Criminal Court's Statute' at <http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=2182> (accessed 9 May 2014).

⁷² The states parties to the Rome Statute (2014) at www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 9 May 2014).

⁷³ Avocats Sans Frontières (ASF), 'Africa and the International Criminal Court: Mending fences' (2012), at <http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf> (accessed 9 May 2014).

⁷⁴ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan, 4 March 2009), No. ICC-02/05-01/09.

⁷⁵ African Union Peace and Security Council, *Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir*, (2009) PSC/PR/Comm.(CLXXV), Addis Ababa, Ethiopia

⁷⁶ Tim Murithi, 'The African Union and the International criminal court: An embattled Relationship?' Institute for Justice and Reconciliation (IRC) (2013) 8 Policy Brief, 4.

⁷⁷ AU. Decisions, resolutions and declarations of the Assembly of the Union. Eighteenth Ordinary Session of the Assembly of Heads of State and Government, Assembly/Au/Dec.397(XVIII), 29 to 30 January 2012, Addis Ababa, Ethiopia, para. 8.

⁷⁸ Adam Branch, *Displacing human rights: War and intervention in Northern Uganda*.(Oxford: Oxford University Press, 2011), 213.

operating in African Conflict zones. What would be the recourse for such non-signatory states if individuals from the states were to commit war crimes in Africa? Who would administer justice in such cases? Certainly not the ICC or the UN. This discrepancy underlies the international justice regime and the power politics between Western powers like the USA and Africa.

The question in Africa has been why not Western states, Russia and Chinese leaders? This would essentially be instances where it is thought that such leaders have committed the most serious crimes of international concern.⁷⁹ The AU has relied on the immunity of state officials arguments in the Kenya, Libya and Sudan cases and there has been a strong perception among African leaders of being targeted.

All this arguments notwithstanding, Africa has been the leading front for most armed conflicts in the past decade. It would seem reasonable that most ICC cases would be handling situations in Africa. This argument is bolstered by the fact that Southern Sudan which seceded from Sudan on 9 July 2011 making it the newest state in the community of nations is by the time of writing this thesis sinking into what analysts have called genocide.⁸⁰

It remains to be seen whether the relationship between the AU and ICC can be salvaged especially with Kenya taking a leading role in the anti-ICC anthem. Lamony's position that the African Court of Justice and Human rights even with an international crimes mandate "cannot, and will not offer relief to any of the people currently indicted or under investigation by the ICC" rings true.

4.2 Alternative: Human rights-enhancing changes to the Amending Merged Court Protocol

If it is so that the train has already left the station, in the sense that there is little political appetite and no space to engage critically with the notion of a tripartite court, a number of concrete suggestions are made as to the improvement, from a human rights point of view, of the Amending Merged Court Protocol.⁸¹

4.2.1 The composition of the Appellate chamber

The composition and role of the Appellate Chamber should be clarified.⁸² Article 10 of the Amending Protocol states the General Affairs Section of the court shall be duly constituted by three (3) judges, the Human and Peoples Rights Section three (3) judges, the Pre-Trial Chamber of the International Criminal Law Section one (1), The Trial Chamber of the International Criminal Law Section one (1) judge and the Appellate Chamber five (5) judges. In providing this clarification, regard must be had to the fact that the human rights section alone should be

⁷⁹ William Schabas, 'The International Criminal Court' in D. Black & P. Williams (eds) *The international politics of mass atrocities: The case of Darfur* (London: Routledge, 2010), 147.

⁸⁰BBC News Africa, 'John Kerry visits South Sudan amid genocide fears' (2014) at <<http://www.bbc.com/news/world-africa-27250056>> (accessed 9 May 2014).

⁸¹ Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (n 64).

⁸² Amending Merged Court Protocol (n 66), art 16.

competent to hear cases related to human and peoples' rights as set out in article 7 in the current version of the Statute.⁸³ The appellate chamber, consisting of judges without competence in human rights matters specifically, should not be placed in a position in which they may affirm, reverse or revise the decision of the findings of the Human Rights Section of the Court.⁸⁴ As the Protocol stands, the decisions of the Human Rights Section may be overturned by the Appellate Chamber of the International Criminal Section. Such a state of affairs would seriously undermine the autonomy of both the human rights section and the General affairs section.

4.2.2 The Title to the Protocol⁸⁵

The title of the Protocol should at the very least identify the exact, tri-functional nature of the court, and should not merely and deceptively be called 'African Court of Justice and Human and Peoples' Rights'.⁸⁶ This amendment to the title may be an appropriate to better represent the nature of the two-section Court (by adding 'and Peoples'' in line with the African Charter on Human and Peoples' Rights and the naming of the current Court, the African Court of Human and Peoples' Rights). However, the addition of a third section makes this name inappropriate, as it does not reflect the essence of the Amended Merged Court: The title should be 'African Court of Justice, Human and Peoples' Rights and International Criminal Justice/International Crimes'. An objection that this title is overly long or complicated merely underlines the true nature of the proposed court. A shorter version would be the African Criminal, Justice, Human and Peoples' Rights Court.

5. Conclusion

This article contends that the merger of the court and extension of the jurisdiction to cover international crimes is not an entire lose for Africa. It is suggested that the implications for this merger and extension have to be streamlined in order to serve the aspirations and needs of the African people not only its leaders. An Africa with African solutions is desirable rather than detestable. Africans have had this twisted mentality that everything western is civilized and everything African is crude and uncivilized. This mentality should be removed by Africans understanding that it is possible to foster an Africa which uphold and respects human rights

⁸³ Ibid.

⁸⁴ Amending Merged Court Protocol (n 66), art 17.

⁸⁵ cf chapter 3.

⁸⁶ Ademola Abass, (n 4), 32; Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (n 64).