9 'African approaches to international law' and the international law-making process: The role of African states and personalities in the making of the Rome Statute of the International Criminal Court

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Abstract

The international law-making process is a relatively new experience for many African states. African states have demonstrated an assertive contributionist approach during multilateral treaty making negotiations. However, the common trend they follow nonetheless appears to result in missing the opportunity to inject new legal concepts, rules, procedures and norms into the international legal order. This chapter examines the role played by African states and personalities in the multilateral negotiations leading to the adoption of the Rome Statute of the International Criminal Court. Based on content analysis of African states' individual and collectively contributions during the negotiations, it confirms the existence of an African approach to international law anchored on the sacrosanct nature of the principle of sovereignty and sovereign equality of states and African states' desire to use international law to garner transnational solidarity on issues they deem to be poorly regulated such as the use of force in international relations. Further, it is established that African states tend to approach negotiations as a 'block' with a relatively common position on various issues. The chapter argues that Africa states' experience of historical injustices and marginalisation in the global governance system influences their contributions in international law-making processes. It bemoans that despite Africa's wealth in cultural heritage and customary legal practices, African states hardly make proposals that reflect a depth of knowledge that could bring new and much needed improvements to the international legal system and the struggle against impunity.

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1 Introduction

This chapter seeks to establish the role of African states in the international law-making process. Using the drafting of the Rome Statute of the International Criminal Court, I explore the existence of any continent-wide norms and values, and whether African states have a unique approach to international law. Apart from investigating the existence of continent-wide norms and values, the chapter also examines the extent to which African states advanced these norms in the international law-making process. The analysis is approached from a 'contributionist' trend in Africa's engagement with international law.[1] According to Gathii, there are 'contributionist' and 'critical theorist' trends which are useful in examining how Africa engages with international law from an historical perspective. Central to the contributionist trend is that international law has been, and will always be, a product of inter-civilisational participation. Africa has been actively involved since pre-colonial days of early interaction with the Europeans in trade and commerce. The principal proponent of this trend was Nigerian jurist and former President of the International Court of Justice, Taslim O Elias. Elias acknowledged that while the colonial 'episode' limited Africa's contribution, it was restored during the post-colonial era. Jeremy Levitt echoes these sentiments where he characterises Africa as a 'legal marketplace not lawless basket case'.[2] While contributionists focus on Africa's contribution to shaping international law and its universality, critical theorists treat international law as an instrument through which western European states seek to sustain their domination of Africa. They blame international law for the slave trade, colonialisation, and neo-imperialism in Africa.

The International Criminal Court (ICC) is the cornerstone in the enforcement of international criminal law, a branch of international law which seeks to punish those responsible for committing international crimes including genocide, crimes against humanity, war crimes, aggression, and torture. The central theme of this chapter is that the contribution by African states to international law-making processes reflects the states' strong belief in multilateralism and strong desire for equality and justice in the international governance system. They adopt a contributionist approach to the international law-making process generally as a way of seeking refuge and protection from international law. Their level of compliance with international law is closely linked to a critical theorist

1 JT Gathii 'Africa' in B Fassbender & A Peters (eds) *Oxford handbook of the history of international law* (2012) 1-16.

2 As above.

approach. As soon as they begin to view the enforcement of international law as biased against them, they revert to a critical theorist mindset. The task is undertaken by examining the proposals by African states during consultative meetings both leading to the Rome Conference and during the historic United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court held in Rome between 15 June and 17 July 1998. The Conference resulted in the adoption of the Rome Statute, an international treaty establishing the ICC.

This introduction is followed by a section mapping some of the elements of what could be regarded as common legal approaches in traditional African society. The third section considers Africa's historical interaction with international law. This is followed by a section examining post-colonial Africa and engagement with international law, and a section on early African states and international law-making processes. Section five details the proposals and positions adopted by African states during the drafting of the Rome Statute. The final section confirms that African states opposed a role for the United Nations Security Council in shaping some of the key elements of the Rome Statute so as to reaffirm their sovereignty and desire for a global governance system anchored in multilateralism. The chapter critiques the African states for not being sufficiently ambitious in introducing novel concepts and crimes reflecting their peculiar history and the crimes to which they had fallen victim in the past. Overall, the study strengthens the contributionist perspective of Africa's role in shaping the international law-making process. It is, however, unclear whether this approach would be adequate to explain Africa's compliance with international criminal law when African leaders or their close allies are indicted.

2 Mapping of some elements of the role of law and approaches in traditional African societies

It is trite that law is a central element in Western civilisation more than in other world civilisations. It was instrumental in the creation of the modern European state system and the birth of capitalism which thrives on predictable and ascertainable standards of behaviour.[3] As such, law acquired a significance and distinctive status in western European states which it did not enjoy in the non-Western societies of Africa. This is not to suggest that in non-Western civilian societies law had no role. It indeed had a role, albeit not as elevated as in Western culture. The primary function of the law was to ensure the survival of the community and to maintain public order. In the African context, the development

3 A Cassese *International law in a divided world* (1986) 41-43.

and protection of individual rights, if it indeed existed, was secondary. However, the approach in which collective interests supersede those of the individual has proved remarkably resilient and has found its way into the contemporary African regional human rights system. For example, the African Charter on Human and Peoples' Rights (African Charter) pioneered the inclusion of individual duties to the family, society, and the state.[4] Jabavu, a South African writer and journalist, captured the primacy of the collective over the individual when she wrote of her upbringing:[5]

> You are not left to be merely your private self: you represent others or others represent you so that you are ever conscious of relative status, classification, interdependent relationships in terms of which your conduct is being judged.

The interplay between the themes of collectivism and individualism raises curious debates in the context of the enforcement of international criminal law, a branch of international law. Individual criminal responsibility is one of the cardinal principles of international criminal law and accountability for international crimes; it forms the basis for the operation of the ICC. The rationale is that holding individuals responsible for their actions reduces the circle of violence which might be driven by the victims' need for collective revenge.[6] However, judging from some of the defence counsels' submissions during international trials it is clear that in the context of international crimes, individualism and criminal liability have not taken root to any great extent;[7] they remain concepts which do not resonate naturally with many African traditional approaches to the administration of justice which tend to focus on the community and restorative justice.

Mamdani, a Ugandan scholar, and former South African President, Thabo Mbeki, argue that there is a distinction between ordinary criminal violence and 'atrocity crimes'. They maintain that '[u]nlike criminal violence, political violence has a constituency and is driven by issues, not just perpetrators'.[8] It is clear that in pre-colonial African society, individual

4 See African Charter on Human and Peoples' Rights (1981) 1520 UNTS 363, art 27; UO Umozurike 'The African Charter on Human and Peoples' Rights' (1983) 77 *American Journal of International Law* 907.

5 Cited in AB Bozeman *The future of law in a multicultural world* (1971) 97.

6 M Lattimer & P Sands *Justice for crimes against humanity* (2003) 19.

7 KM Clarke *Fictions of justice: The International Criminal Court and the challenge of legal pluralism in Sub-Saharan Africa* (2009) referring to Jean Flamme who was defending Thomas Lubanga Dylio before the Pre-Trial Chamber. Flamme described Thomas Lubanga who was accused of crimes against humanity and war crimes as a 'patriot … wanting to defend his people' at 1.

8 T Mbeki & M Mamdani 'Courts can't end civil wars' *New York Times* 5 February 2014 Op-ed.

criminal responsibility existed and individuals could be held liable and punished. Still, in many contexts the collective felt responsible and had to be involved in the proceedings in one way or the other. Research among the Somali in Ethiopia reveals that they actually had a traditional institution termed the *Dia*-paying group[9] and drawn from individuals from the same generation who were held collectively liable for payment or receipt of compensation in the form of 'bloody money' for a crime committed by an individual from their generation.

Among the Kikuyu people of Kenya there were well-established criminal and civil laws and procedures in place. Jomo Kenyatta alludes to the existences of 'rules and regulations governing the behaviour between individuals and groups'.[10] Social anthropologists have found that the Lozi people of South-western Zambezi recognised the concept of law described as the 'quintessence of the *corpus juris*.'[11] Their society was controlled by rules and procedures. These rules also applied to their king, hence the phrase 'even the king is the slave of the law'. In Tswana, the judicial system litigants did not rely on professional lawyers or advisors, and judges were not expected to have special competence in law. In Ethiopia early anthropologists were impressed by the level at which Ethiopians represented themselves and spoke well in court. Legal services were offered 'at a discount … as every man is his own lawyer'.[12] There are similarities in how the Tswana and the Ethiopians saw no role for the legal profession in their judicial affairs, and how the *Gacaca* Courts in Rwanda were structured with no involvement of lawyers.[13] These similarities confirm Elias's assentation that 'there are surprising similarities in bodies of African Customary Law as divergent as those of the Yorubas, the Bantus, the Sudanese, the Ashantis and the Congolose'.[14]

The existence, importance. and the need to develop African law was raised by the delegates who attended the First Meeting of the Inter-African Conference on Social Sciences held in Bukavu, in the then Belgian Congo, now the Democratic Republic of Congo. At the end of the conference the delegates in Recommendation 58 encouraged the study of 'native laws'. The rationale for these studies lay in 'determining having regard to the psychological reaction of the community's methods and judicial systems

9 A Jembere *An introduction to the legal history of Ethiopia 1434-1964* (2012) 63.

10 J Kenyatta *Facing Mount Kenya: The tribal life of the Gikuyu* (1965) 182.

11 M Gluckman *The judicial process among the Barotse* (1955) 165.

12 See Jembere (n 9) 30.

13 See P Clark *Gacaca courts, post-genocide justice and reconciliation in Rwanda: Justice without lawyers* (2010).

14 TO Elias *The nature of African customary law* (1956) 3.

best suited to African societies'.[15] The fact that the recommendation was made in 1950s, long after European intervention in Africa, suggests that there had been little movement in terms of altering the African culture and approaches. Africa had remained unchanged and eager to shape the legal fraternity to meet the needs of its lived reality.

