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Luisa Pereira da Rocha Giannini Figueira

Contesting the Al Bashir Case:
The meaning of politics in the international legal argumentative practices and the limits of the African contestation

Tese de Doutorado

Thesis presented to the Programa de Pós-graduação em Relações Internacionais of PUC-Rio in partial fulfilment of the requirements for the degree of Doutora em Relações Internacionais.

Advisors: Prof. Dr Roberto Vilchez Yamato
Prof. Dr Florian Fabian Hoffmann

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September 2022

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Prof. Roberto Vilchez Yamato
Advisor
Instituto de Relações Internacionais – PUC-Rio

Prof. Florian Fabian Hoffmann
Advisor
Departamento de Direito – PUC-Rio

Prof. Andrea Ribeiro Hoffmann
Instituto de Relações Internacionais – PUC-Rio

Prof. Anna Gudrun Christina Leander
Instituto de Relações Internacionais – PUC-Rio

Prof. João Henrique Ribeiro Roriz
UFG

Prof. Thomas Gammeltoft-Hansen
University of Copenhagen

Rio de Janeiro, 27 September 2022

Luisa Pereira da Rocha Giannini Figueira

Luisa holds a Doctoral degree in International Relations from the Institute of International Relations of the Pontifical Catholic University of Rio de Janeiro (IRI/PUC-Rio). Researcher at the Centre for the Study of International Courts (NETI-USP). She was a visiting fellow at iCourts (Danish National Research Foundation's Center of Excellence for International Courts) at the University of Copenhagen as a CAPES-PrInt sandwich doctoral fellow. Master's in international Relations from IRI/PUC-Rio (2017). She has a certificate in International Politics from Clio International (2014). Bachelor's in international Relations from Centro Universitário La Salle in Rio de Janeiro (2012).

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Para João (*in memoriam*)

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Abstract

Giannini Figueira, Luisa Pereira da Rocha; Yamato, Roberto Vilchez; Hoffmann, Florian Fabian (Advisors). **Contesting the Al Bashir Case: The meaning of politics in the international legal argumentative practices and the limits of the African contestation.** Rio de Janeiro, 2022. 434p. Doctoral Thesis – Instituto de Relações Internacionais, Pontifícia Universidade Católica do Rio de Janeiro.

This thesis works through the process of contestation embarked by African States in relation to the Al Bashir Case in the International Criminal Court. The enactment by these States of practices of contestation represented an unprecedented moment in the practice of international criminal law. Not only were States engaging with the Court through a vast array of practices, but also this participation generated an enormous level of scrutiny from scholars and practitioners of international law. Throughout the response to the African engagement with the ICC was the familiar mobilization of the frontier between law and politics. A frequent position in the practitioners' reactions was that politics should not take place in the environment of the Court, and the practice of international law should be able to transcend it. The analysis of this thesis focuses on these two features: the practices of contestation performed by African States and the responses it engendered from the Court. In this thesis, I question whether the way the Court made sense of these practices through the division of labour between law and politics affected the ability of these contesting States of engendering change in international law. Through this question, I seek to grasp the more significant aspects that are veiled not only in the practices of contestation but in the attribution of meanings in response to them. This endeavour requires an examination of the patterns of meaning underlying these practices and narratives, as they point to the conditions that allow certain actors to question authority. I argue that the creation of a boundary between what belongs to the realm of law and the sphere of politics is itself a political stance that has consequences on the way international law is enacted. The way law and politics are mobilized in the argumentative practices of international law creates a set of barriers so that certain practices of contestation being performed by African States in

relation to the Al Bashir Case in the ICC, when framed as politics, do not stand a chance to provoke change in the first place.

Keywords

African Contestation; Al Bashir Case; Politics of International Law; International Criminal Court; Argumentative Practices.

Resumo

Giannini Figueira, Luisa Pereira da Rocha; Yamato, Roberto Vilchez; Hoffmann, Florian Fabian (Orientadores). **Contestando o Caso Al Bashir: O sentido da política nas práticas argumentativas jurídicas internacionais e os limites da contestação africana.** Rio de Janeiro, 2022. 434p. Tese de Doutorado – Instituto de Relações Internacionais, Pontifícia Universidade Católica do Rio de Janeiro.

Esta tese analisa o processo de contestação iniciado pelos Estados africanos em relação ao Caso Al Bashir no Tribunal Penal Internacional. A promulgação por esses Estados de práticas de contestação representou um momento sem precedentes na prática do direito penal internacional. Não apenas os Estados se engajaram com o Tribunal por meio de uma vasta gama de práticas, mas também essa participação gerou um nível alto de escrutínio de estudiosos e profissionais do direito internacional. Ao longo da resposta ao envolvimento africano com o TPI, esteve constantemente presente a conhecida mobilização da fronteira entre direito e política. Uma posição frequente nas reações dos praticantes foi a de que a política não deveria ocorrer no ambiente do Tribunal e a prática do direito internacional deve ser capaz de transcendê-la. A análise desta tese centra-se nestes dois elementos: as práticas de contestação realizadas pelos Estados africanos e as respostas dadas pelo Tribunal. Nesta tese, questiono se a forma como o Tribunal deu sentido a essas práticas por meio da divisão do trabalho entre direito e política afetou a capacidade desses Estados contestadores de provocar mudanças no direito internacional. Por meio dessa pergunta, procuro capturar os aspectos mais significativos que estão velados não apenas nas práticas de contestação, mas na atribuição de significados em resposta a elas. Esse esforço requer um exame dos padrões de significado subjacentes a essas práticas e narrativas, pois apontam para as condições que permitem que certos atores questionem a autoridade. Argumento que a criação de uma fronteira entre o que pertence à esfera do direito e à esfera da política é em si uma postura política que tem consequências na forma como o direito internacional é praticado. A forma como o direito e a política são mobilizados nas práticas argumentativas do direito internacional criam um conjunto de barreiras para que certas práticas de contestação realizadas pelos Estados africanos em

relação ao Caso Al Bashir no TPI, quando enquadradas como política, não tenham chance de provocar a mudança em primeiro lugar.

Palavras-chave

Contestação Africana; Caso Al Bashir; Política do Direito Internacional; Tribunal Penal Internacional; Práticas Argumentativas.

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Abbreviations

AC	Appeals Chamber
ASP	Assembly of States Parties to the Rome Statute
AU	Organization of the African Union
CPA	Comprehensive Peace Agreement
DPA	Darfur Peace Agreement
ECCC	Extraordinary Chambers in the Courts of Cambodia
GoS	Government of Sudan
ICID	International Commission of Inquiry for Darfur
ICJ	International Court of Justice
ICC	International Criminal Court
ICTR	International Criminal Court for Rwanda
ICTY	International Criminal Court for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
JEM	Justice and Equality Movement
NIF	National Islamic Front
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
SCCED	Special Criminal Court on the Events in Darfur
SCSL	Special Court for Sierra Leone
SLA	Sudan Liberation Army
SLM	Sudan Liberation Movement
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
TWAIL	Third World Approaches to International Law
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of the Treaties

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Courts try cases, but cases also try Courts.
Robert H. Jackson, *The Rule of Law Among Nations*

Introduction

"The African bias is a cover up argument like the denial of the Holocaust. It should not be considered as an argument but rather as an alibi to ignore crimes and it should be exposed as such," wrote former International Criminal Court (ICC) Prosecutor, Luis Moreno Ocampo, in 2016.[1] Ocampo's successor, Fatou Bensouda had likewise framed the 'African bias' as a matter of "powerful individuals responsible for [the victims'] sufferings trying to portray themselves as the victims of a pro-western, anti-African court."[2] These quotes allude to the notorious line of argumentation used by many African leaders that, in general lines, portray the ICC as an institution that reproduces colonial practices and, consequently, adopts a prejudicious stance in relation to African countries. Such discourse has been voiced by many African authorities,[3] including Commissioners from the African Union (AU).[4] Though these are often the types of statement that make into the headlines, the African engagement with the ICC is much more complex and turbid than depicted.

A considerable number of characterizations of the African posture in face of the ICC by academics, journalists and practitioners tend to accept these most radical discourses and, therefore, sustain the rhetoric that the African complaints against the Court are a mechanism to prevent accountability against its leaders.[5] However, this position only provides a very good illustration of the most radical way of understanding the African States' stance in relation to the ICC in the past twenty

[1] MORENO-OCAMPO, Luis, **From Brexit to African ICC Exit: A Dangerous Trend**, Just Security. Available at: <https://www.justsecurity.org/33972/brexit-african-icc-exit-dangerous-trend/>. Accessed: 20 may 2022.
[2] SMITH, David, **New chief prosecutor defends international criminal court**, The Guardian. Available at: <https://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court>. Accessed: 13 dec. 2020.
[3] KENYATTA, Uhuru, **Statement at the Extraordinary Session of the Assembly of the African Union**, Addis Ababa: African Union, 2013.
[4] For example, a Gambian Minister making a statement on state television said "International Caucasian Court" would explain best the Court's acronym, accusing the ICC of being "designed by Western whites to target African blacks," a criticism that echoes "complaints […] that the international justice system focuses its attention solely on cases from Africa." O'GRADY, Siobhán, **Gambia: The ICC Should Be Called the International Caucasian Court**, Foreign Policy. Available at: <https://foreignpolicy.com/2016/10/26/gambia-the-icc-should-be-called-the-international-caucasian-court/>. Accessed: 20 may 2022.
[5] TIEMESSEN, Alana, **Does the ICC Need to Reconcile with Africa? Bensouda Comes Out Swinging**, Justice in Conflict. Available at: <https://justiceinconflict.org/2012/05/25/does-the-icc-need-to-reconcile-with-africa-bensouda-comes-out-swinging/>. Accessed: 20 may 2022.

years. By endorsing this position, the narrative masks the spectrum of engagements by African States that have been taking place. The example of Rwanda, which is not a party to the Rome Statute, demonstrates how framing these States as uncooperative and in favour of impunity does not reflect the actual picture. Rwandan President Paul Kagame, in 2018, demonstrated a very harsh view towards the ICC, saying: "[f]rom the time of its inception, I said there was a fraud basis on which [the ICC] was set up and how it was going to be used. I told people that this would be a court to try Africans, not people from across the world."[6] That was a position that had been more than once been voiced by Rwandan authorities. Louise Mushkiwabo, Rwandan Foreign Minister, in 2013, had already expressed such view calling the ICC "a political court."[7] Regardless of the stern attitude, also in 2013, the government of Rwanda, alongside the United States and the Netherlands, facilitated the transfer of Bosco Ntaganda to the custody of the ICC.[8] This move shows that the position of Rwanda does not fit the clear-cut uncooperative stance that portray the States that express their positions criticizing the 'African bias' of the Court. The State of Rwanda has officially declared itself a supporter of international criminal justice and an advocate for the end of impunity. Nevertheless, in light of the political interference that impairs the affirmation of the principle of sovereign equality, Rwanda adopts a critical stance regarding the *modus operandi* of the ICC.[9] This has been the official position of many African States that voice

[6] **Rwanda's Paul Kagame accuses ICC of bias against Africa**, Al Jazeera. Available at: <https://www.aljazeera.com/news/2018/4/29/rwandas-paul-kagame-accuses-icc-of-bias-against-africa>. Accessed: 20 may 2022.

[7] LAMONY, Stephen A., **Rwanda and the ICC: Playing Politics with Justice**, African Arguments. Available at: <https://africanarguments.org/2013/10/rwanda-and-the-icc-playing-politics-with-justice-by-stephen-a-lamony/>. Accessed: 26 may 2022.

[8] INTERNATIONAL CRIMINAL COURT, **Bosco Ntaganda est désormais détenu par la CPI**, The Hague: International Criminal Court (ICC), 2010; MUSHIKIWABO, Louise, **Bosco Ntaganda has just taken off from Kigali in custody of ICC officials following cooperation btwn Rwanda, US & Dutch governments**, Twitter. Available at: <https://twitter.com/lmushikiwabo/status/315069313642008576>. Accessed: 25 may 2022.
Bosco Ntaganda was wanted by the ICC in relation to the conflict in the Democratic Republic of the Congo (DRC). Upon the request from the OTP for an arrest warrant for Ntaganda, the Chamber held that there were reasonable grounds to believe that Ntaganda had played an essential role in enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities in the DRC and issued a warrant of arrest on 22 August 2006.
INTERNATIONAL CRIMINAL COURT, **Case Information Sheet: Situation in the Democratic Republic of the Congo, The Prosecutor v. Bosco Ntaganda (ICC-01/04-02/06)**, International Criminal Court. Available at: <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/NtagandaEng.pdf>. Accessed: 6 may 2022, (ICC-PIDS-CIS-DRC-02-018/21_Eng).

[9] LAMONY, **Rwanda and the ICC: Playing Politics with Justice**.

their views on the 'African bias' of the Court. They claim that their dissonances in relation to the practice of the ICC does not mean that they are against the existence of the Court or its work towards ending impunity. Africa has been the largest regional grouping within the Court since the adoption of the Rome Statute. The official position of most of these States is that they oppose certain statutory provisions and practices of the Court, but that does not mean that they are against the fight for impunity for international crimes.

Based on the case of Rwanda and many other African States, this thesis departs from the notion that there is a multitude of positions and forms of engagement by African States in relation to the Court that at first glance seem to contradict one another. The fact that these stances are also in flux due to a myriad of reasons – from the arising national and international norms, changing interests and allegiances in international relations, historical grievances to fear of the consequences that these developments might have for the practice of international law – contributes to the intricateness of the African position in relation to the ICC.[10] A study committed to understanding the African relationship with the Court needs to encompass this complexity through the unpacking of superficial narratives and looking carefully into the actual dynamic between States and Court. Many authors have sought to precisely do that.[11] This thesis joins the academic production that see in the African engagement with the ICC a much wider and richer spectrum of practices that can vary from a confrontational, apologist, dismissive and hostile to a fruitful, committed, and purposeful behaviour. This research sets out to investigate the African States' assorted involvement with the ICC.

[10] MILLS, Kurt, "Bashir is Dividing Us": Africa and the International Criminal Court, **Human Rights Quarterly**, v. 34, n. 2, p. 404–447, 2012, p. 406.

[11] A great example can be that of the International Criminal Court Forum's 'Is the International Criminal Court (ICC) targeting Africa inappropriately?' **Africa Debate — Is the ICC Targeting Africa Inappropriately?**, ICC Forum. Available at: <https://iccforum.com/africa>. Accessed: 25 may 2022.

i.
Unfolding the African quarrel with the ICC through the saga of the Al Bashir Case

Analysis on the Africa–ICC dynamics usually depicts it as an initially good relationship that has gone sour.[12] The point of rupture in these accounts is the first time the ICC indicted a serving Head of State, Omar Al Bashir, then President of Sudan.[13] According to these depictions, there was a drastic change in the African States' demeanour towards the ICC from a heavy support during the Rome Conference and the following years to a posture of huge criticism after the issuance of the first arrest warrant against Al Bashir. The idea behind these accounts is that the Al Bashir Case was a catalyst in the Africa–ICC dynamics for African States are against having their Heads of State put in the position of being tried by an international court.

Even though the Al Bashir Case really did strengthen the "perception of unfair prosecutions of Africans,"[14] recent research have shown that most of the criticism voiced by African States towards the structure and proceedings of the ICC have to a large extent remained the same since discussions to create a permanent international criminal court in the 1990s.[15] The elevation in the tone that configures the contemporary African critique has to do with the idea that "the Court's practice deviates too much from their vision of a legitimate ICC."[16] This thesis aligns with this position, claiming that the change after the indictment of Omar Al Bashir does

[12] ODERO, Steve, Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis, *in*: MURUNGU, Chacha; BIEGON, Japhet (Eds.), **Prosecuting international crimes in Africa**, Pretoria: Pretoria University Law Press, 2011, p. 148–150; MILLS, Bashir is Dividing Us, p. 406; MUTUA, Makau W., Africans and the ICC: Hypocrisy, Impunity, and Perversion, *in*: CLARKE, Kamari; KNOTTNERUS, Abel S.; DE VOLDER, Eefje (Eds.), **Africa and the ICC**, Cambridge: Cambridge University Press, 2016, p. 54; CRYSTAL MOKOENA, Untalimile; OLUBORODE JEGEDE, Ademola, Politics or law: reflections on the aftermath of the Omar Al-Bashir saga and South Africa's intended withdrawal from the ICC, **Journal of African Foreign Affairs**, v. 5, n. 2, p. 91–107, 2018, p. 95.