In 1962, in his address at the opening of the Accra Conference on Legal Education and the Ghana Law School, President Kwame Nkrumah raised two fundamental features that support the existence and material distinctiveness of the law that existed in traditional African society. First, he stated that as early as the fourteenth century there was a dynamic society of black lawyers and *juris consults*[16] at the University of Sankore in Timbuktu. In other words, law schools existed on African soil 'long before the foundation of the universities in the European continent'.[17] Second, referring to the works of Ibn Khaldun, a Tunisian whom he described as 'a great African scholar belonging to the Maliki School of Legal Thought', President Nkurumah stressed that law was centered on promoting social solidarity.[18] In fact, this approach was closer to the meaning of law in its etymological Latin language – '*legare*' – to bind or tie. In his view Africa's approach to law should embody its traditional social attributes of communal endeavour and avoid a narrow interpretation of man's duties to the community and the state found in the Western civilisation.[19]

Perhaps this explains why, when the independent African states seized the opportunity to establish their own human rights treaty, they ensured that there was balance between safeguarding the rights and duties of individuals and the survival of communal life. Commenting on Africa's contribution to the development of international human rights and humanitarian law, Viljoen points out that unlike the European Convention of Human Rights, the African Charter 'elevates the communal aspects of human rights in giving rights to peoples'.[20]

15 'First Meeting of the Inter-African Conference on Social Sciences, Bukavu' (1957) 1 *Journal of African Law* 7-8.

16 Speech delivered by President Nkrumah at the formal opening of the Accra Conference on Legal education and of the Ghana Law School, 4 January 1962 (1962) 6 *Journal of African Law* 103 (Nkrumah's speech).

17 As above.

18 As above.

19 Nkrumah's speech (n 16) 104.

20 F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18-39.

So far we have seen how in pre-colonial African states, rulers were slaves of the law which was seen as a product of social practice, inseparable from and in service of the promotion of social solidarity. It is important to add that legal systems in Islamic African societies evolved through religious and ethnical ideas. Cheikh Anta Diop, while describing the judicial organisation of societies in Ghana and Mali after their 'Islamisation', noted how justice was inseparable from religion and that the Koran had been adopted as the civil code.[21] Although these features point to the material distinctiveness of the African approach to law, their influence on how post-colonial African states attempted to modify international law appears to have been overshadowed by Africa's engagement with Europe. This engagement has essentially turned African states into conformists, less revolutionary in their contribution to international law. This happened at the expense of digging deeper into Africa's historical legal heritage. Although such an approach need not necessarily be rejected as 'wrong', it does deny the continent the opportunity to reconstruct or remould its distorted image. In addition, this approach risks forcing African states to mimic the Western states' models and approaches to international law rather than introducing something new informed by Africa's distinct historical heritage and rich value system.

3 Africa's historical interactions with international law

African states came late to the international law-making process due, in part, to European colonisation of African peoples and territories.[22] Under colonial rule, African states lacked international personality, a pre-requisite for their participation and recognition as subjects of international law. They did not have the ability to enter into international relations or enjoy rights and duties under international law. It is important to emphasise that many pre-colonial African states had enjoyed these sovereign powers before the arrival of the colonial powers. They were however stripped of them at the Berlin Conference of 1884. At the conference, the colonial powers (France, United Kingdom, Germany, Belgium, Portugal, Italy, and Spain) awarded each other exclusive control over the external relations of the majority of the indigenous African peoples and their kingdoms. From then until attainment of independence in the 1960s, Africa endured a period in international law described by Nigerian jurist Taslim Elias as an

21 Cheikh Anta Diop *Precolonial Black Africa: A comparative study of the political and social systems of Europe and Black Africa, from antiquity to the formation of modern states* (trans Harold Selemson 1987).

22 T Maluwa 'The transition from the Organization of African Unity to the African Union' in AA Yusuf & F Ouguergouz (eds) *African Union legal and institutional framework: A manual on the pan-African organization* (2015) 25-52.

existence in which 'the historic modes of international intercourse were closed to these indigenous states and kingdoms'.[23]

Underlying the colonial philosophy was a positivist theory of international law. Two, closely linked features of this theory laid the foundation for the engagement between the colonial powers and pre-colonial African states. First, international law is the expressed will of sovereign states; it is purely state-centric. Second, the sovereign state referred to in the first feature did not refer to all states that existed in the nineteenth century when positivist writers developed the theory; it was specifically for Western states. Hall, a prominent positivist theorist, clarifies the nature of the states that qualified as subjects of international law during this period, as follows:[24]

> It is scarcely necessary to point out that as international law is a product of the special civilization of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognized by countries differently civilized, such states only can be presumed to be subjects to it as are inheritors of that civilization…But states outside European civilization must formally enter into the circle of law-governed countries.

In other words, international law was intended primarily for the Western Europe and 'Christian civilisation'. It was not meant for 'uncivilised people' or 'backward territories'. Territories inhabited by 'natives' were deemed to be low on the scale of civilisation![25] As a result the European colonial powers 'engaged non-European civilizations' based on either capitulation or domination.[26] In particular, pre-colonial African states were subjected to colonial domination and international law designed to play a crucial role in supporting the colonial system. This paved way for European states to acquire sovereignty over African states primarily achieved by classifying African states as *terrae nullius* (territories that belong to no one) through the conclusion of treaties. Such treaties between emissaries of the European powers and African leaders – for example, King Lobengula of the Ndebele and Shona people in what is now Zimbabwe – effectively gave the European colonial powers sovereignty and authority including the power to transact international relations affairs on behalf of the African peoples. It was during this phase that Africa's own indigenous knowledge

23 TO Elias *Africa and the development of international law* (1972).

24 WE Hall *A treatise on international law* (1890) 42.

25 MF Lindley *The acquisition and government of backward territory in international law: Being a treatise on the law practice relating to colonial expansion* (1926).

26 Cassese (n 3) 41-43.

systems, particularly as regards crimes and the administration of justice, lost their primacy to Western-based legal systems.

Many elements of African legal systems and values were either excluded from the colonial justice systems or played a limited and peripheral role. The Europeans who colonised Africa sought to shape their colonial possessions in their own image, perhaps for the obvious reason of wanting to deal with issues from their own standpoint and civilisation. They ensured that their laws enjoyed primacy over local laws.[27] This is graphically illustrated by the imposition of Western approaches and values on the justice systems through 'repugnancy clauses' or principles that were considered to be 'repugnant to natural justice and humanity'.[28] This suggested that much of African customary law was deemed to be incompatible with Western values. For example, in 1903 Roume, the French Governor-General in Senegal, passed an ordinance which stated in its in article 75 that *'la justice indigene doit appliquer en toute matière les coutumes locales, tant que celles-ci ne sont pas de la civilisation française*.'[29]

The tacit supremacy of Western values in the administration of international justice was capped by the inclusion of a clause in article 38(1)(c) ('the general principles of law recognised by civilised nations') of the Statute of the International Court of Justice (ICJ).[30] The clause was initially included in the Statute of the Permanent Court of International Justice (PCIJ) and constitutes one of the sources of international law. The basis for its inclusion in the list of the sources of international law was to authorise the ICJ to apply the general principles of municipal jurisprudence in rendering decisions in the absence of the two principal sources: treaties and international custom. Baron Édouard Descamps of Belgium, who was the President of the Advisory Committee of Jurists responsible for drafting the Statute of the PCIJ, justified the inclusion of the clause by stating that the committee sought to avoid a legal lacuna for the judges in deciding controversies submitted to them.[31]

27 I Schapera 'The sources of law in Tswana tribal courts: Legislation and precedent' (1957) 1 *Journal of African Law* 151.

28 M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996) 115.

29 G Deherme *L'Afrique occidentale française: Action politique, action* économique*, action sociale* (1908) 75-82. Freely translated, the Article reads: 'Indigenous courts shall apply local customs in all matters provided that these are not of French civilisation.'

30 Statute of the International Court of Justice, art 38(1)(c).

31 MC Cherif Bassiouni 'A functional approach to general principles of international law' (1990) 11 *Michigan Journal of International Law* 768-818.

Of interest for the purposes of this chapter is the qualification that the principles applied had to be 'recognised by civilised nations'. The mere reference to civilised nations suggests the existence of primitive uncivilised nations which points to clear discrimination between the civilised and uncivilised nations in the post-Second World War international legal system. If one is to consider that at the time of drafting the Statute the international community was dominated by Western civilisations, one may readily conclude that the provision was aimed at the recognition of Western municipal principles rather than non-Western civilisations. When the ICJ Statute was drafted the majority of African states were still under colonial domination and were represented by their Western colonial rulers who dismissed traditional African legal practices as 'repugnant to natural justice and humanity'.

4 Early African states and international law-making processes

Maluwa notes that: 'Africa was not part of the move to multilateral institutions that unfolded at the international level' at the turn of the 19th century;[32] because they had not attained international personality status. This was only achieved after the end of colonialism in the early 1960s through to the late 1970s and 1990s.[33] Prior to the end of colonialism, the majority of African states, with the exception of Liberia, Ethiopia, and the Union of South Africa, could not conclude multilateral treaties directly. Liberia and Ethiopia were the first African states to transact as independent states in the international community, Liberia was one of the founding members of the League of Nations. This is because these two states had attained independence and were recognised internationally. Liberia was founded in 1847 by freed American slaves, and in the Preamble to its Declaration of Independence identified itself as a 'free sovereign and independent state'.[34] After its creation, Liberia sought and obtained recognition by European powers. Ethiopia, which had not come under full European domination, applied for recognition and was admitted to the League of Nations in 1923. At the Berlin Conference (1884-1885) convened by European colonial powers to legitimise and formalise the colonisation process on the African continent, there were no representatives from Africa despite the fact that the subject matter touched most directly on Africa. Instead, there were representatives from fourteen European states.[35]

32 Maluwa (n 22) 25-52.

33 Maluwa (n 22).

34 JH Mower 'The Republic of Liberia' (1947) 32 *Journal of Negro History* 265-306.

35 General Act of the Berlin Conference on West Africa, 26 February 1885.

In 1899, the year the Boer War broke out, the Hague Peace Conference was held on the initiative of the Emperor of Russia to ensure lasting peace and limit the development of military armaments. The Conference was attended by 26 states, but again Africa was conspicuous by its absence. In 1907, the second Hague Peace Conference was held to which 44 states were invited but none from Africa. When the League of Nations was formed after World War I, Liberia was the only African state to sign the Covenant establishing the League of Nations. Although South Africa participated in the drafting of the Covenant with representation by Lieutenant-General Jan Smuts, the then Defence Minister of South Africa, it participated as a dominion of the British Empire with the same status as Canada, Australia, New Zealand, and India and cannot be regarded as a 'true' African representative. Ethiopia did not join the League of Nations until 28 September 1923. When the League of Nations was at its strongest with 60 member states, only two independent African states, Ethiopia and Liberia, had been admitted to membership.

However, membership of the League of Nations did not spare Ethiopia from Italy's violation of international law on aggression. In 1935, Italy invaded and annexed Ethiopia. A year later, in a statement to the League of Nations the Italian government stated that its military action had been based on 'the backwardness of the Ethiopian people, Italy had stepped in to safeguard their fundamental rights and that Italy regarded her mission in Ethiopia as a sacred mission of civilisation'.[36] Some argue that Italy intervened principally to end slavery in Ethiopia, yet there is compelling evidence that the Italian Fascist government wanted to establish a New Roman Empire in North Africa.[37] The Ethiopian Emperor Haile Selassie unsuccessfully sought assistance from the League of Nations. In 1967, at a Conference on World Assembly of Judges in Geneva, he expressed his disappointment at the then highest international body for failure to protect his country. He said: [38]

> In 1936, speaking before the League of Nations in this very city of Geneva, we warned of the consequences of permitting the most gross and flagrant violations of international morality to go unpunished. Our words were unheeded, and the consequences require no repetition or recitation from us today. We appealed then for justice from the highest international body

36 United Nations War Crimes Commission (UNWCC) *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948).

37 A De Grand 'Mussolini's follies: Fascism in its imperial and racist phase, 1935-1940' (2004) 13(2) *Contemporary European History* 127-147.

38 'On World Law Day, July 11 1967' in Imperial Ethiopian Ministry of Information *Important utterances of HIM Emperor Haile Selassie 1 1963-1972* (1972) 492.

> where the majority of the representatives of the fifty-two member nations, substituting expediency for principle, elected to sacrifice my nation to fascism.

Notwithstanding that the African people had been victims of several atrocities in their history – the trans-Atlantic slave trade, the Herero Genocide, forced labour in the Congo under King Leopold II, and use of concentration camps in Sudan and Kenya – their contribution to the early development of international law and international criminal law in particular, was peripheral. This meant that they had no opportunity to shape international criminal jurisdiction to ensure accountability for historical injustices. As already highlighted, the lack of participation and contribution was due to the lack of international personality or falling victim to the power politics of the militarily and economically powerful states. For instance, although Ethiopia had been a victim of Italian aggression which included the violation of the laws of armed conflict, use of mustard gas, execution of captured prisoners without trial, the Graziani massacre, and the killings at the Däbrä Libanos monastery, it was not part of the United Nations Commission for the Investigation of War Crimes.[39] Apart from being a direct victim of the Italian aggression and atrocities, Ethiopia was an ally and its exclusion from the War Commission[40] is linked to Italy switching sides during the war after the death of Benito Mussolini. In addition, during the drafting of the Nuremburg Charter of the International Military Tribunal, no African states were present. Ethiopia was among the additional 19 states that ratified the Charter although they had not participated in the actual drafting process.

In 1945, when the Charter of the United Nations was adopted, four African states (Egypt, Ethiopia, Liberia, and the Union of South Africa) participated. They were the only states from Africa which met the membership criteria outlined in Chapter II of the Charter. These criteria hinged on the concept of statehood as defined in the 1933 Montevideo Convention. However, 15 years later in 1960, African membership of the United Nations and participation in the multilateral treaty-making process changed. Ever since, the presence, influence, and impact of African states on international law has been significant. As of 2022, the membership of African states in the United Nations stood at 54. These states all participate

39 The United Nations War Crimes Commission (UNWCC) was established during the Second World War by the 17 representatives of the Allied nations on 20 October 1943. It was a fact-finding body and its terms of reference included the collection, investigation, and recording of evidence of war crimes and where possible the identification of individuals responsible. See generally, UNWCC (n 36).

40 The members of the Commission were Australia, United Kingdom, United States, Belgium, China, Czechoslovakia, France, Greece, India, Luxembourg, Netherlands, Norway, Poland, and Yugoslavia.

and conclude multilateral treaties. This is a considerable increase from the six states that participated in the United Nations Diplomatic Conference on the Law of the Sea in 1958. In 1998, just 40 years later, 50 African states participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the focus of this chapter.

The question arising from the increased participation of African states in the development of international law is whether one can identify what could be labelled an 'African approach to international law' by analysing African states' proposals and counter proposals during the drafting of the Rome Statute. Naturally the expectation is that once African states attained international personality on independence, they would play a crucial role in making new and modifying existing laws. In 1960, the then United Nations Secretary-General, Dag Hammarskjold, acknowledged the role of African states in shaping the post-Second World War international legal system. He stated that the involvement of African states was taking place in the face of a 'lagging reaction' among Western states to the admission of African states to the United Nations system.[41] He believed in the ability of those (African) states to make a valuable contribution as they steered through the maze of the United Nations. Boutros-Boutros Ghali, the first African to be elected as Secretary-General of the United Nations, was more specific in his analysis of the role of African states in shaping international law.[42] He pointed out that Africa was a latecomer to the international plane and so had made minimal contribution to the development of international law.[43] As such the then Organisation of African Unity was a vehicle through which African states sought to make a fresh start in that traditional international law had been seen as a projection of colonisation designed in part to legitimise European acquisitions and privileges.[44]

It would be a fallacy to claim that as latecomers African states have adopted a sustained opposition to all the rules of traditional law that they found on entering the arena. In fact, it was on the basis of the rules of traditional international law that the majority of the African states attained their sovereignty and subsequently their international personality. They were eager to enter and be considered as members of the family of

41 D Hammarskjöld *Servant of peace: A selection of the speeches and statements of Dag Hammarskjold, Secretary-General of the United Nations, 1953-1961* (1962).

42 Boutros-Boutros Ghali 'The Addis Ababa Charter' (1964) 546 (January) *International Conciliation* 62.

43 As above.

44 As above.

nations based on the established rules of the international system. This was expressed in the Charter of the Organisation of African Unity (OAU), which in article 2 includes as one of the purposes of the organisation the promotion of 'international co-cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights'. Elias, who was one of the drafters of the African Charter, commented that the reference to the Charter of the United Nations indicates not only the adherence of the member states to the principles of the Charter but also their awareness of the need to realise the goal of international cooperation in practical terms.[45] Still, and as pointed out by Henkin, although 'there has been no wide rejection of traditional norms, there have been calls for a complete re-examination of traditional law'.[46] He suggests that the continued codification and development of international law took place in a manner which allowed the new states a voice in re-establishing the legal system through either reaffirming or modifying the existing one.[47] The aim of this chapter is to establish whether from the African states' proposals during the Rome Conference, we can identify trends that can be aligned to what can be referred to as 'African approaches to international law'.

5 Post-colonial Africa and engagement with international law

One would have expected that on attaining independence and admission to the club of nations, African states would adopt a transformative approach towards international law. Quite the reverse; African states inherited and sustained the edifice of the colonial state with its colonial borders, colonial languages, education, and legal systems. Africa's post-colonial ruling elites and academics appeared to have had no appetite to embark upon major modifications or undertake the reconstruction of their societies into something they were familiar with. Perhaps the insistence on the maintenance of Western ideas and concepts such as territorial sovereignty and citizenship in the context of Africa without seeking seriously to interrogate their usefulness, contributed to the slow advancement of Africa. In fact, when compared to Western citizenry, there remains a wide gulf in the level of interaction between an ordinary African citizen and states institutions. Kéba Mbaye captured this difference when he wrote: [48]

45 TO Elias 'The Charter of the Organization of African Unity' (1965) 59(2) *American Journal of International Law* 243-267 at 247.

46 L Henkin *How nations behave: Law and foreign policy* (1979) 124.

47 Henkin (n 46) 125.

48 K Mbaye 'Les réalités du monde noir et les droits de l'homme' (1969) 2 *Revue des droits de l'homme* 391.

> Whilst in western countries the citizens' vigilance, gusto for putting forth claims and their attachment to legal litigation prevented abuse against public freedoms, in the countries of black Africa passivity is the norm. The majority of the population lives under constant fear of the state and indeed outside the state. The African peasant takes pride in saying, 'I have never set foot in a court of law or in a police station'.

There have been attempts by independent African states and African scholars to modify international law to reflect the interests and aspirations of Africa, if not to redress some of its historical imbalances. However, unlike the Soviet Union which during its early days distrusted international law, viewed it as 'essentially bourgeois in character',[49] and adopted an extended version of the principle *rebus sic stantibus,*[50] independent African states started by embracing it. Perhaps they had no option as it was through international law that they came into existence.[51] Tanzania was an exception. Julius Nyerere, the Tanzania President and Tanzania's *Baba wa Taifa* (Father of the Nation), addressed the issue of his country's approach to pre-independence treaty obligations by introducing what is today referred to as the 'The Nyerere Doctrine of State Succession to Treaties'. When he addressed the Legislative Assembly in 1959, two years before Tanzania's independence, he made it clear that his country would not blindly accept all previous treaty obligations. He stated: [52]

> We are willing on a basis of reciprocity to continue in force for a period of two years from Independence Day, all valid bilateral treaties which would otherwise have ended when we became an independent state. During the two-year period, we will negotiate with the states concerned with a view where

49 JN Hazard 'The Soviet Union and international law' (1950) 1 *Soviet Studies* 189-199.

50 See GF Kenna *Soviet foreign policy 1917-41* (1960) stating as follows: 'Every international agreement is the expression of an established social order, with a certain balance of collective interest. So long as this social order endures, such treaties as remain in force, following the principle of *pacta sunt servanda,* must be scrupulously observed. But is in the storm of a social cataclysm one class replaces the other at the helm of the State, for the purpose of reorganizing not only economic tries but the governing principles of internal and external politics, the old agreements in so far as they reflect the pre-existing order of things, destroyed by the revolution become null and void ... Thus in this sense the Soviet Doctrine appears to be an extension of the principle *rebus sic stantibus*, …'. The principle entails that all treaties, accords, or agreements are concluded with the implied condition that they are binding only if there are no major changes in the circumstances.

51 JT Gathii *War, commerce, and international law* (2010).

52 JK Nyerere 'Speech before the 35th Session of the Legislative Congress' *Hansard* 22 October 1959.

> appropriate, to continuing or changing these treaties in a mutually acceptable manner.

He crystallised Tanzania's approach to international law after independence when he stated: [53]

> At the same time the Government must be vigilant to ensure that where international law does not require it, Tanganyika shall not in the future be bound by pre independence commitments which are no longer compatible with their new status and interest.