[13] DU PLESSIS, Max; MALUWA, Tiyanjana; O'REILLY, Annie, Africa and the International Criminal Court, **Chatham House International Law 2013/01**, 2013, p. 4.

[14] DUERR, Benjamin, **Omar Al-Bashir and the Burden of the ICC**, JusticeInfo.net. Available at: <https://www.justiceinfo.net/en/40491-omar-al-bashir-and-the-burden-of-the-icc.html>. Accessed: 20 may 2022.

[15] GISSEL, Line Engbo, A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003, **European Journal of International Law**, v. 29, n. 3, p. 725–748, 2018.

[16] *Ibid*., p. 747; See, also, SCHABAS, W. A., The Banality of International Justice, **Journal of International Criminal Justice**, v. 11, n. 3, p. 545–551, 2013, p. 548–549.

not mean a move from a supportive stance towards an antagonistic one. Rather, after the issuance of the arrest warrant for Al Bashir, there was a change of tone. These States have multiplied the mechanisms through which they engage with the Court to demonstrate their dissatisfaction and try to generate their desired change, a posture that depending on the tactics could be either taken as productive or confrontational. And, as was the case of Rwanda, many of them concomitantly embarked on fruitful and hostile practices. This means that, despite not following the notion that the Al Bashir Case was a watershed for the African change of heart, this thesis recognizes the importance of the Al Bashir Case for the way it has provoked broader and stronger manifestations from African States towards the activities of the organs of the Court.

Therefore, the Al Bashir Case presents itself as a rich situation for a better comprehension of the African engagement with the ICC. It has generated an unparalleled involvement from many African States and, consequently, attracted a lot of attention because of the overflowing range of activities that these States were taking individually and collectively to make their case. This increase in the African States involvement with the Court had to do with the unprecedented situation that was before them. With the issuance by the Pre-Trial Chamber (PTC) I of a warrant of arrest for Al Bashir, not only it was the first time the ICC had indicted a sitting Head of State, but the Case originated from a situation that pioneered the trigger mechanism in article 13(b) of the Rome Statute, the UNSC referral. This means that the wanted individual was a President in office from a State that was not a signatory of the referred treaty.

Since its inception in 2008, the Al Bashir Case has been a unique source because of the circumstances it created for international legal practitioners, a situation for which there is no straightforward legal remedy. The legal conundrum presented by the Case was whether ICC Member States have the obligation to arrest and surrender Al Bashir to the Court in the occasion that he visited their respective territories considering that Sudan was not a signatory of the Rome Statute. Some African States claimed that there would be a problem for them to comply with the ICC's arrest warrants against Al Bashir. They reasoned that, as Sudan has never waived any of its immunities, Al Bashir is entitled to Head of State immunity

pursuant to customary international law.[17] Consequently, the Court's request for cooperation in the arrest and surrender of Al Bashir created for these States inconsistent obligations. Evoking this position throughout the past decade, these African States have made different kinds of requisitions to the ICC and the UNSC ranging from requests for clarification of the legal quandary presented before them to calls for the Court and UNSC to stay the case against Al Bashir. Most of those pleas, regardless of whether justified or not, were not addressed by any of those institutions. This lack of recognition of their allegations contributed to the increase of these States' dissatisfaction with the Court and, as a consequence, many African States parties to the Rome Statute launched a campaign of unilateral and concerted actions of contestation towards the ICC. As a result of the conflicting views between the Court and African States, the Al Bashir Case has been the epicentre of a legal battle over the matter of the application of the norm of Head of State immunity for non-member States of the Rome Statute.

The Al Bashir Case for more than 10 years has been a site where the key challenges the Court faces are represented. Besides, the amount of mobilization that the Case has generated from ICC Member States and the Chambers of the Court to academia has been unheard of. As a result, the amount of scrutiny that the Case has been subject to has created a unique opportunity for a holistic analysis of the field of international criminal law. The tremendous proportion that the Case acquired in the practice of international criminal law was accurately described by Dire Tladi:

> Several court decisions by the different chambers of the ICC and domestic courts have been handed down on whether there was a duty to arrest Mr Al Bashir at the time he was head of State of Sudan […]. Academic conferences were held, diplomatic engagements initiated, and I can go on and on. It would not be an overstatement to say that a whole industry was established around the question whether there was, under international law, a duty to arrest Al Bashir.[18]

Considering that African States have engaged in a wide array of practices in relation to the Al Bashir Case as to voice their divergence and make their case and

[17] Though the main line of argumentation is that Al Bashir is entitled to immunity pursuant to customary international law, there are variations to this reasoning, such as the immunities that derive from his attendance to a regional organization summit (see Interludes No. 3 and 5).

[18] TLADI, Dire, **Sudan Agrees to Send Al Bashir to the ICC: What Now for the Law?**, Opinio Juris. Available at: <http://opiniojuris.org/2020/02/12/sudan-agrees-to-send-al-bashir-to-the-icc-what-now-for-the-law/>. Accessed: 20 oct. 2020.

the Court and other interested actors have had multiple opportunities of manifesting themselves in regard to the matter at stake, this Case presents itself an important and unique site for understanding the African States' involvement with the ICC. More so, as Tladi was able to encompass in the highlighted passage, in the same way that it engendered an increase in the intensity and forms of interaction by African States with Court, the Al Bashir Case also propelled an unprecedented level of scrutiny by the ICC and from academia of these practices of contestation being performed by African States.[19]

ii.
Finding the place of the research: studies on the African contestation in relation to the Al Bashir Case in the ICC

The explorations of these practices of contestation being enacted by African States in the Al Bashir Case can be divided into three groups: (1) the analysis of the argumentative practices articulated by these States as to justify their position of non-compliance with the Court's requests in the Al Bashir Case and the scrutiny of the decisions issued by the Chambers of the Court in relation to these episodes of non-cooperation; (2) the examination the African engagement and discourses in relation to the Case in the ICC that analyse the many challenges facing the Court either in conjunction or separately; and (3) the appraisal of the different means through with these States have been manifesting their disagreement with the Court in a way to categorise and make sense (in the case of scholars) or respond (in the case of the Court) to these actions.

The first group is engaging directly and only with the issue under contestation: whether the States Parties to the Rome Statute had the obligation to arrest and surrender Omar Al Bashir to the ICC in conformity with their duties under the Statute or had to act in accordance with their obligation under customary international law and bestow Al Bashir with his right to immunity as the sitting

[19] There was also a very large response from civil society. But the analysis of their participation would require an overview of processes that are beyond the scope of this research and for that reason are not being considered here. The academic engagement will be considered as long as it takes place within the scope of the Case in the ICC.

Head of State of Sudan.[20] Their goal is to analyse the different legal propositions in order to pinpoint the prevailing obligation and consequently resolve the matter. In regard to the Al Bashir Case, this has been the largest part of the academic production.[21] With many States Parties not complying with the arrest warrants issued for Omar Al Bashir, the Chambers of the Court have had in the past ten years a number of opportunities to manifest themselves on the matter and their decisions have been the centre of scholarly attention of most academic production in the Al Bashir Case.[22] This large focus on how the Court is dealing with this legal conundrum can be explained by previous assessments that the field of international criminal law have a tendency to make developments of normative content through judicial decisions and therefore lay a heavy focus on the individual tribunal as if it can be relied upon in a self-contained way.[23] Consequently, the only kind

[20] As Omar Al Bashir is no longer in office (see Interlude No. 6), his immunity is no longer a problem and, therefore, debates on this matter have been extremely reduced.

[21] GAETA, P., Does President Al Bashir Enjoy Immunity from Arrest?, **Journal of International Criminal Justice**, v. 7, n. 2, p. 315–332, 2009; AKANDE, D., The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities, **Journal of International Criminal Justice**, v. 7, n. 2, p. 333–352, 2009; *Ibid*.; PAPILLON, Sophie, Has the United Nations Security Council Implicitly Removed Al Bashir's Immunity?, **International Criminal Law Review**, v. 10, n. 2, p. 275–288, 2010; NEEDHAM, Jessica, Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law, **Auckland University Law Review**, v. 17, p. 31, 2011; KIYANI, A. G., Al-Bashir & the ICC: The Problem of Head of State Immunity, **Chinese Journal of International Law**, v. 12, n. 3, p. 467–508, 2013; BOSCHIERO, Nerina, The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593, **Journal of International Criminal Justice**, v. 13, n. 3, p. 625–653, 2015; VENTURA, Manuel J., Escape from Johannesburg?: Sudanese President Al-Bashir Visits South Africa, and the Implicit Removal of Head of State Immunity by the UN Security Council in light of *Al-Jedda*, **Journal of International Criminal Justice**, v. 13, n. 5, p. 995–1025, 2015; AKANDE, Dapo, The Immunity of Heads of States of Nonparties in the Early Years of the ICC, **AJIL Unbound**, v. 112, p. 172–176, 2018.

[22] GREENAWALT, Alexander K. A., International Criminal Court: Decisions Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi and the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir & African Union Response, **International Legal Materials**, v. 51, n. 2, p. 393–417, 2012; TLADI, D., The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98, **Journal of International Criminal Justice**, v. 11, n. 1, p. 199–221, 2013; MAGLIVERAS, Konstantinos; NALDI, Gino, The ICC Addresses Non-Cooperation By States Parties: The Malawi Decision, **African Journal of Legal Studies**, v. 6, n. 1, p. 137–151, 2013; BOSCHIERO, The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593; DU PLESSIS, Max, Prosecutor v. Al-Bashir: Decision Under Article 87(7) of the Rome Statute on the Non-Compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir (Int'l Crim. Ct.), **International Legal Materials**, v. 56, n. 6, p. 1061–1090, 2017; KJELDGAARD-PEDERSEN, Astrid, Is the Quality of the ICC's Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?, **Journal of International Criminal Justice**, v. 19, n. 4, p. 939–957, 2022.

[23] TEITEL, Ruti G., **Humanity's law**, Oxford; New York: Oxford University Press, 2011, p. 6; STAPPERT, Nora, Practice theory and change in international law: theorizing the development of

contestation that these approaches are considering are the non-compliances since these practices are the ones that are generating an exchange between States and Court on the disputed issue. Such way of engaging with the Al Bashir Case is important for grasping the justifications these States are presenting for their non-compliance and the ways the Court deals with it. Even though it is not its purpose, such approach fails to encompass important elements for a deeper analysis of the engagement of these States with the issues of the Case.

The second group is composed by analysis that work on the reputed 'African bias' of the ICC. Amongst this production is the common perspective of the African practices towards the ICC in the Al Bashir Case as part of an integrated strategy for affecting change in the ICC institutional setting. Taking these practices as such, these analyses seek to evaluate the shift in the African States behaviour with the start of the Al Bashir Case looking into how the vocabulary of sovereignty, colonialism and race came to be a part of the African States stance in relation to the ICC and the escalation of the practices of contestation in the Al Bashir Case.[24] These investigations see in the Al Bashir Case, and more specifically in these practices of contestation, a very good illustration of the challenges that the ICC faces. Most of these examinations are concerned with accessing the conditions this situation creates for the Court in terms of its authority, legitimacy, or effectiveness.[25] Though useful for a study that seeks to evaluate the Court's

legal meaning through the interpretive practices of international criminal courts, **International Theory**, v. 12, n. 1, p. 33–58, 2020, p. 33.

[24] ODERO, Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis; LABUDA, Patryk I., The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity, **African Yearbook of International Law Online / Annuaire Africain de droit international Online**, v. 20, n. 1, p. 289–321, 2014; BOEHME, Franziska, 'We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court, **International Journal of Transitional Justice**, p. ijw024, 2016; CANNON, Brendon J.; PKALYA, Dominic R.; MARAGIA, Bosire, The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative, **African Journal of International Criminal Justice**, v. 2, n. 1–2, 2016; DU PLESSIS, Max, The Omar Al-Bashir Case: Exploring Efforts to Resolve the Tension between the African Union and the International Criminal Court, *in*: MALUWA, Tiyanjana; DU PLESSIS, Max; TLADI, Dire (Eds.), **The pursuit of a brave new world in international law: essays in honour of John Dugard**, Leiden; Boston: Brill Nijhoff, 2017, p. 431–467; SCHUERCH, Res, **The International Criminal Court at the Mercy of Powerful States: An Assessment of the Neo-Colonialism Claim Made by African Stakeholders**, 1st ed. The Hague: T.M.C. Asser Press, 2017; BENYERA, Everisto, **The failure of the international criminal court in Africa: decolonising global justice**, London; New York: Routledge, 2022.

[25] BARNES, Gwen P, The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir, **Fordham International Law Journal**, v. 34, n. 6,

standing in the international setting, such appraisal misses more fundamental aspects at play.

The third group examines these practices of contestation as to peruse the intended meaning behind them.[26] Their idea is to comprehend the different forms that contestation might take, the motives that States have for engaging in these practices and the ways the Court is responding to these acts enacted by African States. Their investigations focus on the types of contestation termed as *backlash*,[27] which are different from the contestation that is already inherent in the daily practice of international law. Most of the scholarship doing this kind of analysis tries to make sense of these practices of contestation by creating a typology that is usually according to the types of contestation, the motivations and the actual results of said practices.[28] In these categorizations, these authors consider it important to establish distinctions between the ordinary kinds of contestation that are considered a necessary process for the development of international law and the practices of a more abnormal sort, that seeks a more profound result. This group of scholars is more invested in the latter. Though there is no analysis in this group that works solely through the Al Bashir Case (most incorporate the phenomenon of backlash in other Courts and cases), the African practices of contestation in this case often figures amongst the events under scrutiny.

p. 1584–1619, 2011; MILLS, Bashir is Dividing Us; BOWER, Adam, Contesting the International Criminal Court: Bashir, Kenyatta, and the Status of the Nonimpunity Norm in World Politics, **Journal of Global Security Studies**, v. 4, n. 1, p. 88–104, 2019.

[26] Some of these academic inputs analyse the African practices contestation against the ICC as part of a broader phenomenon of States' contestation against international courts.

[27] The term backlash is better examined in Chapter 2.

[28] ALTER, Karen J.; GATHII, James T.; HELFER, Laurence R., Backlash against International Courts in West, East and Southern Africa: Causes and Consequences, **European Journal of International Law**, v. 27, n. 2, p. 293–328, 2016; MADSEN, Mikael Rask; CEBULAK, Pola; WIEBUSCH, Micha, Backlash against international courts: explaining the forms and patterns of resistance to international courts, **International Journal of Law in Context**, v. 14, n. 2, p. 197–220, 2018; SANDHOLTZ, Wayne; BEI, Yining; CALDWELL, Kayla, Backlash and international human rights courts, *in*: BRYSK, Alison; STOHL, Michael (Eds.), **Contracting Human Rights: Crisis, Accountability, and Opportunity**, Cheltenham: Edward Elgar Publishing, 2018, p. 159–178; SOLEY, Ximena; STEININGER, Silvia, Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights, **International Journal of Law in Context**, v. 14, n. 2, p. 237–257, 2018; BRETT, Peter; GISSEL, Line Engbo, **Africa and the backlash against international courts**, London: ZED, 2020; HILLEBRECHT, Courtney, **Saving the International Justice Regime: Beyond Backlash against International Courts**, Cambridge; New York: Cambridge University Press, 2021; BOEHME, Franziska, **State Behavior and The International Criminal Court: between cooperation and resistance**, London; New York: Routledge, 2022.

This thesis borrows from the three groups of contributions. However, differently from the first set of academic production, it does not seek to evaluate the legal details of the Al Bashir Case to find a legal stance on the matter of whether ICC Member States are obliged to arrest and surrender Al Bashir to the Court. For this thesis, these contributions are valuable not for resolving the legal conundrum, but for the way these reasonings are developed, structured and function in the practice of international criminal law. In other words, the interest for this work is in the play of these argumentative practices. A considerable number of scholars developing positions to respond to this legal dispute have been actively engaging with the Al Bashir Case in the ICC and, therefore, the way they make sense of the reasonings produced by and interact with the Court is important to the understanding of the dynamics between African States and the ICC.

The contributions on the African position in relation to the ICC and the challenges that it presents to the Court are also very important for the present work. Although they miss the underlying issues that are at stake, these investigations provide a gaze into the dynamics of contestation taking place inside and surrounding the institutional environment of the ICC. This group of scholarly production is able to zoom out of the issue under dispute and looks at the concerted ways these African States are choosing to deal with it. However, it does so by disregarding the fact that the very legal conundrum is central for a proper understanding of the contestation and its effects for the Court.