Collectively, the majority of the newly independent African states sought to push for equality and the democratisation of international relations by adopting common positions to changing the international legal order. For instance, they used multilateral forums such as the Non-Aligned Movement to air their desire to reshape international economic relations and challenge the continued economic domination by developed states. The need to change the nature of international economic relations was a result of what Bedjaoui Mohammed, an Algerian scholar, alluded to as the newly independent yet underdeveloped states' realisation of the 'inescapable relationship which links their economic backwardness to the political and economic domination they are subjected to'.[54] Africa and other underdeveloped states' unrelenting demand for new international economic relations was articulated in the 1973 Economic Declaration adopted during the fourth Non-Aligned Movement Conference held in Algiers. This conference was attended by 39 African States and 10 African national liberation movements.[55] They sought to formulate new rules and reinterpret the old rules. This was after agreeing that the vast majority of the developed countries were determined to perpetuate the existing

53 As above.

54 M Bedjaoui *Towards an international economic order* (1979) 87.

55 African States present included: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Dahomey (which is today Benin), Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra-Leone, Somalia, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zaire, and Zambia. The African National Liberation Movements who attended as observes included: Angola: MPLA & FNLA, Guinea-Bissau: PAIGC, Mozambique: FRELIMO, São Tomé and Príncipe: CLP, São Tomé, Zimbabwe: ZAPU & ZANU, South Africa: ANC & PAC, Namibia: SWAPO, Seychelles Islands: SPUP, Comoros Island: MOLINACO, and Somalia: FLCS & MLD. See 'Letter dated 22 November 1973 from the Permanent Representative of Algeria to the United Nations Addressed to the Secretary General' *Documents of the Fourth Conference of Heads of State of Government of Non-Aligned Countries held at Algiers from 5 to 9 September 1973.*

economic order for their sole benefit with little regard for the wishes of the developing countries.

The Algiers Conference saw the seeds for the influence of developing states in the development of a New International Economic Order (NIEO). In 1974, the United Nations General Assembly (UNGA) adopted three fundamental resolutions that would shape the NIEO. Two of these resolutions 3201(S-VI)[56] and 3202 (S.VI),[57] were adopted during the UNGS' Sixth Special Session at the request of Algeria and are referred to as the 'Algerian Initiative'.[58] The session held between 9 April and 2 May 1974 at the instigation of an African state (Algeria) was the first during which the UNGA focused its attention on the problems of raw material and development. It sought to change the nature of international economic relations. The two resolutions set the stage for the General Assembly to adopt the Charter of Economic Rights and Duties of the States in December 1974. Although the Charter was adopted after 120 states voted in favour, six states abstained, and ten states voted against, UNGA resolutions are not legally binding. They do, however, serve as an expression of the sentiment among developing states, and Africa in particular.[59]

The same can be said of the further development of international humanitarian law. African states played a crucial role in the elaboration of Additional Protocols to the Geneva Conventions in particular.[60] In this branch of international law, African states exerted considerable pressure and succeeded in elevating the status of wars of 'national liberation' to that of 'international armed conflicts' which resulted in the national liberation fighters being accorded prisoners of war status instead of being treated as ordinary criminals.

56 UNGA Doc 3201 (S-VI) Declaration on the Establishment a New International Economic Order 9 May 1974.

57 UNGA Doc 3202 (S-VI) Programme of Action on the Establishment of a New International Economic Order 16 May 1974.

58 See remarks by the Sudanese Delegate, Abdulla, during the Plenary Session on Agenda Item 7, UNGA Doc A/PV2229 1 May 1974.

59 See Charter of Economic Rights and Duties of States GA res 3281 (XXIX) 1974.

60 G Abi-Saab 'Wars of national liberation in the Geneva Conventions and Protocols' (1979) *Recueil des cours Académie de droit international.*

6 African states and the making of the Rome Statute of the International Criminal Court

Prior to African states becoming involved in the process of adopting the Rome Statute, a few African personalities had already seized on the matter in their individual capacities through the International Law Commission. At the time the UNGA invited the International Law Commission to draft the Code of Offences against the Peace and Security of Mankind,[61] which sowed the seeds that eventually geminated into what is now the Rome Statute. There were five African personalities on the Commission.[62] In the same year Doudou Thiam, a Senegalese diplomat, was elected as the Chairperson to the International Law Commission. In 1983, Thiam was appointed as the Special Rapporteur of the International Law Commission for Draft Code of Crimes against the Peace and Security of Mankind,[63] a position he held for 12 consecutive years (1983-1995). His main contribution to the establishment of the International Criminal Court (ICC) was the presentation of his first report on the Draft Code of Offences against the Peace and Security of Mankind. In his presentation he expressed his views on the necessity for the international community to establish international criminal jurisdiction. He deemed it ineffective to have a 'code which did no more than define crimes without providing for penalties'.[64] This explains the unification of the International Law Commission's work on the drafting of the Code of Crimes against the Peace and Security of Mankind (Part II) which supported the Draft Statute of an ICC. Other African personalities involved in the preliminary stages of the drafting and adoption of the ICC Statute include South Africa's

61 UNGA Doc A/36/106 10 December 1981.

62 The membership of the International Law Commission at time included the following African personalities Mohammed Bedjaoui (Algeria); Boutros Boutros Ghali (Egypt); Emmanuel Kodjoe Dadzie (Ghana); Frank Njenga (Kenya), and Doudou Thiam (Senegal). See A/CN.4/SERA/1981 Summary records of the meetings of the thirty-third session 4 May-24 July 1981 (1981) 1 *Yearbook of the International Law Commission* vii.

63 Other African personalities who have previously served as Special Rapporteurs include Mohammed Bedjaoui (Algeria): Succession of States in respect of Matters other than Treaties; John Dugard (South Africa): Diplomatic Protection; Abdullah El-Erian (Egypt): Representation of States in their Relations with International Organisations; and currently (2019) Dire Tladi (South Africa) is Special Rapporteur for Peremptory Norms of General International Law (*jus cogens*).

64 A/CN.4/SR 'Summary Record of the 1755th Meeting' (1983) *Yearbook of the International Law Commission* 6.

Justice Richard Goldstone,[65] Phakiso Mochochoko from Lesotho,[66] and Professor Cherif Bassiouni from Egypt. Bassiouni was first elected as Vice-Chairperson of the Bureau of the Preparatory Committee before being appointed Chairperson of the Drafting Committee.

African states were on several occasions given the opportunity to shape both the substantive and the procedural elements of the ICC. The UNGA invited them to submit written comments to the International Law Commission's Working Group on a draft statute between 1982 and 1994. The rate at which African states responded to these invitations was very low. For example, in 1994 only two (Algeria and Tunisia) of 30 states submitted observations on the report of the Working Group on a draft statute for the ICC.[67] In some instances the African states were simply silent.[68] The majority of the African states which responded spoke in favour of the Working Group's work and the need for the establishment of international criminal jurisdiction. These included Gabon, Egypt, and Libya who suggested what the applicable law for the ICC should be.[69] Gabon stressed that although it agreed with the International Law Commission's 1954 list of crimes, it proposed that 'the list should be expanded because offences that have emerged since 1954 such as colonialism and apartheid should be included in the list of offences'.[70] Egypt supported the inclusion of 'apartheid' and added 'the use of nuclear weapons' to the list.[71] Algeria regarded the list far from exhaustive or satisfactory in that it failed to include international terrorism.[72] One can make two observations about the contribution of African states during the formative stage of the ICC. First, is that despite low levels of response to the invitation to comment on the draft, the general approach adopted by the African states which responded was relatively progressive.

65 Richard Goldstone *For humanity: Reflections of a war crimes investigator* (2002).

66 MC Bassiouni 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell International Law Journal* 3.

67 'Observations of Governments on the Report of the Working Group on a Draft Statute for an International Criminal Court' ILC Doc A/CN.4/458 & Add 1-8.

68 'Comments of Governments on the Report of the Working Group on the Question of an International Criminal Jurisdiction' Document A/CN.4/452 & Add 1-3.

69 As above.

70 ILC 'Observations of Members States and Intergovernmental Organizations Received Pursuant to General Assembly Resolution 39/80 Topic: Draft Code of Crimes against the Peace and Security of Mankind (Part II) – Including the Draft Statute for an International Criminal Court' ILC Doc A/CN.4/392 & Add 1 & 2.

71 As above.

72 As above.

The second observation is that historical injustice shaped the mindset of the African states and in turn, how they sought to shape international criminal law. This is explained by the consistent reference to colonialism, apartheid, and international terrorism. It is also clear that few African states responded to the call for written comments. It is unclear whether these states agreed or disagreed with what the Working Group had put forward. Experience drawn from other platforms suggests that African states do not generally respond to issues raised through the International Law Commission. This includes legal issues placed on the agenda of the UNGA by African states. In 2009, Tanzania's ambassador, Augustine Mahiga, acting on behalf of the Group of African States, requested the inclusion of the scope and application of the principle of universal jurisdiction[73] on the agenda of the 33rd session of the UNGA. When the issue was included on the agenda, the UNGA requested member states to submit their observations on the scope and application of the principle of universal jurisdiction. Only seven of 44 African states responded. They were Cameroon, Ethiopia, Kenya, Mauritius, Rwanda, South Africa, and Tunisia,[74] which represented only twelve per cent of the African Union's membership at the time. One would at least expect a higher rate of response considering this was an issue raised by the Assembly of the African Union.

6.1 Participation of African states in the Preparatory Committee Sessions of the International Criminal Court

In December 1995, roughly two years before the diplomatic conference in Rome, the UNGA established a Preparatory Committee whose membership was open to all states member to the United Nations.[75] Its main task was to discuss and refine the major substantive and administrative issues that had arisen in the draft statute earlier prepared by the International Law Commission. The General Assembly opened the membership of the Preparatory Committee to all the 185 members of the United Nations at the time (1995). This gave all independent African states an opportunity to take part in negotiating a multinational treaty and presenting their individual approach to the international legal system. This was the first time that all independent African states had an opportunity to take part in the international law-making process. South Africa and

73 UNGA Doc A/63/237/Rev.1 'Letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General' 23 July 2009.

74 'The scope and application of the principle of universal jurisdiction' A/65/181 29 July 2010 Report of the Secretary-General prepared on the basis of comments and observations of governments.

75 UNGA Doc A/50/46 18 December 1995.

Namibia had just been welcomed as democratic and independent states by the international system. As such, African states were free from any European colonial domination and had the legal right to participate as sovereign entities in the life of the international community.

Several African states, including Lesotho, Malawi, Swaziland, Tanzania and South Africa, participated in various sessions of the Preparatory Committee.[76] The participation of some states was made possible by an UN trust fund established to ensure the participation of the least developed countries.[77] Phakiso Mochochoko, who spoke as part of the Lesotho delegation, acknowledged that his country had benefited from the trust and expressed gratitude to the contributing states.[78] The small African state delegations that participated during the sessions, in comparison to those of other states, suggests that Africa could not have been represented in all the working groups.[79] In any case there is little evidence to show that African states contributed in all the six working groups of the Preparatory Committee: i) procedural issues; ii) composition and administration of the court; iii) establishment of the court and relationship with the United Nations; iv) applicable law; v) *ne bis in idem*; vi) jurisdictional issues; and vii) enforcement.[80] What is relevant to this chapter, is an analysis of African states' contribution in the working groups on the establishment of the court and its relations with the United Nations (iii), the working group on applicable law (iv), and jurisdictional issues (v). The contributions are significant in this discussion for what they say, but equally for what they failed to say. Examining them provides an indication of whether or not one can identify an 'African approach to international law'.