The third group also offers a rich gaze into the phenomenon of interest to this thesis. There is a very diverse array of practices of contestation being enacted by African States that are related to matter under dispute between these States and the Court in the Al Bashir Case that needs to be given meaning for the purpose of being analysed. These contributions represent an important asset in establishing a link between these acts of contestation and their capacity to generate change. Even though the discursive processes of contestation may be diffuse, they are very much consequential for international politics and law. This could be exemplified with how much governments bother to elaborate legal reasonings that argues for or justify their actions. Such engagements can be seen in discussions on military actions, humanitarian interventions etc.

Something that also needs to be accounted for besides the elements that revolve around the process of contestation are the results of these practices. There is an important analytical division that is drawn in these contributions: the need to study the practices of contestation and its effects separately. The first consists of the process of opposition and the practices that are put in place for it to happen. The second is about the outcomes of this interaction. As previously asserted, the result of the acts of contestation might not be what was intended. Also, the practices are not being enacted in an empty environment. They are part of a bigger context where there's not only those in opposition to the legal norm, its implementation or something else revolving around a case in an international court. In this bigger picture, it is also important to account for those that represent the international court and its supporters and how they react to these processes of contestation. However, some of these readings seem to miss that a single practice of contestation can be very diffuse in character.

Scholarly engagement with contestation in general easily draws a causal link between the motivation and the practice of contestation. This thesis takes the stance that these practices are cloudier than depicted, which makes the task of establishing a relation between a specific practice of contestation to a divergence of interpretation or a challenge to an entire institutional arrangement not so simple. It is not always possible to distinguish the motivation based on the type of act that was performed. Even when these States performing those acts declare their intentions, it does not mean that there are not any veiled interests. In the situation presented by the Al Bashir Case such endeavour can be even more challenging (if not impossible). The contestation by African States in this case varies between unilateral and collective acts. This means that concerted engagements can be developed: under the banner of a certain interest, which might not be true for some or any of the States; and as individual practices, that might be following the collective interest or might have its own desired outcome but bandwagon into the general movement. The African 'withdrawal strategy' (see Interlude No. 3) serves as a good example to substantiate this point. The document, which generated a

hysteria in the international community for its audacity,[29] elaborated by the African States Parties to the Rome Statute proposes a series of initiatives that does not have the aim of challenging the ICC as an institution. It does make an analysis of what the triggering of the withdrawal provision under article 127 of the Rome Statute would imply for the Member States. Notwithstanding, the part of the document that engages with the strategy itself only proposes constructive engagements that are measures already foreseen within the ICC framework. Considered as the precursors of this collective withdrawal strategy were Burundi, South Africa, and the Gambia, which handed their letters denouncing the Rome Statute in the months preceding the elaboration of said strategy. Although these three withdrawals are considered an African move against the position taken by the ICC in the Al Bashir Case, there is no evidence to support that all of them happened for the same motives. As it has been recognized, even though there is a general argument justifying these withdrawals, the precise trigger for these departures is not so straightforward and remain unknown.[30] More specifically the case of Burundi is very telling that there are interests at play that go beyond the issue of Al Bashir's immunity debacle. The State of Burundi sent its notification of withdrawal from the ICC on 26 October 2016. So it happens that, on 25 April 2016, the OTP had announced the opening of preliminary investigations for a situation in the country.[31]

The case of Burundi serves to emphasize that, even though some acts might be taking place amongst a broader movement, it does not mean that part of its supporters do not have any hidden interests, which generates faulty evidence for the analysis. A practice that has had a regular presence in the Al Bashir Case is a behaviour that can be more tricky to analyse: the "discrete non-compliance by

[29] **African leaders plan mass withdrawal from international criminal court**, The Guardian. Available at: <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>. Accessed: 21 may 2022; **African Union backs mass withdrawal from ICC**, BBC News. Available at: <https://www.bbc.com/news/world-africa-38826073>. Accessed: 21 may 2022.

[30] LABUDA, Patryk I., **The African Union's Collective Withdrawal from the ICC: Does Bad Law make for Good Politics? –**, EJIL: Talk!. Available at: <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/>. Accessed: 19 oct. 2020.

[31] INTERNATIONAL CRIMINAL COURT, **Situation in the Republic of Burundi, ICC-01/17**, International Criminal Court. Available at: <https://www.icc-cpi.int/burundi>. Accessed: 16 apr. 2022; INTERNATIONAL CRIMINAL COURT, **ICC judges authorise opening of an investigation regarding Burundi situation**, The Hague: International Criminal Court (ICC), 2017; THE OFFICE OF THE PROSECUTOR, **Report on Preliminary Examination Activities**, The Hague: International Criminal Court (ICC), 2017.

Member States."[32] While some States have been straightforward and stated that their reason for not arresting and surrendering Al Bashir had to do with their interpretation that their legal obligations under the customary international law of immunities should prevail in this case, not all situations of non-compliance can be linked to this justification (see Interlude No. 3). These situations might or might not be cases of contestation. It will depend on the reasons why the decision was not implemented, whether a missed deadline or institutional inertia – in which there is no contestation – or an action that is a reaction that aims to dispute the decision of the Court.

Even though these contributions cover an ample set of elements from the practices of contestation surrounding the Al Bashir Case in the ICC, there is still underexplored aspects. One is the investigation of the deeper meanings that hide behind the play between these practices of contestation and the response it engenders. Such analysis reveals essential details on the practice of international law. It entails an examination of the notions established in the dynamics between practices of contestation and responses from the Court to understand how practitioners within the ICC, beside merely dealing with a disputed interpretation over the application of a legal norm, also conduct actions in world politics and play a role in relation to the social order, whether in favour of the status quo or to renew such order. This means that the research aims to also look at the ordering practices that are being performed through the juridical practices executed by these actors.

Opening the scope of the investigation to practices of contestation and the mobilization of concepts and attribution of meanings in response to them allows for a more in-depth look at the process of law-making in a way that avoids the privileging of certain practices and actors that the aforementioned readings of the practices of contestation would entail. This is an important step in this research since it does not seek to merely find acts of contestation, their motivations, and results. This is not enough for understanding the practice of international law. This thesis wants to unveil, through the study of these practices and their reception in the juridical environment of the ICC, the "broader, collectively shared patterns of meaning" that are "mainly constituted by practical knowledge enacted in doing and

[32] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts, p. 209.

sayings."[33] The approach undertaken in this thesis subscribes to the idea that the knowledge present in the contestation and argumentative practices should be analysed alongside the legal norm whose interpretation is under dispute – and not in isolation as the alluded contributions do.

iii.
Framing the Problem: African practices of contestation as speaking politics to law?

One point of departure that is central to the analysis being developed in this thesis and that goes in a different way than the studies on the practices of contestation in the Al Bashir Case have been taking so far is the understanding international law as "an *expression* of politics."[34] This work develops an approach that goes beyond the understanding of the practices and its motives. Through the analysis of the response to these practices of contestation, it grasps the deeper intricacies of the process of contestation. Law and politics are in a relationship of identity. International law is one way of doing international politics. Therefore, politics cannot be removed from the practices of international law as it is central to every part of its everyday life "from giving legal advice to drafting judgments of international tribunals, from academic system-construction to the argumentative interventions by activists."[35] This means seeing the practice of international law not as an elaboration of technical tools for defending or opposing a certain legal proposition. On the contrary, to say that the enactment of international law is just as much a part of the practice of international politics is to say that all work in international law is an effort of decision-making, because the set of tools that allows international lawyers to make their case before legal bodies do not give a straight response to the legal scenario in question, these rules, principles and policies require practitioners to make the choice as to what is being defended. In this sense, bias is an inevitable dimension to the practice of international law.[36] One of the effects of

[33] BUEGER, Christian, Practices, Norms, and the Theory of Contestation, **Polity**, v. 49, n. 1, p. 126–131, 2017, p. 127.
[34] KOSKENNIEMI, Martti, **The Politics of International Law**, Oxford: Hart, 2011, p. v.
[35] *Ibid*.
[36] *Ibid*.

acknowledging that the practice of international law as a question of choice usually made based on preconceived ideas is that one also becomes capable of understanding that the very stance adopted in the matter of the relation between law and politics is also a representation of one's bias.

A common occurrence in the narratives regarding the history of international criminal trials is its representation as political proceedings. The trial of Slobodan Milošević, former President of Serbia and of the Federal Republic of Yugoslavia, at the International Criminal Tribunal for the former Yugoslavia (ICTY) was marked by his infamous attempts at portraying the institution as illegal. During the initial stages of the proceedings in the Milošević Case, the epithet political was repeatedly used by both sides to disqualify the position of the other party, as it can be seen in this excerpt of the first status conference of the Case:

> THE ACCUSED: […] It is clear to any lawyer in the world that question of jurisdiction can be open when juridical institutions are concerned, and you are not juridical institution; you are *political* tool.
> JUDGE MAY: You've made all these points. Mr. Milosevic, we're not going to listen to -- we are not going to listen to these *political* arguments. You have your motion on jurisdiction which you can put in and which we will consider.
> THE ACCUSED: But that is not a question of jurisdiction, just because of that --
> JUDGE MAY: We will consider it.
> THE ACCUSED: You are *political* tool of those who --
> JUDGE MAY: Very well. This hearing will be adjourned now until Monday, the 29th of October.[37]

Politics in these depictions is something that takes place outside the environment of the Court. In the practice of international criminal law, even though it is recognized that the formation of the regime is a phenomenon that comes from the play of politics, there is a general understanding that it has the capacity to transcend it.[38] Behind this reluctance to acknowledge that the operation of international law takes place in the environment of politics is a need to create the pretence of a system that fully functions without the interference of politics.[39]

[37] TRIAL CHAMBER III, **Status Conference, IT-99-37-PT**, The Hague: International Criminal Tribunal for the former Yugoslavia (ICTY), 2001, p. 24–25. [highlighted by the author].
[38] MÉGRET, F., The Politics of International Criminal Justice, **European Journal of International Law**, v. 13, n. 5, p. 1261–1284, 2002, p. 1264.
[39] *Ibid*., p. 1264; ODERO, Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis, p. 145.

The practices of both Office of the Prosecutor (OTP) and Chambers of the Court display that the individuals that occupy these places "came to see it as part of their responsibility to promote a certain idea of international criminal justice versus what they saw as scheming and ultimately self-defeating attempts to negotiate with the devil."[40] Accordingly, these individuals upholding the law "back off indignantly from any claim that they were involved in anything as unbecoming as 'politics.'"[41]

This way of delimiting the space of politics does more to the practice of international law than simply showing the position taken by these actors. Those discourses on the place of politics have the power of delegitimising and deauthorising certain practices. The narratives of African leaders and ICC Prosecutors about one another presented at the beginning of this introduction are imbued with this understanding of the place of politics in the practice of international (criminal) law. These portrayals attach the characterization of political as a means of diminishing authority, contrasting such political practices with proceedings that have a foundation in law; or as a way of ascribing to certain actors a crude political intent, which would consequently delegitimize any of its actions.

Yet, the narratives on the place of politics are not reduced to these two extremes. Explorations of the initiation of cases in the ICC find the exercise of prosecutorial discretion a space for the exercise of politics.[42] Other forms of manifestation of politics are also identified through both the analysis of the foundations and certain aspects of the proceedings of the Court. Even though they are not buying into the generalisations of the more radical narratives, these framings are similarly positing that politics is contained to certain aspects of the practice of international law. As a consequence, they are sustaining the belief that most of the work of the Court is indeed devoid of any politics.

Frequently practitioners and scholars dealing with the practices of contestation being enacted by African States towards the ICC classify these acts as

[40] MÉGRET, The Politics of International Criminal Justice, p. 1277.
[41] *Ibid*., p. 1278.
[42] See, for example, DAVIS, Cale, Political Considerations in Prosecutorial Discretion at the International Criminal Court, **International Criminal Law Review**, v. 15, n. 1, p. 170–189, 2015; RASHID, Farid Mohammed, **Prosecutorial discretion in the International Criminal Court: legitimacy and the politics of justice**, Abingdon; New York: Routledge, 2022.

either tools of international law or international politics.[43] In these portrayals, practices such as the proposal of amendments to the Rome Statute or the request of an advisory opinion to the International Court of Justice (ICJ) are subsumed within the realm of legal practices, meanwhile notifications of withdrawal and non-compliances would fit into the category of political practices. While the former is deemed to entail productive and therefore welcomed engagements, the latter is taken as uncooperative behaviour that seeks to diminish the Court's authority and legitimacy.[44] The desired and healthy participation, according to these narratives, is the one that speaks law to politics. "Political considerations" have no place in the judicial process of the Court.[45] The virtuous practice of international law would lie in the autonomous technical craft of the law.[46]

These narratives on the place of law and politics play an important part in the practice of international law. As the Milošević Case shows, the Judge deemed the accused's arguments political, which was reason enough to interrupt his statement and finish the status conference that was taking place. The characterization of some argument or practice as doing politics has the function of drawing the threshold and determining which is not to be allowed in the legal environment.

By following the belief that these practices of contestation performed by African States are more diffused and that not always it is possible to draw from them a precise indication as to the motivation, and much less if the desired outcome was achieved, this thesis does make a different kind of immersion into this dimension than what has been previously done in scholarly contributions. In this sense, the potential of this thesis – by taking these practices of contestation by African States that are related to the Al Bashir Case and the argumentative practices in response to them as its objects of study – is in grasping the more meaningful aspects that are veiled not only in the practices themselves but in the way they are perceived. The effect of looking into these contestation and argumentative practices

[43] See, for example, REINOLD, Theresa, **African Union v International Criminal Court: episode MLXIII (?)**, EJIL: Talk!. Available at: <https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/>. Accessed: 19 oct. 2020.
[44] BOEHME, **State Behavior and The International Criminal Court: between cooperation and resistance**, p. 2, 10.
[45] BENSOUDA, Fatou, OpenForum 2012: Money, Power and Sex: The Paradox of Unequal Growth, *in*: **Open Society Africa Foundation**, Cape Town: International Criminal Court, 2012.
[46] POST, Robert, Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics, **California Law Review**, v. 98, n. 4, p. 1319–1350, 2010, p. 1319.

alongside their meaning is an analysis that does not only work by raising empirical questions, "such as which norms are contested by whom, where, and how."[47] A "principled approach to contestation" raises questions regarding "the right to question authority (such as […] who should have access to contestation)."[48] In a study on the practices of contestation by African States and the narratives developed by the Court's authorities in response to these practices, this means investigating the structures of meaning that are constantly being reaffirmed through the enactment of practical knowledge. This presupposes an exploration of the patterns of meaning that are behind the practices and narratives, since they point to the conditions that establish the right for certain actors to question authority. Differently from most of the contributions on the 'African bias' of the ICC that seek to examine the Court's work as to attest the manifestation of said bias, this thesis follows the steps of the indispensable contribution of the Third World Approaches to International Law (TWAIL) and departs from the notion that this prejudicial character is already part of the nature of international law.[49] In this sense, this research reverses the question made by those trying to determine whether these practices of contestation by States are affecting the authority and legitimacy of the Court, questioning instead what the bias present in the practice of international (criminal) law does to the contestation practices of these States.

Driven by what has been so far introduced, the main question that this thesis sets out to address is *in which ways the manner through which the relationship between politics and law is conceived in the narratives of the Court on the practices of contestation of African States in the Al Bashir Case affect these States' ability to play a role in the (re)making of international law.* It argues that the very way one

[47] WIENER, Antje, A Theory of Contestation—A Concise Summary of Its Argument and Concepts, **Polity**, v. 49, n. 1, p. 109–125, 2017.
[48] *Ibid.*
[49] ANGHIE, Antony, **Imperialism, Sovereignty and the Making of International Law**, Cambridge: Cambridge University Press, 2005; ANGHIE, Antony, TWAIL: Past and Future, **International Community Law Review**, v. 10, n. 4, p. 479–481, 2008; GATHII, James T., TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography, **Trade Law & Development**, v. 3, n. 1, p. 26–64, 2011; ESLAVA, Luis; PAHUJA, Sundhya, Beyond the (Post)Colonial: TWAIL and the Everyday Life of International Law, **Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America**, v. 45, n. 3, p. 195–221, 2012; FALK, Richard, Foreword: Third World Approaches to International Law (TWAIL) special issue, **Third World Quarterly**, v. 37, n. 11, p. 1943–1945, 2016; REYNOLDS, John; XAVIER, Sujith, 'The Dark Corners of the World': TWAIL and International Criminal Justice, **Journal of International Criminal Justice**, v. 14, n. 4, p. 959–983, 2016; KIYANI, Asad G., Third World Approaches to International Criminal Law, **AJIL Unbound**, v. 109, p. 255–259, 2015.

places politics in relation to law do expose a set of preconceived ideas which is already representing by itself the politics of international law in action. The use of notions that establish a distinction between the place of law and the place of politics work as gatekeepers in the field of international (criminal) law. As a result, certain practices of contestation, like the ones performed by the African States in relation to the Al Bashir Case in the ICC, regardless of intent and foundation, when framed as politics, are placed in a position that it is unable to provoke change in the practice of international (criminal) law. The proposition of studying these this phenomenon of categorisation involves examining all the forms of engagement that these African States are employing to perform their contestation and the way the officials of the Court through argumentative practices make sense of these practices of contestation in terms of their conceptions of the divide between law and politics. In that way it is possible to understand the way that the language used by the Court impacts the capacity of these States to contest and generate change in the practice of international law.

iv.
Acknowledging the complexities in this research commitments: reflecting on critique and the postcolonial position

This thesis engages in an effort of critique, as categorized by Didier Fassin,[50] in the genealogical sense. It attempts to distance itself from the common sense, defamiliarizing itself from given assumptions and confronting the dominant discourses, showing how they are related to a certain position in international society. With the observation of the contestation and argumentative practices, it sets out to highlight the rationality established within the unquestioned narratives, pointing into the way it is possible to (re)conceive these events being studied. In this sense, this thesis problematizes the manner through which the practices of contestation of African States in the Al Bashir Case are read by both scholars and practitioners as fitting into either the box of legal or political practices and advances its argument as to what this divide does to the capacity of these practices of

[50] FASSIN, Didier, The endurance of critique, **Anthropological Theory**, v. 17, n. 1, p. 4–29, 2017.

contestation to generate change in international law. This means questioning the knowledge practices that are implied in the way these narratives establish a division between the realms of law and politics.

As highlighted by Andrea Bianchi, investigations on law such as the one being proposed tend to be considered as about the juridical sciences but not belonging to it, a characterization that creates an exclusion "which allows one to avoid questioning the fundamental tenets of the discipline, leaving the presuppositions of those who do law unchallenged."[51] In that point of view, the reflexive endeavour is not useful for the development of this kind of scientific inquiry. The present research goes into the opposite direction, following Steven Winter in that it understands "that the only reflective position is an impossibly transcendent position,"[52] believing, accordingly, that there is no way of reaching "an objective form of knowledge through reflexivity."[53] It follows the notion that meaning is reached through social interaction and that this very meaning is going to affect the situation under observation. As put by Merleau-Ponty,

> Reflection does not withdraw from the world towards the unity of consciousness as the world's basis; it steps back to watch the forms of transcendence fly up like sparks from a fire; it slackens the intentional threads which attach us to the world and thus brings them to our notice.[54]

It is the consciousness regarding the dynamics of the social field that allows us to (re)work them from our own standing point in the social world with all the constraints that come with it.[55] Therefore, the position of critical self-consciousness presents itself as a way for us to better understand the social experience at the same time keeping in mind the impossibility of transcendence.

There is a complexity in the task set upon this thesis that comes from the amalgamation of its choice of case study with its postcolonial commitments. Departing from a position that the colonial nature of international law places Third World States in a position of disadvantage in relation to the international legal

[51] BIANCHI, Andrea, **International law theories: an inquiry into different ways of thinking**, Oxford; New York: Oxford University Press, 2016, p. 4.
[52] WINTER, Steven L, **A clearing in the forest: law, life, and mind**, Chicago; London: The University of Chicago Press, 2003, p. 356.
[53] BIANCHI, **International law theories: an inquiry into different ways of thinking**, p. 4–5.
[54] MERLEAU-PONTY, Maurice, **Phenomenology of perception**, London: Routledge, 2005, p. xv.
[55] WINTER, **A clearing in the forest: law, life, and mind**, p. 357.

practice means affirming that such a thing as an African bias does exist.[56] However, the framing of these States in a condition of subalternity must be a step exerted with caution as not to adhere to ready-made discourses that generalize the place of this subaltern. Edward Said's Orientalism did not just consider the undervaluing of everything related to the Orient. Said understood it as a pendulum that could also be swung in the opposite direction: the overvaluing of the Orient.[57] This often-neglected facet of Orientalism represents the position that views the subaltern as a "innocent primitive space" that without the West's intervention "would still enjoy a queer utopia."[58] This fetishization (just as much as the belittlement) of the subaltern is quite treacherous to any analysis. One primary concern that this thesis sets out to address aims to avoid precisely falling into any of the two facets of Orientalism, as is frequently the case in explorations of the Africa–ICC relationship, through the unpacking of the 'African bias' rhetoric. Most analyses of said narrative generalise it in a way that fails to account for its complexity and, consequently, either undervalues it as a way of manipulating their way out of accountability or overvalues it as a beacon in the fight against (neo)colonialism. An approach that escapes both forms of Orientalism must capture the way that these voices are plural and most times controversial often not fitting thoroughly within the expected conduct of the subaltern or the dominant culture. Considering that the second form of Orientalism speaks more closely with the postcolonial stance assumed in the present research, the attention is drawn to the need to avoid the stance that the subaltern can do no wrong. In the case under study, this means taking seriously the endeavour of unpacking the African contestation as to really see the way that idealistic arguments and power politics are enmeshed in these African States' behaviour, in a way that makes it impossible to categorize these practices as either a serious fight against (neo)colonialism nor a pure play for prioritizing these leaders at the expense of international justice and human rights accountability.

It appears particularly important to reflect on the condition of subalternity[59] in the mobilization under study in this thesis occupied African States contesting

[56] Though not in the way the African leaders' rhetoric depicts.
[57] SAID, Edward W, **Orientalism**, New York: Vintage Books, 2003, p. 150.
[58] THE IILAH PODCAST, **Rahul Rao: Out Of Time: The Queer Politics Of Postcoloniality (Book Discussion)**. Available at: <https://podcasts.apple.com/au/podcast/rahul-rao-out-time-queer-politics-postcoloniality-book/id1530129561?i=1000507778231>. Accessed: 4 feb. 2021.
[59] The idea of subalternity is further elaborated in Chapter 3.

against the Court's practices regarding the Al Bashir Case. These States' subalternity has to do with the situation that the very body of law that gives them the power to fight for their rights, also creates a set of barriers that prevent their access to the platforms that would allow the revindication of said rights. These practices of contestation, however, are being put in place to argue in favour of a Head of State accused of the crimes of genocide, crimes against humanity and war crimes. The capacity of critique to analyse such scenario is paramount. Contemporary practice not only of international criminal law but international human rights law in general fail to see these States the condition of subalternity because for them it lies elsewhere: with the victims of these individuals under trials in the ICC. Human suffering is the emblem of the human rights regime. Such "totemic" image is used to buttress "a binary narrative of good versus evil."[60] The former is constructed based on "the moral power of the wounds of victims and survivors," built on a true aesthetics of innocence.[61] The latter is represented by all that causes these harms to the victims, such as Omar Al Bashir. The Government of Sudan (GoS) was an ally of Washington until the situation in Darfur began to get media attention because of the supposed genocidal campaign of its leaders against its own population (see Interlude No. 1). Throughout the year of 2004, the conflict in Sudan moved up in the United States international priorities since it could no longer be ignored. The United States government broke its ties with Sudan and used for the first time the term "genocide" to refer to an ongoing crisis.[62] The accusation that the GoS was engaging in a campaign of genocide meant that it joined the ranks of 'evil' alongside the Nazis. Once a regime and its leaders are associated with the perpetration of such crimes by the international community, there is no room for compromise and it becomes imperative that the legal regime put in place to protect the innocent victims of such conflicts be championed as fiercely as these individuals need defending.[63] "Nuance stands at cross-purposes with the […] imperative to

[60] HOPGOOD, Stephen, **The endtimes of human rights**, Ithaca; London: Cornell University Press, 2015, p. 29.
[61] *Ibid*.
[62] **United States Declares Genocide in Darfur**, United States Holocaust Memorial Museum. Available at: <https://www.ushmm.org/learn/timeline-of-events/after-1945/genocide-in-darfur>. Accessed: 27 may 2022.
[63] HOPGOOD, **The endtimes of human rights**, p. 55.

convict." [64] The critical gaze enables us to see beyond these moral and compassionate appeals and deal precisely with the nuances that are at play. Engaging with critique means seeing the threshold between good/evil as a blur. The world is not black and white. Even though in the Courtroom, across from the victims, sits the Pinochets, Miloševićs, Saddam Husseins, Charles Taylors, Habrés, Gaddafis and Al Bashirs, the imperative to convict must not be reached at all costs. A large portion of human rights advocates from civil society to politicians, however, seem to think the opposite. Madeleine Albright, while United States Ambassador to the United Nations (UN), answered in an interview that she considered having half a million Iraqi children die a worth price to capture Saddam Hussein.[65] In a town hall, on 1998, when questioned about the hypocritical stance of the United States human rights policy, she answered by listing things that are not right in the world, demonstrating her surprise "that people feel that it is necessary to defend the rights of Saddam Hussein." [66] The point I am defending was eloquently expressed by Martti Koskenniemi. In the preface of his book *The Politics of International Law*, he posited that:

> If there is an underlying critical motif in these chapters, it is directed at the point where the experience of choice is lost and where standard interpretations begin to appear as inevitable results of an impartial legal reason or where institutional routine has become so entrenched that it is no longer recognised as the contingent result of past choices that it is. That international law itself tends to become, to use a well-worn phrase, 'part of the problem', is often a consequence of the emotional and political intensity of its vocabularies. Expressions such as aggression, genocide, torture or right to life, among others, are key parts of the professional language and make powerful appeals for choosing in particular ways. But they speak to the heart so that the mind may find it indecent to object. To lose the experience of contestability even of such words, however, and thus one's distance from the institutional commitments one has made, is to be complicit in the way the world is.[67]

In that sense, it is considered unseemly any kind of contestation that is voiced against what is understood as the side of human rights. During the process of Jordan's appeal related to the Al Bashir Case (see Interlude No. 5), this position

[64] DRUMBL, Mark A., **Reimagining child soldiers in international law and policy**, Oxford; New York: Oxford University Press, 2012, p. 154.
[65] Punishing Saddam: Too Good to be True, *in*: **60 Minutes**, New York: CBS Video, 1996.
[66] **Remarks at Town Hall Meeting, Ohio State University**, US Department of State Archive. Available at: <https://1997-2001.state.gov/www/statements/1998/980218.html>. Accessed: 27 may 2022.
[67] KOSKENNIEMI, **The Politics of International Law**, p. vi.

was reflected in the *amicus curiae* submission of Prof. Andreas Zimmermann, which argued that the uncooperative posture of Sudan towards the ICC created a situation of abuse of rights which meant for Sudan losing the ability of evoking its Head of State immunity before third States. In this rationale, two wrongs *do* make a right. This thesis takes the opposite path as not to, using Koskenniemi's term, lose the experience of contestability.

v.
Research Design and Methodological Strategy

I consider this thesis as an interdisciplinary undertaking that engages with the critical literatures developed within both disciplines of International Relations and International Law. The approach developed in the following chapters is influenced by the work of Nikolas Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen, in that it sees that an analysis of practices in the intersection between International Law and International Relations bears the prospective of charting the way the certain practices are performed "through creating symbols, mobilizing concepts and giving legal meanings to entities and actions" are actually ordering the social world.[68] In line with Leander and Aalberts, this thesis sees that practices and opinions do not merely express a position regarding the referred matter. More than that, they reaffirm a specific understanding regarding which kinds of practices and opinions are to be taken into consideration.[69] For this research, this means that the investigation of the practices of contestation and argumentative practices can highlight some problematic dimensions both in the very practice but also in more fundamental aspects of the international legal dynamics.

The task set out for this research involves the analysis of two set of practices: the practices of contestation enacted by African States and the argumentative practices performed by the representatives of the ICC prompted by the African

[68] RAJKOVIC, Nikolas M.; AALBERTS, Tanja E.; GAMMELTOFT-HANSEN, Thomas, Introduction, *in*: RAJKOVIC, Nikolas M.; AALBERTS, Tanja E.; GAMMELTOFT-HANSEN, Thomas (Eds.), **The Power of Legality: Practices of International Law and their Politics**, Cambridge: Cambridge University Press, 2016, p. 11.
[69] LEANDER, Anna; AALBERTS, Tanja, Introduction: The Co-Constitution of Legal Expertise and International Security, **Leiden Journal of International Law**, v. 26, n. 4, p. 783–792, 2013, p. 789.

engagement with the Court. The generalist forms ICC and African States are often used in the text to refer to these groupings. Nevertheless, it does not mean that the actors in the study will be treated throughout the research as monolithic entities. Such a position is irreconcilable with one of the goals of this thesis. On the contrary, all through this work attention is given to the actors that compose these groupings as to demonstrate that, even though their activities coalesce, there are very different agendas. This research will not, however, investigate the domestic dynamics of the States. Although some reference might be made to the internal politics of these States, a careful analysis of them is beyond the scope of this research and does not have a fundamental impact on the matter under scrutiny.

Based on the proposal for an empirical research composed of more than one set of practices enacted by multiple actors, this thesis undertakes a two-fold tactics. First, it ventures on an effort of mapping the practices of contestation performed by the African States in relation to the Al Bashir Case in the ICC and placing them in the wider context, which considers declared motivations, events surrounding the contestation and other relevant information. Considering that the critical move made in this research is also a method, this exercise could be better described as a "counter-mapping" of the practices of contestation.[70] The second part of the methodological strategy comprises the investigation of the dynamics within the institutional framework of the ICC. It goes through the process of (re)production of certain discourses that reflect the way the Court's employees make sense of these practices and categorize them. The goal is to find the definitions that are being established in these narratives. Throughout these two tactics it adopts a bottom-up approach "where definitions, concepts and categories are studied as they are produced by the relevant actors in/of the field."[71]

Borrowing from Fleur Johns (which in turn is borrowing from Harry Wolcott), this thesis develops an "ethnographic way of seeing."[72]

> That is a way of seeing identified with research that seeks to 'describe what the people in some particular place or status ordinarily do and the *meanings* they ascribe

[70] JOHNS, Fleur, **Non-Legality in International Law: Unruly law**, Cambridge; New York: Cambridge University Press, 2012, p. 9.
[71] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 12.
[72] **Non-Legality in International Law: Unruly law**, p. 21.

> to the doing, under particular or ordinary circumstances, presenting that description in a manner that draws attention to regularities that implicate cultural process.'[73]

In other words, this is an investigation that is able not only of describing the practices that ordinarily take place in relation to a case goes through the process at the ICC, but also of understanding the meanings given to these dynamics according to the context of their occurrence.

This thesis in many ways follows a Bourdieusian sociology, which "encourages the use of heterogeneous techniques in order to adjust thinking tools to each specific research site."[74] Subscribing to that proposition, it incorporates more than one kind of legal production in its empirical investigation of the case study. It follows the work of international criminal law practitioners mostly through reports involving the situation in Darfur and the Al Bashir Case, decisions issued by the Chambers of the Court, submissions and requests of the States, OTP and *amici curiae*, statements given by officials of the Court (for the most part, from the Chambers, OTP and Assembly of States Parties (ASP)) and African States' authorities and published writings of scholars considered specialists in this particular field. Considering that most of the response coming from the ICC must respect the procedures of an institutionalized environment, this research also has a minor presence of international legal instruments.

The Al Bashir Case in the ICC formally began in 2008 with the OTP's request for an arrest warrant for the then President of Sudan (see Interlude No. 1). However, some important determinations for the case were made in the previous years by the Commission of Inquiry and the OTP in the process of investigating the case. This means that an exploration of the Al Bashir Case in the ICC involves going over about fifteen years of legal practices. A chapter for the case study, as thesis of this nature often design, would occupy a disproportionate place in the thesis and would require the editing of the factual narrative. As to make an intensive and holistic analysis of the events surrounding the Al Bashir Case, the strategy chosen was to develop the empirical study through interludes between chapters. These interludes were designed to follow a temporal route narrating through the stages of the Case

[73] *Ibid*.
[74] BIGO, Didier, Pierre Bourdieu and International Relations: Power of Practices, Practices of Power: Pierre Bourdieu and International Relations, **International Political Sociology**, v. 5, n. 3, p. 225–258, 2011, p. 245.

in the ICC, from the conflict in Darfur to Al Bashir's deposition and recent talks about sending him to the Hague for trial. Notwithstanding that these interludes are developed in six parts, the heart of the empirical investigation resides in interludes 2, 3 and 4. The strategy of sectionalizing the examined events and the temporal criteria used to organize them works in communication with the chapters. The main theme of each interlude plays an important role for the theoretical-analytical (in the case of Interlude 6, concluding) discussion that takes place in the chapters.