A recurring theme from African states' contribution to the establishment of the ICC and how the court interacts with the United Nations, is that although African states welcomed the establishment of the court, they were circumspect as to the role of the United Nations Security Council (UNSC). The South African ambassador to the United

76 S Maqungo 'The establishment of the International Criminal Court: SADC's participation in the negotiations' (2000) 1 *African Security Review* 42-53.

77 UNGA Doc A/RES/52/160 on the Report of the Sixth Committee (A/52/651) 'Establishment of an international criminal court' 28 January 1998.

78 UN Press Release GA/L/3044 11th Meeting 21 October 1997.

79 For example, Botswana was represented only by Tendekani Malebeswa as was the Congo by Georges Bakala, whereas Brazil sent four delegates and France seven. See UNGA Doc A/AC.249/INF/2 Preparatory Committee on the Establishment of an International Criminal Court 12-30 August 1996.

80 UN Doc A/CONF 183 (vol III) 'United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome 15 June-17 July 1998'. UNOR vol III – 'Reports and other documents' 12 para 10.

Nations, Khiphusizi Jele, who spoke on behalf of the Southern African Development Community (SADC), clearly stated that the ICC 'should be unfettered by the veto of the Security Council'.[81] The Sudanese delegate, Elfatih Mohamed Ahmed Erwa, also supported the need to create an ICC that would operate outside the influence of the UNSC. For him the UNSC, a political body, and the ICC, a judicial organ, should not be conflated.[82]

It is noteworthy that at the time of the Preparatory Committee sessions, the then Organisation of African Unity (OAU) – now the African Union (AU) – was experiencing challenges in handing the Lockerbie crisis which involved Libya, the United Kingdom, France, and the United States – all permanent members of the UNSC.[83] The sentiments arising from the African states were that the three permanent members of the UNSC were using their privileged status to treat Libya unjustly and were 'disrespectful' of the role of the ICJ. These sentiments were aired by the Cape Verde, Morocco, and Zimbabwe delegations to the United Nations.[84] Consequently, the OAU and its member states intensified their campaign for the democratisation of the UNSC.

In 1997, while the Preparatory Committee was in session, the Assembly of Heads of State and Government meeting at its thirty-third Ordinary Session in Harare, Zimbabwe, adopted a series of declarations on the restructuring of the UNSC.[85] They declared, among other things, that the composition of the UNSC should be democratised to reflect the increase in the number of member states to the United Nations; expansion of the membership of the UNSC from 15 to 26; and that Africa be allocated no less than two permanent seats. It is therefore possible that a combination of such experience in the *Libya* case, and also the perception of the UNSC abusing its power played a part in the African states' stance in relation to the role of such a political body in the ICC.

During one of the preparatory sessions, the Cameroon delegation presented a summary of why its country could not support the proposal for the UNSC to be allowed a role in the functioning of the ICC. He said:[86]

81 UN (n 77).

82 UN (n 77).

83 See, for instance, UNSC Doc 748 (Tuesday 31 March 1992).

84 See UNSC Doc S/PV 3063.

85 Assembly of Heads of State and Government Thirty-Third ordinary session AHG/Decl.1-4 (xxxiii) 2-4 June 1997 AHG/Dec.120-123 (xxxiii) Harare, Zimbabwe AHG/AEC/Dec.1(i).

86 UN Press Release GA/L2777 4 April 1996.

> If the criminal court was created by the General Assembly as an independent judicial body, there was no reason for the Security Council to play the 'exorbitant role' that certain permanent members seemed to want it to play.

Tunisia's delegate had the following to say on the same issue: [87]

> Her Government could support the provision giving the Security Council the right to refer matters to the court. However, such a possibility should also be in the hand of the General Assembly, which the Charter gave the overall authority within the United Nations.

As regards the applicable law, African states were generally on the conservative side, supporting the inclusion of the four core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The submissions by South Africa and Ghana indicate some preference for the *status quo*, namely, that the future court should prosecute the core crimes as presented in the draft submitted by the International Law Commission.[88] Perhaps the conservatism of these states was influenced more by expediency than conviction. These states were likely concerned that adding new crimes, especially the treaty crimes, could have prolonged the process of adopting a treaty and subsequently establishing an international criminal court. There were instances when they sought the accommodation of additional crimes experienced in their own territories that went unpunished. This view is supported by the fact that some African states sought the inclusion of apartheid under the jurisdiction of the ICC. This was consistent with the common position of African states against apartheid, which had been practised in Southern African countries: then Southern Rhodesia and now Zimbabwe, and South Africa. Comoros and Madagascar attempted to apply a similar approach – that is, ensuring solidarity through international criminalisation of acts that threatened their territorial integrity – to mercenaryism.[89] However, their proposals could not garner sufficient support during the Rome Conference.

Certain African states pushed in vain to have 'international terrorism' included in the crimes under the jurisdiction of the court. Algeria's delegate, Nour-Eddine Sidi Ebed, said that his country wanted not only

87 UN Doc L/2776 'Role of Security Council in Triggering Prosecution' discussed in Preparatory Committee for the ICC 4 April 1996.

88 For ILC's proposed crimes within the jurisdiction of the ICC see Art 20 of the Draft Statute for an International Criminal Court 1994 (1994) II (Part 2) *Yearbook of the International Law Commission* 38.

89 Comoros & Madagascar (A/CONF 183/C 1/L.46 & Corr l).

international terrorism to be included but also treaty crimes.[90] Libya was more cautious and called for a distinction to be drawn between 'international terrorism', 'national liberation', and 'self-determination' before their criminalisation under the ICC.[91] A possible explanation for this stance could have been Libya's views on and support for the Palestinian cause for self-determination, and its concern that the Palestinian Liberation Movement could easily be treated as a 'terrorist organisation'.

What is equally interesting for this discussion is what African states seemed *not* to have proposed during the Preparatory Committee sessions. Had some of the issues that were later to emerge in the operation of the ICC been debated during the Preparatory Committee sessions, there would have been some degree of consistency in how some African states view the court and its role on the continent. African states were uneasy with the proposal to give the UNSC a role in the work of the court. The main challenges subsequently faced in the relationship between African states and the ICC can be traced back to the role of the UNSC in either referring or failing to refer certain situations to the Office of the Prosecutor.[92] They also involve how the UNSC failed to offer an official response to the AU's request to defer the ICC proceedings against the former President of Sudan, Omar Bashir. It was a case of *déjà vu* of the initial discomfort felt African states with the role of the UNSC in the ICC and the continent's perception of being marginalised.

It is strange that there was very little discussion from African states on the jurisdictional issues of the court during the Preparatory Committee sessions. One would have expected that as victims of several historical justices dating back to trans-Atlantic slave trade, colonialism, and plundering of their natural resources, African states would have used their participation in the Preparatory Committee to push for a court with expansive temporal, personal, and subject-matter jurisdiction. The approach adopted by many African states appears to have supported the

90 UN Doc GA/L3011 'Press Release' 31 October 1996.

91 UN Doc GA/L2766 Press Release 27 March 1996 'Terrorism should be core-crime of proposed International Court, India Tells Preparatory Committee'.

92 See AU Extraordinary Session of the Assembly of the African Union 'Decision on Africa's Relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec 1 October 2013 in which the AU Assembly decided to 'set up a Contact Group of the Executive Council to be led by the Chairperson of the Council, composed of five (5) Members (one (1) per region) to undertake consultations with the Members of the United Nations Security Council (UNSC), in particular, its five (5) Permanent Members with a view to engaging with the UNSC on all concerns of the AU on its relationship with the ICC, including the deferral of the Kenyan and the Sudan cases in order to obtain their feedback before the beginning of the trial on 12 November, 2013'.

establishment of a court with limited jurisdiction based on the crimes prosecuted during the Nuremburg Trial after the Second World War.

In 1997, SADC issued a common statement on the establishment of the ICC.[93] The statement indicated that SADC preferred the ICC to have limited subject-matter jurisdiction, covering only genocide, crimes against humanity, and war crimes;[94] it opted for a safer route. Although Africa had suffered from all forms of aggression, the African states that took part in the Preparatory Committee did not appear to have a common position on whether the crime should be included under the jurisdiction of the Court. In addition, some of the crimes such as 'war crimes' and 'crimes against humanity' had been criminalised under customary international law. There seemed to have been no legal justification for the temporal jurisdiction of the Court to be limited to the period after the Rome Statute entered into force. This appears to have been an opportunity missed by African states to influence the course of the prosecution of international crimes committed in their territories before the establishment of the ICC.

A common practice in both pre-colonial and certain post-colonial African states in their administration of justice is the desire to repair social bonds, that is, adopting a restorative form of justice. This is a form of justice based on an acknowledgement that the victim, the offender, and the judge will have to coexist in the same community beyond the confines of the court. The aim is to ensure continuity in such relationships. At its core restorative justice seeks to repair the damaged web of complex relations. As such the focus falls on seeking consensus in decision making and the delivery of justice, public participation, and less adherence to rules. Despite having so rich a criminal justice heritage informed by Africa's own history, the African states in the Preparatory Committee appear not to have tried to propose progressive procedures. For instances the idea of criminal proceedings not adhering to strict rules, which is common in African justice systems, is not unheard of in the prosecution of international crimes. Article 19 of the London Charter for the International Military Tribunal in Nuremburg contains a provision which exempted the tribunal from being 'bound by technical rules of evidence'.[95] The fact that African traditional procedures were completely ignored during the drafting history

93 Maqungo (n 76) 43-44.

94 Maqungo (n 76) at 47.

95 Charter of the International Military Tribunal, 8 August 1945, art 19.

of the Rome Statute could explain why they have since popped up as alternatives to the mainstream international criminal system.[96]

6.2 The Rome Conference and African states' proposals

A total of 49 African states attended the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome from 15 June to 17 July 1998.[97] The African states not represented were Equatorial Guinea, Gambia, Somalia, and Seychelles.[98] There were an estimated 300 delegates from African states. The size of the delegations varied between 15 and one. Egypt, Cameroon, Senegal, Morocco, and Nigeria were among the African states that sent the highest number of delegates, while Liberia, São Tomé and Príncipe, and Chad managed to send only a single delegate.[99] According to the delegates' titles as recorded in the Official Records of the Conference, there was a total of fifteen academics in the total of African state delegations. Egypt had the highest number with three academics. Egypt sent a total of 15 delegates including Professor Cherif Bassiouni, Dr Abdel Azim El Wazir, and Dr George Abi Saab. The South African delegation had a total of eight delegates with one academic, Professor Medard R Rwelamira. Nigeria, too, had a single academic, Professor Yadudu, in its twelve-member delegation.[100] What is noticeable is that some African states with a fairly

96 On the role of Gacaca courts in prosecuting genocide alongside the International Criminal Tribunal for Rwanda see G Gahima 'Alternatives to prosecution: The case of Rwanda' in E Hughes, WA Schabas & Ramesh Thakur (eds) *Atrocities and international accountability: Beyond transitional justice* (2007) 159-182; Clark (n 13). For the role of *mato oput* in Uganda see, T Allen *Trial justice: The International Criminal Court and the Lord's Resistance Army* (2008).