Following this introduction, Interlude No. 1 begins the saga of the Al Bashir Case in the ICC. It departs from the conflict in Darfur and the creation of a Commission of Inquiry established by the UN Secretary-General to investigate whether international crimes were taking place. It goes through the proceedings for the referral of the situation by the UNSC to the ICC and the first developments of the situation once it was under the jurisdiction of the Court. It further explores the procedure for issuing a warrant of arrest for Omar Al Bashir. It first goes through the stages of this process presenting the divergence between the PTC I and the OTP in relation to the criteria of evidence used for determining the *mens rea* for the crime of genocide and then covers the OTP's appeal and the PTC I decision that ended up including genocide amongst the crimes for which Al Bashir was indicted.

Chapter 1 introduces a central point of departure of this thesis: the politics of international law. It explores the relationship between law and politics in the practice and scholarship of international law. The first part of the chapter examines the way international legal practitioners understand their field and the role they play in it. Furthermore, this part considers the consequences of this perception for the practice of international law. The second part of the chapter is dedicated to the play between law and politics in the relationship between the academic fields of International Law and International Relations. It navigates through the historical entanglements between fields, the problems that arise out of these encounters, and the possibilities for doing an interdisciplinary research that does justice to both international law and politics as scholarly and professional practices.

Interlude No. 2 makes an exploration of the dynamics between Court and African States after each non-compliance with the ICC's arrest warrants for Al Bashir. It departs from the aftermath of the issuance of the arrest warrants by the PTC I. It examines the proceedings prompted at the ICC after each State Party to

the Rome Statute received Omar Al Bashir in their respective territories. This Interlude demonstrates the way the Chambers' demeanour, and consequently its response to these States, changed as the number of non-compliances grew and the non-compliant African States began to present their justifications for not arresting Al Bashir. It further investigates the non-compliance decisions issued by the Chambers in some of these instances. Lastly, the Interlude covers the art. 97 consultation process undertaken between the Court and South African authorities on the verge of the well-known visit by Al Bashir to the South African territory.

Chapter 2 draws from Interlude No. 2 as to initiate a discussion over a topic introduced in Chapter 1, which is the way politics is manifested in the practice of international law, making a more specific inquiry into how change, indeterminacy, and formalism are central elements in the international legal dynamics. It further explores the practice of interpretation of international law, presenting it as a mechanism for contesting international law. The final part of the chapter discusses the contestation of international law, presenting the way legal interpretation is inserted in such phenomenon. This section posits that contestation is a common feature of international legal practice, for contestation is the main driver of international legal change. The chapter, then, engages in a comprehensive look into the literature on international legal contestation and explores the categorizations that the scholarship has created about these contestation processes in terms of patterns and motivations. The chapter ends by demarcating where this thesis and its empirical study part ways with the existing research on practices of international legal contestation.

Interlude No. 3 dives into the first part of the two-fold tactic for the empirical research. In maps and explores the African practices of contestation in relation to the Al Bashir Case in the ICC throughout the years. It departs from the first manifestations once the PTC I authorized the issuance of the arrest warrant for Omar Al Bashir. It covers the decisions taken under the auspices of the Organization of the AU, the notifications of withdrawal, the amendments proposed, and other measures taken by the African States that composed the African strategy of contestation.

Chapter 3 begins by considering the meaning of practicing international law. It first reflects about the engagement of political entities, in particular States, in

international legal practice. It posits that States are also frequently successfully participating in the (re)making of international law. It further presents the categories and ontological assumptions that are required for an analysis of practices. The chapter also analyses the possibilities for performing contestation in international law that were used by the African States explored in the preceding Interlude. It goes through each of the contestation practices as to understand the elements, formalisms, and possible effects that are involved in their enactment. Lastly, the chapter explains in detail the way practices of international law are reproducing the structural bias of the field of international (criminal) law and inquiries into the kind of bias that is present in the mechanisms adopted in the African contestation.

Interlude No. 4 examines the way the OTP, Chambers, the Presidency of the Court, the Presidency of the ASP, and Registrar responded through argumentative practices to the contestation explored in the previous Interlude. It further explores the unfolding of the South African art. 97 consultation process as to ascertain the Court's perception about the very process of consultation requested by the South African authorities. This interlude investigates the ways through which the officials of the Court responded and made sense of the African practices of contestation by looking into their statements, in particular the speeches given at the ASP meetings, throughout the years.

Chapter 4 unpacks the argumentative practices of the Court's officials examined in Interlude No. 4 to understand they ways they perceive and interpret the different practices of contestation enacted by African States in relation to the Al Bashir Case. It analyses the ways the structural bias of the field of international criminal law affects the manner through which the officials of the Court make sense of the African practices of contestation. It identifies the rhetorical patterns and argumentative structures used in these narratives in response to the African contestation. It further investigates one element that has been a constant throughout these phases, which is the expression of certain values that move the Court's work. This section examines the power of expressivism in international legal discourses. It focuses on the role of the narrative on impunity pondering its effect on the practices of contestation enacted by the African States in relation to the Al Bashir Case. Lastly, the chapter traces the connection between the argumentative practices of the ICC officials articulating the proper practice of international (criminal) law

based on the field's structural bias. It assesses the limits of contestability through the analysis of the barriers that the Court's perspective creates for the practices of contestation practiced by the African States in relation to the Al Bashir Case.

Interlude No. 5 focuses on the process of Jordan's appeal. Even though Jordan's non-compliance is not directly associated with the African contestation against the Al Bashir Case in the ICC, it demonstrated that the argument advanced by some African countries was shared outside the region. Besides that, the appeal process had a large significance because of the way proceedings were conducted by the AC. This Interlude looks over Jordan's request for an appeal, the Chamber's decision, the *amici curiae* participation of international legal scholars in the proceedings, and the AC's decision on the matter of the non-compliance.

Chapter 5 analyses the kind of international legal order that is being defended in the argumentative practices of the ICC officials in relation to the African practices of contestation in the Al Bashir Case. It works through the notion that most practices of international law tend to justify their choices in the name of justice. It evaluates the way international justice is constructed as either achieving accountability or as guaranteeing the equality of international political entities respectively in the argumentative practices of Court's officials and African States. Furthermore, it reflects on the meanings of these readings for the practice of international justice. The chapter also analyses the more fundamental dimension of international legal practice. It examines the meanings that are veiled within the categories of international (criminal) law used throughout the Al Bashir Case in response to the African contestation as to understand the way these meanings are sustaining the inequalities of the international legal order through practices of normalisation. Lastly, the chapter addresses the question that was the main driver of this thesis reflecting on whether the practices of contestation of African States are accounted for in international (criminal) law.

Interlude No. 6 brings the narrative on the Al Bashir Case in the ICC to a close. It picks up from Al Bashir's deposition in 2019 after a *coup d'état* and the following statements by the sovereign council that they considered having Al Bashir be put to trial by the ICC. The Interlude is followed by the final considerations, which draws some reflections on the state of the international

discussions on Heads of State immunity before international criminal courts, the impact of the ICC's response to its future, and the Africa–ICC relationship.

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Interlude No. 1: From the conflict in Darfur to the ICC

Post-colonial Sudan has a history marked by civil war, coup d'états and attempts at peace accords between government, military and rebel forces. However, the acts that called international attention and eventually led to the situation before the ICC took place in 2003. These events resulted from a complex history involving "tribal feuds resulting from desertification, the availability of modern weapons, […] deep layers relating to identity, governance, and the emergence of armed rebel movements which enjoy popular support amongst certain tribes[75]."[76] Only in the Darfur region, it is estimated to have between 30 to 80 different ethnic groups and tribes. Besides, the very porous borders that Sudan shares especially with Libya and Chad,[77] but also with Egypt, Uganda, Eritrea, and the Central African Republic, allowed internal politics (and conflicts) to spill over both ways contributing to the instability in Sudan.

Omar Al Bashir came to power in Sudan through a coup d'état that took place in 1989.[78] He led a group of military officers allied with the National Islamic Front (NIF), one of the most radical Islamic groups in Sudan and a ramification of the Egyptian Muslim Brotherhood headed by Hassan al-Turabi, "an Islamic intellectual who had studied at the Sorbonne and articulated the creation of an Islamic republic

[75] As stated by Alex de Waal, "the use of the label 'tribe' is controversial. But when we are dealing with the subgroups of the Darfurian Arabs, who are ethnically indistinguishable but politically distinct, the term correlates with popular usage and is useful. Hence, 'tribe' is used in the sense of a political or administrative ethnically-based unit." DE WAAL, Alex, Who Are the Darfurians? Arab and African Identities, Violence and External Engagement, **African Affairs**, v. 104, n. 415, p. 181–205, 2005, p. 181.

[76] ICID, **Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General**, Geneva: United Nations, 2005, para. 61.

[77] "For centuries, […] [Sudan] has been connected to its western neighbor Chad, and north-western neighbor Libya, through ancient trade routes of the Maghrib and the migratory patterns of herders. It was a land of various tribal chiefdoms and sultanates until contemporary times [...] In recent times, the Libya–Chad–Darfur triangle has been the center of intense and prolonged geopolitical struggle" SOLEVAD NIELSEN, Erik, Ethnic boundaries and conflict in Darfur: An event structure hypothesis, **Ethnicities**, v. 8, n. 4, p. 427–462, 2008, p. 433–434.

[78] This is a brief account of some of the major events that resulted in the situation before the ICC and as such is not able to account for all the more detailed complexities. In order to get a better explanation and analysis of the conflict in Darfur, see DE WAAL, Who Are the Darfurians? Arab and African Identities, Violence and External Engagement; FLINT, Julie; DE WAAL, Alexander, **Darfur: a new history of a long war**, London: Zed Books, 2008; SALIH, M. A. Mohamed, **Understanding the conflict in Darfur**, Copenhagen: Centre of African Studies, 2005; SOLEVAD NIELSEN, Ethnic boundaries and conflict in Darfur.

that would straddle the Horn of Africa."[79] The coup led by Bashir sought to create a more radically Arabic and Islamic Sudan and, to accomplish this purpose, it radicalized the already existing Muslim militia which was set up by a government decree, the Popular Defense Forces.[80]

This Islamist uprising in Sudan that gathered different groups was fractured in 1999 because of the split between Bashir and Turabi.[81] Without the heavy support that Turabi brought, the Government of Sudan (GoS) was weakened and had to look elsewhere for allies. With the Islamist movement divided, the GoS decided to reach out to the Sudan People's Liberation Army (SPLA), a southern resistance movement, which at that point had struck many government outposts and govern-backed militias. The GoS created the narrative that this attempt to ally with the SPLA and its affiliated militias was an effort towards a peace agreement, "but it was obviously a temporary stratagem to divide and rule and weaken the successful SPLA offensives."[82]

> For eighteen long months, government and SPLA delegates met, argued and broke up. A month after a framework agreement was signed in the town of Machakos in July 2002, the SPLA overran two government garrisons in the South and the government broke off the talks while it mobilized for a counterattack. Militia attacks continued, especially in the oilfields, and the two sides backed different sides in the on-off civil war in the Central African Republic. Both talked peace while they waged war, but gradually did more of the former than the latter.[83]

With the National Congress Party divide, another loss faced by the GoS was the region of Darfur. Even though it seemed to be fruitful for the expansion of the government's project, most of the Darfur movements turned against it and aligned themselves with Turabi.[84] As a consequence "[r]elations between Arabs and non-Arabs deteriorated sharply in North Darfur," with the GoS collecting all weapons

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[79] SOLEVAD NIELSEN, Ethnic boundaries and conflict in Darfur, p. 441–442.
[80] *Ibid*., p. 450; FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 27.
[81] Accounts vary as to the reasons for the split between these Islamic movements in Sudan. Alex de Waal attributes this separation to, among other reasons, that "the Islamists took the region for granted, and certainly because the ruling groups were focused on the threats from the South, Nuba and Blue Nile, Darfur was neglected in the series of Islamist projects aimed at social transformation." DE WAAL, Who Are the Darfurians? Arab and African Identities, Violence and External Engagement, p. 191.
[82] MOORCRAFT, Paul L., **Omar al-Bashir and Africa's longest war**, Barnsley: Pen & Sword Military, 2015, p. 136.
[83] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 30.
[84] DE WAAL, Who Are the Darfurians? Arab and African Identities, Violence and External Engagement, p. 191; FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 30, 68.

from the non-Arabs[85], including the ones in the police forces.[86] The measures adopted by the GoS resulted in a growing reaction that led to many attacks on Arabs and created a cycle of violence.

While the two leaders were severing ties, the Masalit, Fur and Zaghawa populations were already under attack by the GoS through its militias.[87] The result was that rebel movements withing these ethnic groups began to forge an alliance in the following years with the purpose of defeating the government's "Arab agenda,"[88] under the banner of the Darfur Liberation Front (DLF).[89] This means the fighting was already taking place in the beginning of the 2000s in Darfur. The scale of the fighting however increased substantially only in early 2003 and went on for just over a year.[90]

The conflict in Darfur was not detached from the war waged between Khartoum and the South. It is said that the first 2.000 Darfur rebels were trained by the South's rebel group, with the purpose of applying pressure that would be felt in the ongoing peace negotiations.[91] Throughout the year of 2002, the rebellion gained strength in Darfur and the fighting begin to escalate exponentially, culminating in

[85] Ethnic groups in Sudan are divided into Arab and non-Arab. The choice for naming non-Arabs is due to the fact that, as many have already emphasized, non-Arab groups are much diverse, and therefore are not encompassed by the characterisation as Africans. The distinction between Arabs and non-Arabs is more cultural than racial. In that sense, "[c]haracterising the Darfur war as 'Arabs' versus 'Africans' obscures the reality. Darfur's Arabs are black, indigenous, African and Muslim – just like Darfur's non-Arabs, who hail from the Fur, Masalit, Zaghawa and a dozen smaller tribes." DE WAAL, Alex, **Darfur's deep grievances defy all hopes for an easy solution**, The Guardian. Available at: <https://www.theguardian.com/society/2004/jul/25/internationalaidanddevelopment.voluntarysector>. Accessed: 12 oct. 2021. See also **The escalating crisis in Darfur**, The New Humanitarian. Available at: <https://www.thenewhumanitarian.org/report/47856/sudan-escalating-crisis-darfur>. Accessed: 27 oct. 2021.
The motifs for the conflict in that sense were tribal and political, but not racial, since it was not a rivalry between Arabs and Africans. And besides those two components, there are "factors associated with climate change: the desertification of the Sahel." MOORCRAFT, **Omar al-Bashir and Africa's longest war**, p. 152.
[86] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 68–69.
[87] See, for example, *Ibid*., p. 73–74.
[88] *Ibid*., p. 79.
[89] The DLF, armed movement between Fur, Zaghawa and Masalit, began, to organize in 2001. *Ibid*., p. 124.
[90] MOORCRAFT, **Omar al-Bashir and Africa's longest war**, p. 150. That is the narrative of many authors on the subject. Flint and de Waal also portray the situation similarly: "It is usually said that the rebellion in Darfur began on 26 February 2003 when a group calling itself the Darfur Liberation Front (DLF) issued a statement claiming an attack on Golo, the district headquarters of Jebel Marra. But by the time of the attack on Golo, war was already raging in Darfur: the rebels were attacking police stations, army posts and convoys, and Jebel Marra was under heavy ground and air attack." FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 81.
[91] MOORCRAFT, **Omar al-Bashir and Africa's longest war**, p. 151.

an announcement by the rebel forces in February 2003 that publicly acknowledged itself as a front against the government.[92]