97 Algeria; Angola; Benin; Botswana; Burkina Faso; Burundi; Cameroon; Cape Verde; Central African Republic; Chad; Islamic Federal Republic of the Comoros; Republic of the Congo; Côte d'Ivoire; Democratic Republic of Congo; Djibouti; Arab Republic of Egypt; Eritrea; Federal Democratic Republic of Ethiopia; Gabon; Ghana; Guinea; Guinea Bissau; Kenya; Lesotho; Liberia; Great Socialist People's Libyan Arab Jamahiriya; Madagascar; Malawi; Mali; Mauritania; Mauritius; Morocco; Mozambique; Namibia; Niger; Federal Republic of Nigeria; Rwanda; São Tomé and Príncipe; Senegal; Sierra Leone; Republic of South Africa; Sudan; Eswatini; United Republic of Tanzania; Togo; Tunisia; Uganda; Zambia; and Republic of Zimbabwe.

98 Note that although Sahrawi Arab Democratic Republic is recognised as a state under the AU, it is not recognised as a state under the United Nations and so could not take part in the treaty-making process organised by the United Nations. Furthermore, in 1998 South Sudan had not yet come into being as a state.

99 UN Doc A/CONF.183 (vol II) United Nations Diplomatic Conference of Plenipotentiaries of the Establishment of an International Criminal Court, Rome 15 June-17 July 1998, *Official Records Volume* II – Summary Records of the Plenary meetings and the meetings of the Committee of the Whole.

100 As above.

high number of delegates included no academics at all.[101] The point is that, with limited representation of experts at such an important conference, it is less likely that the majority of the delegations that participated made meaningful contributions to all thematic areas covered.

In the run-up to the Rome Conference several African states held consultative meetings to discuss and agree on a uniform approach to guide their negotiations at the conference. In 1997, the legal experts from SADC's 14 members states met and agreed on key principles adopted by their Ministers/Attorneys-General as the sub-regional body's common statement or the 'SADC Principles'.[102] Maqungo, a South African lawyer, pointed out that the SADC countries' initiative stimulated the then Senegalese President Abdou Diouf in partnership with the international non- international governmental organisation No Peace Without Justice, who had organised a Pan African Conference on the ICC in Dakar in 1998. The conference was attended by 25 African states and adopted the Dakar Declaration for the establishment of the ICC.[103] During the Rome Conference, two documents, SADC Principles and the Dakar Declaration, were referred by the South African Minister for Justice, Abdula Omar and the Senegalese Minister for Justice and Keeper of the Seals, Jacques Baudin.[104] The Arab states in Africa appear to have adopted a different approach during the negotiations and in most cases sided with other Arab states from the Gulf Region.[105]

There are three main themes that emerge from SADC Principles, the Dakar Declaration, and African states' individual submissions or proposals during the Rome Conference. These are: (i) Africa's commitment to the relevance of international law in international relations; (ii) sovereign equality and the inviolability of sovereignty in international relations; and (iii) transnational solidarity in dealing with territorial threats and freedom of action.

These themes point to what this chapter would classify as African states' general approach to international law and international relations. Sovereign equality of states has always been seen by African states as a

101 As above.

102 Maqungo (n 76) 42-53.

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

104 A/CONF.183/SR 'Summary records of the plenary meetings' 2 Monday 15 June 1998, para 13; A/CONF 183/SR.4 'Summary records of the plenary meetings' Tuesday 16 June 1998 para 15.

105 Maqungo (n 76) 333-350.

safe haven; a shield against external interference in their domestic affairs. Former Algerian President Abdelaziz Bouteflika's (1999-2019) statement during the debate on humanitarian intervention in the United Nations is illustrative: [106]

> We do not deny that the United Nations has the right and the duty to help suffering humanity, but we remain extremely sensitive to any undermining of our sovereignty, not only because sovereignty is our last defense against the rules of an unequal world, but because we are not taking part in the decision-making process of the Security Council.

The two themes of sovereignty or independence and equal status in the international legal order were common in African states' proposals and positions during the Rome Conference. First, both the SADC member states' Common Statement and Dakar Declaration underscored the sacrosanct nature of state sovereignty. The Preamble to the SADC Ministers of Justice/Attorney-General's Common Statement emphasised the need to safeguard the 'sovereignty of states'[107] and that the court should reflect equitable geographical representation.[108]

Several African delegates to the Rome Conference linked the concept of sovereignty to the complementary principle which was included in the Rome Statute. The complementary principle requires the ICC to intervene, investigate, and prosecute international crimes in a sovereign state either to complement the existing domestic criminal justice systems, or in situations where the existing systems are unwilling or unable to act.[109] The Guinean Head of Delegation, François Fall, was very clear on this point. He said: 'The complementarity of the Court with national jurisdictions was essential to preserve the sovereignty of States.'[110] A similar position was expressed by the Mozambican Deputy Minister of Foreign Affairs, Hipólito Patricio: 'Since the principles of sovereignty and non-interference were sacrosanct, the prior consent of a State to confer jurisdiction on an international criminal court was required.'[111] The United

106 UNGA Doc 9595 'Implications of International Response to Events in Rwanda, Kosovo' examined by Secretary-General, in address to General Assembly 20 September 1999.

107 Maqungo (n 76).

108 As above.

109 WA Schabas *An introduction to the International Criminal Court* (4th ed 2011) 190.

110 Fall (Guinea) A/CONF.183/SR.5 'Summary records of the plenary meetings' 17 June 1998 para 20.

111 Hipólito Patricio (Mozambique) A/CONF.183/SR.5 'Summary records of the plenary meetings' 17 June 1998 para 9.

Republic of Tanzania, Chargé d'Affairs to Italy, Asmani, adopted a more nuanced approach. Tanzania valued the need to respect sovereignty but it also understood that sovereignty could be a stumbling block in efforts to end impunity. He said: [112]

> Some aspects of the idea of sovereignty were a potential bar to the common will to punish heinous crimes, but the court must ensure that state sovereignty became a concept of responsibility and international cooperation rather than an obstacle to the enjoyment of universal human rights.

The Libyan Arab Jamahiriya's head of delegation, Kamel Hassan Al-Maghur, said: 'It was essential to respect the sovereignty, equality and independence of states and to prevent political organs from controlling international life.'[113] Libya had its concerns regarding the role of any political organisation, but the UNSC in particular, in relation to the ICC. He elaborated that his country[114]

> … had submitted five issues to the International Court of Justice (ICJ) and had complied with its decisions in all those cases. A similar conduct had regrettably not been adopted by certain other states, some of which were permanent members of the Security Council and were represented in the ICJ. Moreover, those states had used their influence in the council to impede the work of the ICJ even before cases had started.

A combination of the powers of the five permanent members of the UNSC and the fact that there is not a single African state represented among the permanent members, complicated the position of several African states at the Rome Conference. Generally, the fact that only five members of the UNSC had the powers to veto decisions affecting the international community meant that the principle of sovereign equality had its limitations. In order to counter such lack of equality in international relations, certain African states proposed that the UNSC not be involved

112 Asmani (Tanzania) A/CONF.183/SR.3 'Summary records of the plenary meetings' 17 June 1998 para 30.

113 Al-Maghur (Libyan Arab Jamahiriya) A/CONF.183/SR.6 'Summary records of the plenary meetings' 17 June 1998 para 81.

114 As above.

at all.[115] Others supported that it be given a limited role,[116] while yet others sought the involvement of UNGA as a counter measure.[117]

When the Rome Statute was adopted, the UNSC was authorised to refer situations to the Office of the Prosecutor of ICC[118] and to defer proceedings for a period of 12 months.[119] It should therefore come as no surprise that once the ICC was established in 2002, the main source of the controversy between African states as expressed through the African Union and Court is linked to the role of the UNSC.[120] The AU Assembly, as the supreme organ of the Union, had passed several resolutions expressing its disappointment at how the UNSC had failed formally to respond to its request for the deferral of proceedings against the then Sudanese President, Omar Bashir.[121] This impasse led the AU to threaten

115 See statements made by Nigerian Head of Delegation, Alhaji Abdullahi Ibrahim, during the 7th Plenary Meeting of the Rome Conference when he said that Nigeria had '… a reservation about the proposed role of the Security Council. While there should be a relationship between the United Nations and the Court under an agreement, he was opposed to conferring on the Council the exclusive right to determine when aggression was committed and to refer such cases to the Court. The Court should not be encumbered at the outset by avoidable political influences. The power of the Council under Chapter VII of the Charter of the United Nations should not extend to the Court.' A/CONF.183/SR/7 para 87. See also, the remarks by the Niger Ambassador to Italy, Chékou Adamou, that: 'The International Criminal Court should not abide any interference. The Security Council and States must in no case delay or interrupt investigation and prosecution by the Court.' A/CONF.183/SR/7 para 77; and finally, the remarks by the Democratic Republic of the Congo's Chef de Cabinet, Maniwa Ruberwa, that '…the Court should be able to function without interference from any other organ, especially the Security Council…' A/CONF.183/SR.7 18 June 1998 para 93.

116 See the statement by the Sierra Leonean Deputy Permanent Representative to the United Nations, Fode, that: 'The Security Council should be able to refer situations to the Court but should not be able to exercise any veto or unilaterally cause indeterminate delays to the Court's proceedings.' A/CONF/183/SR.4 16 June 1998 para 54.

117 See statement by the Sudanese First Secretary, Embassy to Italy, Taj Aldin Al Hadi, echoing the sentiments of the Group of Arab States that they feared the 'Security Council might be granted powers that could affect the role of the Court concerning any war criminal, regarding of country, religion, or nationality. The text adopted might increase the powers of the Council over the above those set out in Chapter VII of the Charter of the United Nations. Where the Council failed to shoulder its responsibilities, the General Assembly should have a role in punishing war criminals.' A/CONF.183/SR 9th Plenary Meeting, 17 July 1998 para 78.