Nevertheless, as rebel forces attacked and an uprising welled in Darfur, the government responded with more violence and the fighting escalated. With the conflict attaining new proportions, the rebels fighting under the banner of the DLF began to gain media attention and place themselves as fighting for all Sudanese. In order to reflect this change, from February 2003 on, they began calling themselves the Sudan Liberation Movement/Army (SLM/A).[93] These rebel forces, composed mostly of the Fur, Masalit, Zaghawa and other tribes, called the people of Darfur 'of Arab background' to join their non-Arab indigenous forces against the GoS. At that same moment, another rebel group was forming in Darfur: the Justice and Equality Movement (JEM). JEM, which had ties with Hassan al-Turabi, was also formed mostly by the Fur, Masalit, Zaghawa tribes and from the start was coordinating attacks with the SLA.[94]

In response, Khartoum asked the tribes of Darfur to defend their properties and, therefore, support the government against these rebel forces.[95] In that movement, some economically destitute farmers from Northern Darfur were incorporated into the Sudanese armed forces stimulated by "economic benefits, racial extremism and, for some, criminal immunity."[96] More to the South, the GoS recruited individuals from the Baggara tribe and local militias.[97]

After the February 2003 attacks by the SLA, which triggered an escalated response from the government, a series of events that are within what has been termed the "war in Darfur"[98] start to take place. In March 2003, the GoS broke an already fragile ceasefire by ambushing a prominent elderly sheikh of the Masalit tribe. The SLA and JEM then seized large number of arms and equipment form the

[92] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 116, 118.
[93] *Ibid*., p. 90.
[94] *Ibid*., p. 104.
[95] **The escalating crisis in Darfur**.
[96] SOLEVAD NIELSEN, Ethnic boundaries and conflict in Darfur, p. 451.
[97] *Ibid*.
[98] As previously stated, saying that the war starts in February 2003 does not mean that the sides were not already involved in a conflict amongst themselves. But the reference to the War in Darfur serves to pinpoint the moment where the fighting reached calamitous proportions.

government from a town in the border with Chad. The government responded quickly indicating that the "army would be 'unleashed' to 'crush' the rebellion."[99]

> The truth of the matter, well known to Bashir, was that the armed forces had already been 'unleashed' – but to very little avail. They were making no headway against the rebels, whose hit-and- run tactics, using Toyota land cruisers to cross the semi-desert at high speed, were proving devastatingly effective. Untrained in desert warfare, the Sudanese army was losing almost every encounter, and the government was relying more and more on its air force. Badly hurt by aerial bombardment – especially in and around the Ain Siro mountains, the SLA's main base at the time – the rebels planned an attack that would change the face of the war. Unable to take the government on in the air, they decided to destroy its planes on the ground.[100]

These events changed the dynamics of the war. The GoS began a "scorched-earth policy," seeking to destroy many 'African villages and thus preventing the rebels from operating.[101] The army and the government-backed militias, that have come to be known as 'Janjaweed'[102], went in hard on their offensive, in particular after surprise rebel attacks on 25 April 2003 directed towards the government's air force equipment, that was being used in the destruction of villages in Northern Darfur.[103] The response was an intensification of the use by the government of the militias that by that point were completely integrated into the military forces.[104] In the height of warfare, the government's "regular and irregular forces became virtually indistinguishable" in a campaign coordinated by Ahmed Mohamed Haroun, joined by militia commander Ali Mohamed Ali Abdel Rahman – also known as Ali Kushayb.[105] At that point, both sides were unleashing all its forces

[99] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 119.
[100] *Ibid*.
[101] MOORCRAFT, **Omar al-Bashir and Africa's longest war**, p. 152.
[102] *Janjaweed* or *Janjawiid* is a word used customarily in Sudan "to refer to gangs of outlaws from Chad." The original *Janjawiid* were "fighters from the Salamat of south-central Chad, and the Sudanese intermediaries who smuggled their weapons. […] It was Sheikh Hilal Mohamed Abdalla, whose Um Jalul clan's yearly migration routes took them from the edge of the Libyan desert in Northern Darfur to the upper reaches of the Salamat River where it crosses from Sudan into Chad. Renowned for their traditionalism, their camels and the vast reach of their semi-nomadism, the Um Jalul were a logical intermediary for Libya's gun-running. Their encounter with the Salamat militia, first social, then commercial and finally military, forged the Janjawiid, which is now headed by the Sheikh's younger son, Musa Hilal." DE WAAL, Alex, Deep down in Darfur: Nothing Is as We Are Told in Sudan's Killing Fields, **Review of African Political Economy**, v. 32, n. 106, p. 653–659, 2005, p. 653.
[103] MOORCRAFT, **Omar al-Bashir and Africa's longest war**, p. 152.
[104] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 118.
[105] *Ibid*., p. 128.

and brutally attacking the civilian population in the process. “The years 2003–04 would be the bloodiest in Darfur’s troubled history.”[106]

> In the subsequent debate over whether the war in Darfur constituted genocide or not – a debate whose burden of proof, paradoxically, became a hindrance to action – one thing is certain: the people who decided to use ethnic militias as a counter-insurgency force knew exactly what it would mean. They had used similar militias since 1985 and had seen the results. Ahmed Haroun himself had been coordinator for the Popular Defence Forces in Kordofan during the vicious war against the Nuba. Now the government was organizing a replay.[107]

As negotiations took place between the GoS and the SPLA/M, the military believed that they should act before “any peace deal that could curb their action was signed.”[108] According to most accounts, Bashir did not envision a war with Darfur. But the military had free reign to operate in the region. For Bashir, a war meant burning all the political and diplomatic capital he had spent specially investing in a deal with the South, which had more layers than simply making peace with rebel forces. Working towards an agreement amounted to keeping the US happy which would consequently mean that they would follow through with their promise to repeal their sanctions against Sudan as soon as the comprehensive peace agreement (CPA) was signed.[109]

The war between the GoS and the rebel groups from Darfur managed to last for so long without any intervention because all international attention was focused on the ongoing conflict and then peace negotiations with the South. Khartoum was also accused of exploiting the focus on the ongoing conflict in Iraq abuse its powers in Darfur.[110] To drive international attention to the actions of the GoS, rebels attacked aid convoys that were attending to the large population of famine. What was initially a small peacekeeping operation by the Organization of the African Union (AU) was soon boosted into an UN–AU joint operation.[111]

While the government unleashed war on Darfur, Vice-President Ali Osman waged peace with the South, by travelling to Kenya to have direct talks with John

[106] *Ibid*., p. 122.
[107] *Ibid*., p. 123–124.
[108] MOORCRAFT, **Omar al-Bashir and Africa’s longest war**, p. 152.
[109] *Ibid*.
[110] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 118.
[111] MOORCRAFT, **Omar al-Bashir and Africa’s longest war**, p. 153.

Garang, chairman of the Sudan People's Liberation Movement (SPLM), the political wing of the SPLA. These negotiations aimed to reach a CPA. A deal was finally reached and finalized by New Year's Eve 2004 and signed on 9 January 2005.[112] As Osman negotiated, Bashir fretted over the possibility of being cheated by its ally, who could make a "secret pact with Garang to marginalize him."[113] That was reason enough for him not to attend the signing ceremony.

The CPA – also known as the Naivasha Agreement – was held as a success for it ended "Africa's longest civil war" and, even with Bashir's absence, led many in his close circle to stir talks of a Nobel Peace Prize.[114] Until that moment, the GoS figured amongst Washington's allies in Africa and, in that sense, that hypothesis was not totally out of place. While negotiations were moving forward and seemed to be leading to an agreement, George W. Bush – by whom Bashir was "regularly phoned directly"[115] – invited President of Sudan to a reception at the White House. The visit was cancelled though, the events in Darfur were proving to be an anticlimactic development. Only 16 days after the CPA was formally signed between the leader of the SPLM, John Garang and Ali Osman, representing the GoS, a Commission of Inquiry released its report on the situation in the country. With the end of the conflict between the North and the South and all the attention now focusing on the escalating conflict and the level of atrocities taking place in Darfur, the US had a change of heart regarding the GoS.[116] Bashir went from an African Saviour to being a leader of a rogue State.

On April 2004, the situation in Darfur began to figure among UNSC discussions. Its members expressed a "deep concern about the massive humanitarian crisis" that was taking place in the Sudanese region.[117] Later in the year, the UNSC issued Resolution 1556, in which it declared the conflict in Darfur a threat to international peace and security,[118] that under Chapter VII of the UN

[112] FLINT; DE WAAL, **Darfur: a new history of a long war**, p. 30–31.
[113] *Ibid*., p. 31.
[114] MOORCRAFT, **Omar al-Bashir and Africa's longest war**, p. 149.
[115] *Ibid*.
[116] SCHIFF, Benjamin N., **Building the international criminal court**, 1st. ed. New York: Cambridge University Press, 2008, p. 227.
[117] UNITED NATIONS SECURITY COUNCIL, **Press Statement on Darfur, Sudan, by Security Council President**, New York: United Nations Security Council, 2004.
[118] UNITED NATIONS SECURITY COUNCIL, **Resolution 1556 (2004)**, New York: United Nations Security Council, 2004.

Charter would have it fall under its scope of action. Meanwhile, the US government had commissioned a study of Sudanese refugees in Chad which was presented by Secretary of State Colin Powell to the Senate Foreign Relations Committee.[119] By the evidence presented, the State Department was convinced that a genocide had taken place – and might had still be occurring – in Darfur "and that the Government of Sudan and the jinjaweid [*sic*] bear responsibility."[120] Influenced by the United States,[121] the UNSC asked the UN Secretary-General for a report on the situation in Darfur. The Secretary-General appointed former ICTY President, Judge Antonio Cassese, to head a Commission of Inquiry.

The International Commission of Inquiry for Darfur (ICID) was set up by UNSC Resolution 1564 with the mandate "to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations" to ensure they are held accountable.[122] The Commission began its work on 25 October 2004 and, while not dismissing other range of events in the conflict in Darfur, focused on those that took place between February 2003 and beginning of January 2005. The ICID was set up under the Office of the High Commissioner for Human Rights and was composed by the Commission itself,[123] which visited Sudan from 7-21 November 2004 and 9-16 January 2005, and an investigative team, which remained in Darfur from November 2004 through January 2005.[124]

[119] SCHIFF, **Building the international criminal court**, p. 228.
[120] UNITED STATES SENATE COMMITTEE ON FOREIGN RELATIONS, **The current situation in Sudan and the prospects for peace: hearing before the Committee on Foreign Relations, United States Senate, One Hundred Eighth Congress, second session, September 9, 2004.**, Washington, DC: U.S. G.P.O., 2005, p. 13.
[121] The United States deployed its own experts to the Chadian border in order to access whether a genocide was taking place in Darfur. For more on the debate ongoing inside the US State Department on the events in Darfur, see HAMILTON, Rebecca, **Inside Colin Powell's Decision to Declare Genocide in Darfur - The Atlantic**, The Atlantic. Available at: <https://www.theatlantic.com/international/archive/2011/08/inside-colin-powells-decision-to-declare-genocide-in-darfur/243560/>. Accessed: 29 nov. 2021.
[122] UNITED NATIONS SECURITY COUNCIL, **Resolution 1564 (2004)**, New York: United Nations Security Council, 2008, para. 12.
[123] The Commission was composed by highly regarded legal experts: chairperson Antonio Cassese, Mohammed Fayek, Hina Jilani, Dumisa Ntsebeza and Thérèse Striggner Scott.
[124] ICID, **Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General**, p. 2.

The full report of the ICID was submitted to the UN Secretary-General on 25 January 2005. In accordance with its mandate, the Commission focused of four key questions: (1) map the violations of international humanitarian law and international human rights law by all parties in the conflict in Darfur; (2) determine whether acts of genocide were committed; (3) identify the perpetrators of the international humanitarian law and international human rights law violations; and (4) explore the means available to ensure that those responsible for these violations are held accountable.[125]

Regarding the violations, the Commission affirmed to have reason to believe that "the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law."[126] According to the document, the GoS and its militias have conducted "indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur."[127] The Commission pinpointed the widespread and systematic character of these actions which would indicate that these actions figure as crimes against humanity. And these actions, according to the report, were mostly directed towards the Fur, Zaghawa, Masalit, Jebel, Aranga "and other so-called 'African' tribes."[128] Withal, the Commission also had credible evidence that testified that the rebel forces – the SLA and JEM – were too responsible for serious violations of international human rights and humanitarian law amounting to war crimes. The report stated that they did not find though a "systematic or a widespread pattern to these violations."[129]

As to the issue of whether a genocide took place in Darfur, the report pointed at two elements of genocide present in the violations of human rights perpetrated by the GoS alongside its supported militias: "the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of

[125] *Ibid*.
[126] *Ibid*., p. 3.
[127] *Ibid*.
[128] *Ibid*.
[129] *Ibid*., p. 4.

criminal conduct."[130] However, the Commission arrived at the conclusion that there was not a policy of genocide by the GoS since the key element of genocide seemed to be missing: the intent to annihilate a group – in part or as a whole – on racial, ethnic, national or religious grounds. The Commission recognized though "that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis."[131]

When identifying the perpetrators, the report indicated that those possibly responsible for the violations that included crimes against humanity and war crimes, were "officials of the Government of Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity."[132] Among those individuals, the Commission found some possibly responsible for joint criminal enterprise to commit international crimes and others involved in the planning and ordering or aiding and abetting the perpetration of international crimes. Senior government officials were also considered may have been responsible under the notion of command responsibility, "for knowingly failing to prevent or repress the perpetration of crimes."[133] The Commission did not list the name of these persons in the report, it sent it instead separately to the UN Secretary-General and recommended that it is forwarded to a competent Prosecutor.[134]

And, finally, regarding mechanisms for accountability, the Commission "considered alternative means to bring suspected Sudanese perpetrators to justice, such as an ad hoc or hybrid tribunal."[135] However, in the final text, it recommended that the situation in Darfur be referred to the ICC by the UNSC, triggering article 13(b) of the Rome Statute. The document states that the crimes documented in Darfur "meet the thresholds of the Rome Statute as defined in articles 7(1), 8(1) and 8(f)."[136] The Commission further stated that the Sudanese justice system is

[130] *Ibid*.
[131] *Ibid*.
[132] *Ibid*.
[133] *Ibid*., p. 5.
[134] *Ibid*.
[135] SCHIFF, **Building the international criminal court**, p. 229.
[136] ICID, **Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General**, p. 5.

unwilling and unable to deal with the situation in Darfur, since the mechanisms put in place by the GoS to deal with the events in Darfur have been very inadequate an ineffective corroborating to further the impunity for human rights violations. This state of affairs puts the situation in Darfur within the scenarios the ICC may proceed to launch an investigation. The Commission even goes further to state that there's not only a need to deal with individual accountability for crimes that were committed in Darfur, but victims must also be prioritised, and, in that sense, the report even recommend that even though perpetrators might not be identified, the UN or other competent body should still formulate a plan to grant reparations to the victims. The Commission also points to the exercise of universal jurisdiction by other States but does not explore that venue in detail.[137]

On 16 February 2005, the UN High Commissioner for Human Rights, Louise Arbor, presented the ICID's report to the Security Council.[138] The UNSC debated for three months. "There was agreement there had to be justice. But the issue was who will do it."[139] The United States was a heavy opponent to having the situation referred to the ICC and throughout the discussions held by UNSC pressed for alternatives. "U.S. Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper said on January 28, 2005, 'we don't want to be party to legitimizing the ICC,'"[140] already showing the US position about a referral. It is said that even before the report was finalized, the United States was already proposing to create "a new court at the headquarters of the existing UN criminal tribunal for Rwanda in Arusha, Tanzania, to be administered jointly by the African Union and the United Nations."[141] Despite the United States strong position towards the issue, most of the other members of the Council leaned towards that course. On top of that the then Secretary-General, Kofi Anan, endorsed the ICC as the venue to try those responsible for the atrocities that took place in Darfur.[142]

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[137] *Ibid*., p. 5–6.
[138] **Sudan Chronology of Events**, Security Council Report. Available at: <https://www.securitycouncilreport.org/chronology/sudan.php>. Accessed: 1 nov. 2021.
[139] **Lunch with the FT: Luis Moreno-Ocampo**, Financial Times. Available at: <https://www.ft.com/content/8dce2894-e4fc-11e0-9aa8-00144feabdc0>. Accessed: 1 nov. 2021.
[140] SCHIFF, **Building the international criminal court**, p. 229.
[141] CROOK, John R., U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC, **American Journal of International Law**, v. 99, n. 2, p. 501–502, 2005, p. 502.
[142] HOGE, Warren, **U.S. Lobbies U.N. on Darfur and International Court**, The New York Times. Available at: <https://www.nytimes.com/2005/01/29/world/us-lobbies-un-on-darfur-and-international-court.html>. Accessed: 2 nov. 2021.

As of mid-March, the UNSC was still debating where these trials would take place. At long last, the United States did not gather enough support for its proposals and "allowed the referral to go through by abstaining."[143] On 31 March 2005, the UNSC settled this issue and referred the situation in Darfur to the ICC through Resolution 1593 that was adopted by 11 votes to none against and four abstentions from China, the United States, Algeria and Brazil.[144]

Paragraph 1 of Resolution 1593 triggers article 13(b) of the Rome Statute for the first time by stating that the UNSC had decided "to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court."[145] Many human rights and international justice advocates welcomed enthusiastically the referral of the situation to the Court,[146] though the triggering the ICC's jurisdiction through the UNSC seemed highly unlikely given the strong opposition the Court faced by two permanent members of the Council, China and the United States.[147]

Nevertheless, the United States negotiated "a quid pro quo for its abstention" that included that Resolution 1593 encompassed three caveats.[148] The first one came in paragraph 7, which affirms that "none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations."[149] The text of the Resolution states that Rome Statute's Member States that wish to do so should be the ones to bear the costs of the investigations and

[143] CERONE, J. P., Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals, **European Journal of International Law**, v. 18, n. 2, p. 277–315, 2007, p. 301.
[144] **Security Council resolution 1593 (2005) [referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court]**, United Nations Digital Library. Available at: <https://digitallibrary.un.org/record/544831>. Accessed: 2 nov. 2021.
[145] UNITED NATIONS SECURITY COUNCIL, **Resolution 1593 (2005)**, New York: United Nations Security Council, 2005, para. 1.
[146] See, for example, **U.N. Security Council Refers Darfur to the ICC**, Human Rights Watch. Available at: <https://www.hrw.org/news/2005/03/31/un-security-council-refers-darfur-icc>. Accessed: 11 nov. 2021.
[147] WHITING, Alex, Prosecution Strategy at the International Criminal Court in Search of a Theory, *in*: JESSBERGER, Florian; GENEUSS, Julia (Eds.), **Why Punish Perpetrators of Mass Atrocities?**, Cambridge; New York: Cambridge University Press, 2020, p. 294; CRYER, Robert, Sudan, Resolution 1593, and International Criminal Justice, **Leiden Journal of International Law**, v. 19, n. 1, p. 195–222, 2006, p. 203; SCHIFF, **Building the international criminal court**, p. 230.
[148] CRYER, Sudan, Resolution 1593, and International Criminal Justice, p. 204.
[149] UNITED NATIONS SECURITY COUNCIL, **Resolution 1593 (2005)**, para 7.

prosecutions. Following the Resolution, the Government of Canada pledged US$500,000 to assist in the ICC investigations in Darfur.[150]

The second was that it made reference to the immunity agreements signed bilaterally with a number of countries, which ended up materialized in the Resolution's preamble, through the wording "Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute."[151] However, both Brazilian and Danish members of the Council expressed that the inclusion of this provision in the Resolution do not mean that such agreements are in consistency with the Rome Statute.[152]

The third compromise, though, had a much bigger effect. The Unites Stated negotiated the inclusion of a controversial paragraph in the Resolution. In paragraph 6, the UNSC Resolution makes nationals of states not party to the Rome Statute exempt from ICC jurisdiction and further determine that nationals from any contributing State outside Sudan – which is not a party to the referred treaty – "shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan […] unless such exclusive jurisdiction has been expressly waived by that contributing State."[153] After it was issued, many questioned the lawfulness of Resolution 1593 and its "compliance with basic principles of the rule of law."[154]

In the meeting that approved Resolution 1593, the Sudanese representative highlighted these compromises as clear examples of "the use of double standards [...] and a two-track justice."[155] Once it was announced that the Security Council had approved Resolution 1593, the GoS began to attack the decision. According to news reports, Sudan's Council of Ministers declared a "total rejection" of UN

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[150] CRYER, Sudan, Resolution 1593, and International Criminal Justice, p. 204; CANADA, Global Affairs, **Canada Contributes $500,000 to International Criminal Court for Darfur Investigations**, Government of Canada. Available at: <https://www.canada.ca/en/news/archive/2005/04/canada-contributes-500-000-international-criminal-court-darfur-investigations.html>. Accessed: 11 nov. 2021.

[151] UNITED NATIONS SECURITY COUNCIL, **Resolution 1593 (2005)**, Preamble.

[152] CRYER, Sudan, Resolution 1593, and International Criminal Justice, p. 204–205; For the full debate, see **United Nations Security Council 5158th meeting**, New York: United Nations Security Council, 2005.

[153] UNITED NATIONS SECURITY COUNCIL, **Resolution 1593 (2005)**, para. 6.

[154] CRYER, Sudan, Resolution 1593, and International Criminal Justice, p. 205.

[155] **United Nations Security Council 5158th meeting**, p. 5.

Resolution 1593,[156] and stated that the Resolution compromised the efforts of the government for realising peace and stability,[157] since it would send the "wrong signals to the rebels."[158] Sudanese Head of State, Omar Al Bashir, announced that his government would not allow for any citizen to handed to the ICC[159] and be tried outside the country and Sudanese judiciary was equipped and ready to try those responsible for the violations in Darfur.[160]

After receiving all the material from the ICID, on 5 April 2005, Chief Prosecutor of the ICC at the time, Argentinian Luis Moreno Ocampo, directed his attention to the events that had just taken place in Darfur. Among the material, were "more than 2,500 items, including documentation, video footage and interview transcripts that had been gathered by the International Commission of Inquiry on Darfur."[161] There was also a confidential list which included the names of 51 individuals and why the Commission believed they were suspects for the crimes that took place in Darfur.[162]

"Prior to the commencement of a formal investigation, the Prosecutor is required to gather and assess relevant information in order to determine whether there is a reasonable basis to initiate an investigation."[163] Such analysis is done in the preliminary examinations and checks whether the situation meets the

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[156] **Sudan: Darfur War-Crime Suspects Won't Go to ICC, Government Says**, UN Integrated Regional Information Networks. Available at: <https://allafrica.com/stories/200504040075.html>. Accessed: 11 nov. 2021.

[157] SCHIFF, **Building the international criminal court**, p. 233.

[158] **Sudan's Cabinet rejects UN resolution on ICC trials**, Sudan Tribune. Available at: <https://sudantribune.com/article9537/>. Accessed: 11 nov. 2021.

[159] "Sudan has not always rejected the ICC. Before the establishment of the ICC, Sudan welcomed the idea of an international court that respected sovereignty3 and was based on complementarity.4 With a divided delegation in Rome, it ultimately abstained on account of disagreement with various provisions, such as the subject-matter jurisdiction over crimes committed during non-international armed conflict, *the power of the Security Council to refer situations to the Prosecutor of the Court* and the prohibition on reservations." NOUWEN, Sarah M. H., **Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan**, Cambridge: Cambridge University Press, 2013, p. 247. (highlighted by the author).

[160] **Sudan: Darfur War-Crime Suspects Won't Go to ICC, Government Says**.

[161] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, The Hague: International Criminal Court (ICC), 2005, p. 2.

[162] OFFICE OF THE PROSECUTOR, **List of Names of Suspects in Darfur opened by the ICC OTP**, The Hague: International Criminal Court (ICC), 2005.

[163] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, p. 1.

prerequisites laid out in article 53(1) of the Rome Statute.[164] At this stage, the OTP does not enjoy investigative powers, it may only receive or seek information from States, organs of the UN, NGOs and other sources deemed reliable.[165] Immediately after the adoption of Resolution 1593, the three divisions inside the OTP – the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division, and the Prosecution Division – engaged on the process of gathering information.[166]

Analysing the situation in Darfur, in light of the Court's complementarity regime and article 53(1), the OTP concluded that there was "sufficient information to believe that there are cases that would be admissible in relation to the Darfur situation."[167] It has "studied Sudanese institutions, laws and procedures," gathered information regarding the national justice system and traditional systems for alternative dispute resolution from the GoS, consulted the report of the National

[164] Article 53(1) of the Rome Statute establishes that "to initiate an investigation, the Prosecutor shall consider whether:
(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
(b) The case is or would be admissible under article 17; and
(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."
In the beginning of her term as Chief Prosecutor, Fatou Bensouda published, in 2013, a Policy Paper on Preliminary Examinations, where it was laid out the steps taken at each phase of this stage. Each phase focuses on a statutory factor. Phase one is only needed for situations that are brought to the Prosecutor's attention through article 15 communications. Phase two is considered to be the formal commencement of a preliminary examination, because situations triggered by a State Party or by the UNSC will start from this point. On phase two, the OTP evaluates if the alleged crimes fall under the subject-matter jurisdiction of the Court, checking if the criteria under article 12 are met. Phase three, in turn, will analyse the admissibility in terms of complementarity and gravity. Relevant factors to access gravity are: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes. And, finally, phase four, the more subjective one, will consist of an examination by the Prosecutor's office on whether they believe that this situation serves the interests of justice. It is important to note that complementarity and interests of justice are ongoing assessments. Even though a situation goes to the investigation stage, these elements will be constantly checked by the OTP.
Rome Statute of the International Criminal Court, Rome: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1998, Article 53(1); OFFICE OF THE PROSECUTOR, **Policy Paper on Preliminary Examinations**, The Hague: International Criminal Court (ICC), 2013, paras. 78-83; OFFICE OF THE PROSECUTOR, **Report on the activities performed during the first three years (June 2003-June 2006)**, The Hague: International Criminal Court (ICC), 2006, p. 6.

[165] OFFICE OF THE PROSECUTOR, **Policy Paper on Preliminary Examinations**, para. 85.

[166] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, p. 1–2.

[167] OFFICE OF THE PROSECUTOR, **Report on the activities performed during the first three years (June 2003-June 2006)**, p. 18.

Commission of Inquiry, among other methods for collecting information.[168] The situation in Darfur was within the subject-matter jurisdiction of the Court, since the crimes that were allegedly committed amounted at least to war crimes and crimes against humanity and the individuals were within the territory that had been referred to the Court by the UNSC, triggering article 13(b) of the Rome Statute. In terms of complementarity, the OTP considered that there was not and has not been any investigation or prosecution at the national level of the events of interest to the ICC and the GoS did not seem to be willing and able[169] to adjudicate the matter. The gravity threshold in the events in Darfur were considered sufficient to satisfy article 17(1)(d),[170] since it "involves thousands of wilful killings as well as international and large-scale sexual violence and abductions."[171] As regards the interests of justice, the OTP evaluation looked into traditional mechanisms for justice and reconciliation and decided to pursue to the investigation. Two elements helped to make this decision: the gravity of the crimes in question and the interests of victims.[172]

On 1 June 2005, the OTP notified Pre-Trial Chamber of the decision to proceed to an investigation in the situation in Darfur[173] and, on 6 June 2005, issued a press release announcing it was opening an investigation.[174] "The start of formal investigations in relation to crimes in Darfur brings into effect the Prosecutor's full investigative powers."[175] For this stage, the OTP "selected a number of alleged criminal incidents for full investigation" and "those persons bearing greatest

[168] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, p. 3–4.
[169] For the OTP's criteria for deeming a State unwilling and unable, see *Ibid*., p. 3, footnote 2.
[170] OFFICE OF THE PROSECUTOR, **Report on the activities performed during the first three years (June 2003-June 2006)**, p. 6–7.
[171] OFFICE OF THE PROSECUTOR, **Letter of Prosecutor Dated 9 February 2006 (Iraq)**, The Hague: International Criminal Court (ICC), 2006, p. 9.
[172] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, p. 4–5.
[173] OFFICE OF THE PROSECUTOR, **Decision By the Prosecutor to initiate an investigation**, The Hague: International Criminal Court (ICC), 2005.
[174] OFFICE OF THE PROSECUTOR, **The Prosecutor of the ICC opens investigation in Darfur**, The Hague: International Criminal Court (ICC), 2005.
[175] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, p. 9.

responsibility for those incidents."[176] The OTP understood that this selection process needed to be thorough in order to meet "the high evidential thresholds set by the Statute."[177]

In the following day that the OTP announced the opening of investigations, the GoS announced it was establishing a Special Criminal Court to adjudicate the crimes committed in Darfur.[178] The Special Criminal Court on the Events in Darfur (SCCED) was created by the authority of the Chief Justice and President of the Sudanese Supreme Court and would be seated in Fashir, the capital of North Darfur. Later in the year, on November 2005, a new decree established two new Special Courts to sit on Geneina, West Darfur, and Nyala, South Darfur.[179] The GoS announced that the SCCED would try 160 individuals.[180]

The decree gave the SCCED jurisdiction over "acts which constitute crimes in accordance with the Sudanese Penal Code and other penal codes," charges that were established in the decision of the Minister of Justice based on the violations identified by the Commission of Inquiry established by the GoS, acts determined by the Chief Justice, and, a later addition, international humanitarian law.[181] In the eyes of the GoS, the SCCED was a substitute to the ICC, as was stated in such way by Sudanese Justice Minister, Ali Mohamed Oman Yasmin.[182]

However, Human Rights Watch, monitoring the trials, identified that in the period of a year only 13 people were convicted and all but one case only involved ordinary criminal matters, "such as individual acts of armed robbery, weapon possession and murder that could have been prosecuted by the ordinary courts."[183] The OTP since then has often stressed that they have not identified "any national

[176] OFFICE OF THE PROSECUTOR, **Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, The Hague: International Criminal Court (ICC), 2005, p. 2.
[177] *Ibid*., p. 3.
[178] **Letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council**, New York: United Nations Security Council, 2005, p. 1.
[179] OFFICE OF THE PROSECUTOR, **Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, p. 5.
[180] Lack of Conviction: The Special Criminal Court on the Events in Darfur, **Human Rights Watch Briefing Paper**, n. 1, 2006, p. 10.
[181] **Letter dated 18 June 2005 from the Chargé d'affaires a.i. of the Permanent Mission of the Sudan to the United Nations addressed to the President of the Security Council**, p. 4.
[182] SCHIFF, **Building the international criminal court**, p. 233.
[183] Lack of Conviction: The Special Criminal Court on the Events in Darfur, p. 10.

investigation or prosecution of the cases selected for prosecution by the Court," meaning that the SCCED has not tried any of the individuals or the crimes of concern to the ICC.[184] For the Court to deem a case inadmissible, the proceedings at the national level have to "encompass both the person and the conduct which is the subject of the case before the Court."[185] The OTP monitored these national proceedings through many missions to Sudan and verified that even though they "were in relation to crimes in the same date range," the individuals held on trial in these national proceedings were individuals that *refused* to comply with the GoS' orders.[186]

In the investigation stage, the OTP is heavily dependent on cooperation for the purposes of evidence gathering not only from the parties but also from other regional actors, like neighbouring countries and regional organizations. However, investigating the situation in Darfur was proving to be a challenge. The conflict in Darfur was still ongoing at that point which meant that the continuing insecurities derailed the "establishment of an effective system for the protection of victims and witnesses," an issue that directly affected the conduction of investigations.[187] There also seemed to be some hurdles in the ICC's operation through the investigations:

> Descriptions of the ICC's progress in Sudan from ICC insiders indicated that the investigation faced debilitating difficulties. They claimed that lack of a consistent investigation and prosecution strategy was undermining progress toward warrants. High personnel turnover sapped momentum. Tensions with the Registry were inhibiting operations on the ground. A deteriorating security environment in 2006 led the Registry Security Division to determine that OTP missions into the area were becoming overly risky, and the investigation slowed. Some participants in the missions argued that investigations required taking risks and that the ICC shouldn't be seen to be among the first international organizations to leave when situations became threatening. The lack of Sudanese cooperation increased the challenge to the ICC to tenaciously build cases that could stand up in Court. The task was feasible, some Court personnel argued, but internal problems were hampering the effort.[188]

[184] OFFICE OF THE PROSECUTOR, **Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, p. 5.
[185] OFFICE OF THE PROSECUTOR, **Fact sheet: The Situation in Darfur, the Sudan**, The Hague: International Criminal Court (ICC), 2007.
[186] OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**, The Hague: International Criminal Court (ICC), 2008, para. 3 (emphasis added).
[187] OFFICE OF THE PROSECUTOR, **Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, p. 6.
[188] SCHIFF, **Building the international criminal court**, p. 235–236.