118 Rome Statute art 13(b).

119 Rome Statute art 16.

120 AU Doc 'Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/ AU/10(XV)' Assembly/AU/Dec.296XV.

121 J Okoth 'Africa, the United Nations Security Council and the International

the Court with collective withdrawal by the African state parties from the Rome Statute.[122] The controversial relationship between Africa and the ICC should be analysed in the broader debate of African states' desire for equality in international relations. In other words, a situation in which African states are treated equally and respected within the international governance system.

At the peak of the tension between the AU and the ICC, the AU explored whether UNSC powers under the Rome Statute could be extended to the UNGA.[123] This was consistent with the African states' approach to international law and a desire for equality in international affairs. Since attaining independence, African states and other developing countries had pushed for the UNGA to be granted legislative powers. As Cassese notes, such a push was based on the fact that African states and their fellow developing countries wanted to use their command of a strong majority in the General Assembly to 'pass new international legislation and do away with what they considered the most blatant injustices or inadequacies of traditional international rules'.[124]

6.3 African states and seeking transnational solidarity through international law

A cursory review of the list of crimes that African states wanted to be included under the jurisdiction of the ICC suggests that they sought transnational solidarity in curbing some of the threats to their territories and freedom. Durkheim would say that they sought to foster mechanical solidarity by seeking the international community to share their values and punish those who violated or threatened them.[125] On attaining independence African states were aware of their weaknesses both economically and militarily. A combination of what had happened in the Congo on independence, a litany of military coups, and the threat of mercenaries on the continent exposed their vulnerabilities and weakness. In some situations, the political instability in the newly independent

Criminal Court: The question of deferrals in Africa and the International Criminal Court in Africa' in G Werle, L Fernandez & M Vormbaum (eds) *The International Criminal Court* (2014).

122 See AU Doc 'Decision on the International Criminal Court' Assembly/AU/Dec.622(XXVIII), adopting the 'ICC withdrawal strategy'.

123 See D Akande, M Du Plessis & CC Jalloh 'Assessing the African Union concerns about article 16 of the Rome Statute of the International Criminal Court' (2011) 4 *Africa Journal of Legal Studies* 5.

124 Cassese (n 3) 174.

125 E Durkheim 'Sociology and its scientific field' (K Wolff trans) in K Wolff (ed) *Essays on sociology and philosophy by Emile Durkheim et al* (1960).

African states was linked to the former colonial powers convincing African leaders that their freedom was constantly under threat. The militarily and economically powerful states were eager to continue interfering in their domestic affairs either directly or indirectly. This reality appears to have influenced African states' approach to international relations during the Cold War period. This was when they preferred to remain neutral and non-aligned while the East and West blocs vied for world supremacy.[126] The preservation of their independence and freedom of action was of paramount importance and this emerges clearly from their proposals during the Rome Conference.

A significant legal outcome of the Second World War was the limitations it placed on the use of armed force and the establishment of a collective security system under the Charter of the United Nations, which appeared to favour the economically or militarily weaker states. The Nuremburg Tribunal had prosecuted the leaders of the Third Reich for planning and initiating 'a war of aggression' and the UNGA classified aggression as an international crime. There was no international platform on which the perpetrators of aggression could be brought to book. The African states were, in all likelihood, feeling vulnerable when the opportunity arose to establish an institution mandated to prosecute wars of aggression arose in the form of the ICC. It is, therefore, unsurprising that African states were among the delegates to support the inclusion of aggression under the jurisdiction of the new court.[127] The significance that African states attached to the criminalisation of aggression is captured by the remarks of Georges Ruphin, Madagascar's ambassador to Italy at the time of the Rome Conference:[128]

> The international community must not remain indifferent to the plight of defenseless countries or allow aggressors to act with impunity. The crime of aggression should be included among the crimes over which the Court had jurisdiction.

The Angolan delegate to the Rome Conference, Agostino Domingos, also supported the inclusion of the crime of aggression as part of the jurisdiction of the new court. His country treated aggression 'as a very serious crime which caused a great deal of suffering and damage to the

126 D Thiam *Foreign policy of African states: Ideological bases, present realities, future prospects* (1965) 80.

127 See also remarks by the delegates from the following countries: Algeria 149; Burkina Faso 289; Cameroon 282; Côte d'Ivoire 174; Malawi 172; Zambia 179 at the United Nations Diplomatic Conference of Plenipotentiaries (n 99).

128 See remarks by Georges Ruphin (Madagascar) 243 in United Nations Diplomatic Conference of Plenipotentiaries (n 99).

victim state'.[129] The crime of aggression was listed among the crimes under the jurisdiction of the court in 1998. However, this jurisdiction could only be exercised

> … once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.[130]

Article 5(2) was amended at the International Criminal Court Review Conference held in Kampala, Uganda. During the conference a definition of aggression and the court's triggering mechanisms were agreed on.[131] The Review Conference agreed that the amendments were to enter into force from 1 January 2017 and only after receiving 30 ratifications from the existing state parties to the Rome Statute. However, when the amendments entered into force only Botswana, a lone voice among the 34 African state parties, had ratified the changes.

The rationale behind the sudden drop in the African state parties' appetite for the criminalisation of aggression under the Rome Statute remains unclear. Perhaps it was simply a reflection of the dynamic and tense relations between the AU and its member states, the Office of the Prosecutor of the ICC, and the UNSC. The AU and its member states had adopted a position against cooperation with the ICC. The inclusion of the crime of aggression in the regional criminal court proposed by the AU,[132] suggests that African states still recognised the value of aggression being investigated and prosecuted in a court of law. The proposed regional criminal court will be formed once 15 African states have ratifies the Protocol. However, since 2014 when the Protocol was agreed upon, it has been signed by only 15 African states[133] and as at September 2022 there had been no ratifications.

129 See remarks by Dr Agostino Domingos (Angola) 180 in in United Nations Diplomatic Conference of Plenipotentiaries (n 99).

130 Rome Statute art 5(2).

131 ICC Review Conference Resolution RC/Res.6 11 June 2010.

132 African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, art 28M 'Crime of Aggression'.

133 The following African states have signed the Proposal: Benin 28 January 2015; Chad 25 February 2016; Comoros 29 January 2018; Congo 12 June 2015; Ghana 28 January 2016; Guinea-Bissau 31 January 2015; Kenya 27 January 2015; Mauritania 26 February 2015; Sierra Leone 29 January 2016; São Tomé & Príncipe 29 January 2016; and Uganda 3 July 2017.

Soon after the Republic of Congo achieved independence, there was total breakdown of law and order which provoked Belgium's intervention against the will of the new Congolese administration.[134] The new and weak administration sought military assistance from the United Nations in a letter dated 13 July 1960 to the UNSC signed by both the then President of the Republic of Congo, Joseph Kasavubu, and the Supreme Commander of the National Army and then Prime Minister and Minister of National Defence, Patrice Lumumba. The rationale behind their request for military aid was 'to protect the national territory of Congo against the present external aggression which is a threat to international peace'.[135]

In 1986, Libya accused the United States of an act of aggression when it attacked its territory under Operation El Dorado Canyon.[136] Although the United States defended its action under article 51 of the Charter of the United Nations which allows sovereign states an inherent right to self-defence, the UNGA condemned the attack after noting the declaration adopted by the OAU Assembly on the same issue. The UNGA described the United States' action as a 'violation of the Charter of the United Nations and of international law'.[137] The OAU not only condemned the attack as an act of aggression, but also viewed it as a collective attack on the organisational body.[138] The vulnerability African states felt at the hands of the superpowers and their neighbours, could have played a major role in galvanising their support for the criminalisation of aggression. The criminalisation of any act creates a sense of solidarity among the members of international and regional communities and perhaps mobilises diplomatic and material support to protect the important values. African states are considered politically and economically weak when it comes to exercising a sustained influence on international affairs. As such they regard the application of principles of international legalism in their international relations as a practical way of safeguarding their sovereignty and security from powerful states.

134 G Abi-Saab *The United Nations operation in the Congo 1960-1964* (1978); S Williams *Who killed Hammarskjöld? The UN, the Cold War and white supremacy in Africa* (2011).

135 UNSC Doc S/4382 13 July 1960.

136 UNSC Doc S.PV 2682 21 April 1986 at 51.

137 UNGA Doc 41/38 20 November 1986.

138 OAU Doc AHG/Decl.2. (XXII).

6.4 A missed opportunity to introduce progressive African practices in the administration of international criminal justice

What is conspicuously absent are proposals from African states that indicate confidence in their own traditional and peculiar practices in the administration of justice regarding international crimes and gross violations of human rights. There are two notable exceptions: proposals from South Africa which had instituted a Truth and Reconciliation Commission (TRC) in 1995;[139] and Libya whose proposals reflected the influence of Islam. During the drafting process of the Rome Statute, and more specifically in the negotiations on how cases became admissible, the South African delegation sought to ensure that its decision to grant amnesty in the context of its TRC was not to be viewed as an attempt to shield perpetrators from justice.[140] In other words, South Africa sought the court to have a positive attitude to alternative methods of accountability. Schabas contends that 'while there was widespread sympathy with the South African model, many delegations recalled the disgraceful amnesties accorded by South American dictators to themselves'.[141] What delegates ended up settling for is the current article 17(2)(c). This provision suggests that in determining the admissibility of a case, the court must first establish that the state is unwilling to act. One of the factors to be considered in establishing unwillingness of a state to act is when the proceedings were not or are not being conducted independently or impartially, and were or not being conducted in a manner which, in the circumstances, is inconsistent with intention to bring the person concerned to justice.[142]

Maqungo, who was part of the South African delegation to the Rome Conference, points out that the provision above was proposed by South Africa with support from SADC delegates.[143] He interprets the inclusion of this provision as a recognition of the 'proceedings such as those of a TRC'.[144] Since no state has asked the ICC to make an admissibility determination based on truth and reconciliation proceedings, the Court's attitude to alternative justice mechanisms such as a truth and reconciliation commission remains uncertain. It is, therefore, somewhat 'risky' to claim that article 17(2)(c) serves as its official recognition of South African TRC or any future truth commissions in other countries, as a substitute for

139 Promotion of National Unity and Reconciliation Act 34 of 1995 (SA).

140 Maqungo (n 76).

141 W Schabas *Introduction to International Criminal Court* (2011) 198.

142 Rome Statute, art 17(2)(c).

143 Maqungo (n 76).

144 As above.

the court's jurisdiction. However, if the court is to stick to article 1 of the Rome Statute which clearly states that it shall be complementary to national criminal jurisdiction[145] and not to truth commissions or any other forms of justice, then it seems alternative justice mechanisms are unlikely to be considered favourably.

African states that participated in the Rome Statute Conference could have pushed for full recognition of their African traditional values regarding justice and other alternative mechanisms for justice. African states have a rich traditional heritage and history from which they could have tapped into broaden their proposals and counterproposals during the Rome Conference. This would have ensured that the new institution was effective and enjoyed a wider legitimacy. Instead, they appear to have preferred a bandwagon approach when they could have demonstrated an attempt to assert Africanness[146] in the international law-making process. This is not to ignore that African states' history and hatred for apartheid was crucial in their support for its inclusion as a crime against humanity.[147] Similarly, African states could have proposed the inclusion of practical procedures and approaches for delivering justice and promoting reconciliation other than that adopted in the aftermath of the Second World War where one party had been vanquished and so could easily be brought to Nuremburg to face trial.

African states could further have proposed the establishment of an institution modelled on the South African TRC. Such an institution could have been an alternative form of justice to the Nuremberg-type justice that formed the foundation for the establishment of the ICC. According to Archbishop Desmond Tutu, the South African TRC model sought 'to rehabilitate both the victim and the perpetrator who should be given the opportunity to be reintegrated into the community'.[148] As such, this is a model based on the logic of inclusion and dialogue between victim and perpetrator.

In both pre- and post-colonial African states, the predominance of communal life over the individual shapes how justice is administered and

145 Rome Statute art 1.

146 See C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018) for an analysis of the concept 'Africanness'.

147 See proposals by Bangladesh, India, Lesotho, Malawi, Mexico, Namibia, South Africa, Swaziland, Trinidad and Tobago, and United Republic of Tanzania regarding art 5 in A/CONF.183/C.1/L.12 on 22 June 1998, and by Lesotho, Malawi, Namibia, South Africa, Swaziland and United Republic of Tanzania A/CONF/C.1/L/13 on 22 June 1998 and eventually the Rome Statute art 7(1)(j).

148 Desmond Tutu *No future without forgiveness* (1999) 51.

impunity prevented. In such states and societies justice was administered to maintain social order and an equilibrium within the community by preferring reconciliation over punitive measures. This possibly explains why prisons are not found in many pre-colonial African societies before colonisation.[149] The difference between Western and indigenous African approaches to justice is that the former focuses on the individual whereas the latter focuses on safeguarding the general wellbeing of communal life. In pre-colonial Africa, crime was generally viewed as a collective responsibility deserving collective punishment. Justice aimed at reconciliation and not retribution – the harmonisation of relationships was more important than the punishment of the offender.

Generally speaking, African tradition places greater emphasis on tangible and concrete action than on abstract thought and action. For example, while Western culture underscores the importance of proper adherence to abstract legal definitions and relies (too) heavily on professional lawyers during court proceedings, the same cannot be said of African culture.[150] The procedures in pre-colonial African societies were less abstract. Aja points out that the Igbo tribe of Nigeria find it difficult to understand why under modern English law a murderer can be acquitted simply for of lack of evidence or other technicalities.[151] In Igbo offenders were usually asked to pay compensation to the victim's family and tribe. Among the Yoruba people of Nigeria, justice as a concept demanded that the 'victim group' regain what had been taken from them and also ensured that the offenders did not emerge from the dispute richer or in a more favourable position than they had previously enjoyed.[152]

In the South Darfur region of Sudan the custom of paying *Dia* was common and remains relevant in the modern era.[153]*Dia* is an Arabic word which translates to 'blood money'. It is financial or material compensation by which offences are settled.[154] Although it is difficult to trace the source of this custom in South Darfur,[155] it was widely regarded as an effective

149 C Ebo 'Indigenous law and justice: Some major concepts and practices' (1979) 76 *Vierteljahresberichte* 139-150.

150 See JF Hollenman 'An anthropological approach to Bantu law (with special reference to Shona Law' (1950) X *Rhodes-Livingstone Journal* 51-64.

151 E Aja 'Crime and punishment: An indigenous African experience' (1997) *The Journal of Value Inquiry* 31.

152 Ebo (n 149).

153 See reference to the *Dia* system in T Mbeki *Darfur: The quest for peace, justice and reconciliation* (2009), 48.

154 L Holy 'Social consequences of *Dia* among the Berti' (1967) 37 *Africa Journal of the International African Institute* 469.

155 There are contradictory theories on the origins of the custom of paying *Dia* in South

way of satisfying the indigenous people's idea of justice. In 1928, Bell, a former Chief Justice of Sudan, wrote the following on his perception of the payment of *Dia*:[156]

> The settlement is allowed [by the colonial government] partly because it satisfies the native idea of justice and in many cases the payment simply justified compensation of women or children who may have lost their bread winner.

Generally, the payment of *Dia* was regarded as a substitute for an aggrieved party's right to avenge his or her kinsmen's death. Among the Berti people of Northern Darfur, *Dia* was paid for cases that included killing, injury, and damage to or destruction of property.[157] However, the payment of *Dia* applied only in cases involving disputes between two different tribes.

The payment of *Dia* demonstrates the concept of collective responsibility in the pre-colonial African justice system. In societies such as the Berti of Northern Darfur and Somalia, the members of the of the culprit's lineage contributed to the payment of compensation in homicide cases. Among the Somali, individuals belonged to a *Dia*-paying group which is a close kinship unit that would either contribute to the payment of *Dia* or receive and share *Dia* in the event that one of its members was killed by an individual from another lineage or group.[158] Being born into a community meant that one shared their status and assumed collective identity, roles, and duties. This meant that when one member committed an offence such as homicide against a member of a different clan or tribe the entire community was deemed responsible by the victim's group.

This communitarian approach to justice which is common in modern Africa is closely linked to how international crimes are interpreted. As Mamdani points out, international crimes are committed by individuals with political constituencies.[159] Applying individual criminal responsibility in such situations appears to be inappropriate and less satisfactory for the victims. Notwithstanding all these positive aspects of African approaches

> Darfur. Some argue that the custom originated with the arrival of the Arabs in the region and so is associated with the Islamic law. This theory is not supported by many elders in the area who argue that the custom is older that the Arab invasion and the existence of a similar custom in the Dinka Tribe which does not follow Islam calls the first theory into question. The Dinka pay *Dia* although they call it *Puk*.

156 Based on a 1968 report by the Sudan Law Society after a visit to Southern Darfur in 1968 available in the University of Khartoum Library.

157 Holy (n 154).

158 As above.

159 Mbeki & Mamdani (n 8).

to the administration of justice, African states at the Rome Statute would appear to have forgotten them entirely during the drafting process.

The Libyan delegate, Al-Maghur, was a lone voice who expressed the desire for the construction of a criminal justice system reflective of different legal systems. He stated: [160]

> Western values and legal systems should not be the only source of international instruments. A large proportion of the world's population followed other systems.

The proposal to consider the diversity of existing legal systems in shaping the international criminal court could be said to have been addressed under the complementarity principle in the Rome Statute. Still, as the determination of whether the domestic courts are effectively investigating and prosecuting certain crimes falls to the Court Chambers and will in all likelihood be made using values inherent in Western legal systems, it is not unlikely that practices drawn from other legal system will be side-lined. This has already happened in the situation in Uganda where traditional justice mechanisms were not considered in the debates around the trial of individuals from the Lord's Resistance Army – a matter in which local traditional and religious leaders would have favoured the application of the local Acholi traditional justice mechanisms.

7 Conclusion

There are identifiable tenets that characterise how African states engage with and seek the application of international law. What emerges from the participation of African states at the Rome Conference is that they generally embrace international law in its conservative guise. This may be ascribed to the role international law played in the decolonisation process and also in the recognition and protection of newly-independent states in the anarchic international political system. International law was the rite of passage for independent African states into the community of nations.

Although there are instances of dissatisfaction, especially regarding the role of the UNSC, the principal bone of contention does not appear to be international law as such. The issue is rather its consistent and unbiased application. In principle African states are positivist in their approach. They see sovereign states as the main actors within the international legal system. The Rome Conference also points to the importance that African

160 Al-Maghur (Libyan Arab Jamahiriya) A/CONF.183/SR.6 'Summary records of the plenary meetings' para 84.

states place on their historical involvement in multilateral engagement. To begin with, African states prefer to participate in multilateral negotiations as a block, as evidenced by the Africa Group and the SADC Common Position. This is not to imply that they always agree on what common positions they should support – their interest lies in *negotiating as a team*. It can be argued that this approach is a reflection of African states' lack of confidence or expertise on certain technical aspects. This negative impact of limited available expertise also explains why when engaging with international legal institutions – for instance, the ICC – African states often seek legal representation from foreign legal expertise.[161]

If we are to apply Gathii's 'contributionist' and 'critical theorist' dichotomy[162] to our analysis of the role of African states during the Rome Conference, there is ample evidence to suggest that African states are contributionist. In fact, they are largely conformist and seek to strengthen the equal application of international law. Perhaps they realise that they would end up worse off were they to attempt to dismantle the extant legal framework. As discussed in this chapter, the post-Second World War international legal order is more protective of sovereign states than previous dispensations. In the establishment of the ICC, the states of sub-Saharan Africa would appear to have supported the extant legal order, while their North African counterparts – in particular those with a strong Islamic tradition – sought to inject entirely different values and norms. Their failure to have these values included in the Rome Statute may explain why very few North-African states have ratified the Statute. It is conceivable that sub-Saharan Africans have not succeeded in shaking off their colonial history and have over time become a replica of Western Europe in their behaviour and identify more easily with Western values

161 In *Maritime delimitation in the Indian Ocean (Somalia v Kenya*) ICJ 12 October 2021, both Kenya and Somalia's legal advisers were from other states. For example, the co-agents for Somalia included Paul S Reichler, Attorney-at-Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia; Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, former Member and former Chairman of the International Law Commission, member of the *Institut de droit international*; Philippe Sands, QC, Professor of International Law at University College London, Barrister at Matrix Chambers, London. Kenya's team included Vaughan Lowe, QC, member of the English Bar, Emeritus Professor of International Law, University of Oxford, member of the *Institut de droit international*; Payam Akhavan, LLM SJD (Harvard), Professor of International Law, McGill University, member of the State Bar of New York and of the Law Society of Upper Canada, member of the Permanent Court of Arbitration; Mathias Forteau, Professor at the University of *Paris Ouest, Nanterre-La Défense,* member of the International Law Commission. See too the legal teams for Equatorial Guinea and France the Judgement in the *Case Concerning Immunities and Criminal Proceedings* (*Equatorial Guinea v France*) ICJ 11 December 2020

162 Gathii (n 1).

and norms. African approaches to international law, it would appear, do not differ in any meaningful way from those of Europe.