As a result, most of the information gathered by the OTP in the first phase of the investigation stage came through the ICC's presence in Chad which allowed access to the refugee population from Darfur situated in the Eastern region of the country.[189] During preliminary examinations, the Prosecutor had managed to meet twice with officials from the GoS and "held exploratory meetings with other parties to the conflict in Darfur in order to establish channels for communication and cooperation."[190] One of the reasons the OTP met with authorities from Sudan was due to an agreement signed between the two parties to cooperate in the situation in Uganda, more specifically for the Case *The Prosecutor vs Kony et al*.[191]

During one of these visits, as part of the fact-finding process, the OTP made a formal request to undertake interviews that would allow them to better access the national judicial proceedings related to the conflict in Darfur.[192] But information on what the Sudanese courts were doing seemed to be all the information the ICC representatives were being able to get from their visits to Khartoum. The GoS were not cooperating with the investigation on site. "There was no indication that ICC teams would be permitted access to Darfur or given access to victims and/or witnesses in Sudan of the crimes they sought to investigate."[193]

Prosecutorial strategy was drawing a tough criticism from UN High Commissioner for Human Rights, Louise Arbour, and the Chairman of the ICID, Antonio Cassese.[194] In both accounts, the OTP was being too cautious in its

[189] OFFICE OF THE PROSECUTOR, **Third Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, The Hague: International Criminal Court (ICC), 2006, p. 1.
[190] OFFICE OF THE PROSECUTOR, **Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)**, p. 5.
[191] OFFICE OF THE PROSECUTOR, **Public Redacted Version of Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute**, The Hague: International Criminal Court (ICC), 2010, para. 45. See NOUWEN, **Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan**, p. 249.
[192] OFFICE OF THE PROSECUTOR, **Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, p. 9.
[193] SCHIFF, **Building the international criminal court**, p. 236.
[194] *Ibid*., p. 237; See also CASSESE, A., Is the ICC Still Having Teething Problems?, **Journal of International Criminal Justice**, v. 4, n. 3, p. 434–441, 2006.

approach to Darfur.[195] After receiving submissions from organizations and individuals on how the still ongoing conflict presented problems for victims' protection and for the preservation of evidence, the PTC I, acting under rule 103(1) of the Rules of Procedure and Evidence (henceforth, Rules), invited Arbour and Cassese to submit observations in relation to the protection of victims and witnesses and the preservation of evidence in the situation in Darfur.[196] "In essence the two prominent and experienced international officials were being asked to comment upon the Chief Prosecutor's course of action, each of them having recently been critical of those actions."[197]

Once Cassese and Arbour submitted their responses to the Court,[198] per rule 103(2) of the Rules, the OTP and the Defence had the right to reply. The Prosecution responded that both recommendations went beyond the scope of article 68(1) of the Rome Statute, since the Prosecution was relying on a strategy of not conducting investigations (and therefore gathering testimony) in Darfur, which for the OTP meant that there were "no witnesses to protect there."[199] The responsibility to provide security for civilians in Darfur, in the OTP's view, relied with the GoS and the UNSC.[200]

Considering that the situation in Darfur was still at the investigation stage, when inviting observations from Cassese and Arbour, the PTC I ordered the

[195] CASSESE, Is the ICC Still Having Teething Problems?, p. 439; **UN rights chief urges ICC to act on Darfur**, Sudan Tribune. Available at: <https://sudantribune.com/article16131/>. Accessed: 11 nov. 2021.
[196] PRE-TRIAL CHAMBER I, **Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence**, The Hague: International Criminal Court (ICC), 2006, p. 5.
[197] SCHIFF, **Building the international criminal court**, p. 238.
[198] PRE-TRIAL CHAMBER I, **Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence**, The Hague: International Criminal Court (ICC), 2006; PRE-TRIAL CHAMBER I, **Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC**, The Hague: International Criminal Court (ICC), 2006.
[199] OFFICE OF THE PROSECUTOR, **Prosecutor's Response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC**, The Hague: International Criminal Court (ICC), 2006, para. 8; OFFICE OF THE PROSECUTOR, **Prosecutor's response to Arbour's observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence**, The Hague: International Criminal Court (ICC), 2006, para. 8.
[200] OFFICE OF THE PROSECUTOR, **Prosecutor's Response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC**, para. 16; OFFICE OF THE PROSECUTOR, **Prosecutor's response to Arbour's observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence**, para. 12.

Registrar "to appoint an ad hoc counsel to represent and protect the general interests of the Defence in the Situation in Darfur, Sudan during the proceedings pursuant to rule 103 of the Rules,"[201] since both parties should have the opportunity to react to *amicus* curiae observations.[202] By appointing Mr Hadi Shalluf as *ad hoc* counsel on 25 August 2006,[203] the PTC I envisaged his mandate to be restricted to reacting to the *amici curiae* submissions. The Council believed his duties to encompass all those of a regular counsel and filed a motion challenging the admissibility of the case[204] and requested permission to travel to Sudan.[205] All his requests were rejected because it was considered that they fell "out the parameters of his legally assigned responsibilities," his mandate was "strictly restricted to those proceedings and does not extend automatically to other proceedings at the pre-trial stage set out in the Statute and the Rules."[206] However, some believe that the PTC I disregarded that the *ad hoc* counsel is also "required to undertake a solemn undertaking under Article 5 of the ICC Code of Conduct declaring that he shall perform his duties with integrity and diligence, freely, independently and conscientiously and did so accordingly."[207] When the PTC I ended the proceedings regarding Rule 103, it discharged the *ad hoc* counsel of his duties and also followed the Registry's decision that work outside the mandate would not be remunerable, meaning that they would not pay the fees relating to his work for December 2006 to February

[201] PRE-TRIAL CHAMBER I, **Decision Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence**, p. 6.
[202] Rules of Procedure and Evidence, rule 103(2).
[203] REGISTRAR, **Decision of the Registrar Appointing Mr. Hadi Shalluf as ad hoc Counsel for the Defence**, The Hague: International Criminal Court (ICC), 2006.
[204] DEFENCE, **Conclusions aux fins d'exception d'incompétence et d'irrecevabilité**, The Hague: International Criminal Court (ICC), 2006, p. 12–23.
[205] DEFENCE, **Conclusions aux fins d'in limine litis sursis à statuer**, The Hague: International Criminal Court (ICC), 2006, p. 6.
[206] PRE-TRIAL CHAMBER I, **Decision on the Ad hoc Counsel for Defence Request of 18 December 2006**, The Hague: International Criminal Court (ICC), 2007, p. 5.
[207] TEMMINCK TUINSTRA, Jarinde P. W., **Defence counsel in international criminal law**, The Hague; West Nyack: TMC Asser Press, 2009, p. 229.

2007.[208] The Chamber further deemed the counsel's filings to the Court as "vexatious and frivolous claims"[209] and did not grant any possibility for review.[210]

The issue of admissibility kept appearing in different poles of the situation in Darfur in the ICC. Differently from the *ad hoc* counsel's filing, where the issued lied in the method for sending the situation to the Court, for the OTP if the situation was to be rendered inadmissible it should be due to complementarity. However, when reassessing the admissibility of the situation in Darfur in the end of 2006, still in the investigation stage, the Prosecution identified that there had been 14 arrests for suspects of serious violations of international humanitarian law, but they did not make the case inadmissible before the ICC.[211]

Between 27 January and 7 February 2007, the OTP went on its fifth mission to Khartoum with the goal of moving to the completion of the investigation and presenting to the Court its first cases on the situation in Darfur.[212] During the investigation stage, the Prosecution selected a series of incidents that took place in 2003 and 2004 to collect evidence and identify the main perpetrators. During their travels to Sudan, the officers of the OTP also had contact with rebel organizations, mostly with JEM since internal disputes within the SLA made it difficult to establish a constant contact.[213] After selecting "some of the gravest alleged criminal incidents in Darfur for full investigation," the OTP announced that the evidence proved that numerous crimes within the jurisdiction of the Court had taken place in Darfur amounting to crimes against humanity and war crimes.[214]

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[208] GUT, Till, **Counsel misconduct before the International Criminal Court: professional responsibility in international criminal defence**, Oxford; Portland: Hart Publishing, 2012, p. 268; TEMMINCK TUINSTRA, **Defence counsel in international criminal law**, p. 229.
[209] PRE-TRIAL CHAMBER I, **Decision on the Request for Review of the Registry's Decision of 13 February 2007**, The Hague: International Criminal Court (ICC), 2007, p. 7.
[210] GUT, **Counsel misconduct before the International Criminal Court: professional responsibility in international criminal defence**, p. 268; TEMMINCK TUINSTRA, **Defence counsel in international criminal law**, p. 229.
[211] OFFICE OF THE PROSECUTOR, **Fourth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)**, The Hague: International Criminal Court (ICC), 2006, p. 1.
[212] *Ibid*., p. 10; OFFICE OF THE PROSECUTOR, **Fifth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)**, The Hague: International Criminal Court (ICC), 2007, p. 8.
[213] OFFICE OF THE PROSECUTOR, **Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593**, p. 9.
[214] OFFICE OF THE PROSECUTOR, **Fourth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)**, p. 4.

The investigation relied on the GoS' cooperation to have access to the report by the National Commission of Inquiry, and five missions to Khartoum, which included an interview with a senior army officer.[215] Throughout these two years of investigations, no official from the ICC has ever set foot in Darfur.[216] "Sudan never officially denied ICC criminal investigators access to Darfur, simply because the ICC Prosecutor arguing that it would be too dangerous […] in fact never sent them."[217]

Throughout this process, efforts for negotiations sought to promote peace between the GoS and rebel groups from Darfur. International involvement in the conflict in Darfur began with a process led by the Chadian President, who mediated a 45-day ceasefire between the GoS and SLM in 2003. The ceasefire was violated by both sides.[218] Further talks were established in April 2004 between the GoS and a joint SLM and JEM delegation in the Chadian capital N'djamena headed by the Chadian government with AU support and resulted in a humanitarian ceasefire to allow humanitarian access to Darfur.[219] These negotiations evolved to peace talks between the three parties which were developed in three rounds hosted and mediated by Nigeria, the chair of the AU at the time.[220] Chadian attempts to continue mediating failed once its impartiality was questioned by the SLM/A-JEM joint delegation.[221]

> The first round began on 23 August 2004 and broke up in mid-September, after inconclusive talks on a humanitarian protocol. The second round led to the signing of two protocols — on humanitarian issues and on security — on 9 November 2004. […] A third round of talks in December 2004 was intended to lead to the signing of

[215] However, it is important to highlight that the GoS was uncooperative on many other issues. See, for example, OFFICE OF THE PROSECUTOR, **Fifth Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)**, p. 10.
[216] KERSTEN, Mark, **Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace**, Oxford; New York: Oxford University Press, 2016, p. 170, footnote 2.
[217] NOUWEN, **Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan**, p. 250.
[218] FLINT, Julie; DE WAAL, Alexander, **Darfur: a short history of a long war**, London: Zed Books, 2005, p. 119; NGWUBE, Arinze, Nigeria's Peace Keeping Role in Darfur, **Journal of Studies in Social Sciences**, v. 4, n. 1, p. 76–91, 2013, p. 81.
[219] **Humanitarian Ceasefire Agreement on the Conflict in Darfur**, N'Djamena: Sudan, 2004.
[220] ABDULWAHEED, Isiaq A., Nigeria and Peacekeeping Process in Africa: The Darfur Peace Process in Sudan, **International Journal of Politics and Good Governance**, v. 3, n. 1, 2012, p. 12–13.
[221] NETABAY, Nuredin, **The Darfur Peace Process: Understanding the Obstacles to Success**, M.A. Thesis, University Notre Dame, South Bend, Indiana, 2009, n.p.

> a "Political protocol", but the talks were abandoned because of escalating violence in Darfur, caused in large part by the Sudanese government's aggressive "road-clearing" operations.[222]

With the conclusion of the CPA between North and South Sudan, the international community's attention was then finally drawn to the situation in Darfur. The third round of talks, which was set to resume on February 2005, recommenced on June 2005, after Resolution 1593 that placed the situation in Darfur under ICC jurisdiction had been approved and the OTP had announced the beginning of investigations. This AU-mediated peace was an exhaustive and long negotiation process that only started to make some progress in the beginning of 2006.[223] It resulted in the Darfur Peace Agreement (DPA), signed on 5 May 2006 between the GoS and only one faction of the SLM,[224] since JEM refused to sign the agreement.[225] The DPA contained provisions on issues such as power sharing and political representation, compensation for the victims of the conflict, ceasefire arrangements, long-term security issues and a Darfur-Darfur Dialogue and Consultation that was meant to establish a local dialogue and a process of reconciliation.[226] However, according to many experts, the result was the opposite. They claim that there is sufficient evidence to reason that the DPA "heightened the conflict and made its resolution more difficult."[227]

Another important aspect is that a divisive issue was completely left aside from the negotiation table since it was deemed to be in the realm of ICC operations: granting amnesties or insisting on accountability. During the AU-mediated peace talks, the issue of accountability for human rights violations was removed from the

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[222] INTERNATIONAL DEVELOPMENT COMMITTEE, HOUSE OF COMMONS, **Darfur, Sudan: The responsibility to protect**, London: House of Commons, 2005, para. 61.
[223] DUURSMA, Allard; MÜLLER, Tanja R., The ICC indictment against Al-Bashir and its repercussions for peacekeeping and humanitarian operations in Darfur, **Third World Quarterly**, v. 40, n. 5, p. 890–907, 2019, p. 894.
[224] The Darfur Peace Agreement negotiated by the AU was the issue that caused the division within the SLM/A in 2006. The split resulted in two factions of the SLM/A, the SLM/A-MM, named after the initials of its leader Minni Minawi, and the SLM/A-al-Nur, after is leader Abdul al Nur. Only the SLM-MM signed the DPA.
[225] NATHAN, Laurie, The Failure of the Darfur Mediation, **Ethnopolitics**, v. 6, n. 4, p. 495–511, 2007, p. 496; NOUWEN, **Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan**, p. 265; ABUELBASHAR, Abaker Mohamed, On the Failure of Darfur Peace Talks in Abuja: An SLM/A Insider's Perspective, *in*: HASSAN, Salah M.; RAY, Carina E. (Eds.), **Darfur and the crisis of governance in Sudan: a critical reader**, Ithaca: Cornell University Press; Prince Claus Fund Library, 2009, p. 348.
[226] **Darfur Peace Agreement**, Abuja: Sudan, 2006.
[227] NATHAN, The Failure of the Darfur Mediation, p. 508.

agenda before the negotiations resumed in June 2005.[228] There was a shadow cast by the ICC into the peace process:

> [O]n several occasions, leaders of the armed movements and independent Darfurians have demanded that the Sudanese government issue an apology for the crimes committed in Darfur, as a prelude to offering compensation to the victims. When this suggestion has been raised to a high level in Khartoum (e.g. to Assistant President Nafie Ali Nafie and to President Bashir himself), it has been rejected on the grounds that an apology is an admission of culpability, and this is out of the question while the prospect of ICC indictments hangs over the government. The counter-argument to this – that the payment of compensation traditionally marks the closure of a dispute, with no further judicial recourse – has been scornfully rejected. Khartoum's most senior leaders simply do not believe that any gesture they make will be respected, let alone reciprocated.[229]

While the OTP prepared to make its first steps into opening cases in the situation in Darfur, peace was elusive.

On June 2008, the Prosecutor indicated that his office would be proceeding in the following months with its second and third investigations.[230] In the following month, on 14 July 2008, the OTP presented its case against Omar Hassan Ahmad Al Bashir to the PTC I.[231] In its request, the OTP contended that the evidence presented is able to create a 'reasonable basis to believe' that Al Bashir had the intention to destroy a part of ethnic groups (Fur, Masalit and Zaghawa) using the State apparatus – that counted with both the military and the militiamen. It also

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[228] DE WAAL, Alex, Darfur, the Court and Khartoum: The Politics of State Non-Cooperation, *in*: WADDELL, Nicholas; CLARK, Philip (Eds.), **Courting conflict? Justice, peace and the ICC in Africa**, London: Royal African Society, 2008, p. 33.

[229] *Ibid*.

[230] OFFICE OF THE PROSECUTOR, **Seventh Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)**, The Hague: International Criminal Court (ICC), 2008, paras. 11 and 15.

[231] OFFICE OF THE PROSECUTOR, **Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR**, The Hague: International Criminal Court (ICC), 2008; OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**; OFFICE OF THE PROSECUTOR, **Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008**, The Hague: International Criminal Court (ICC), 2008; OFFICE OF THE PROSECUTOR, **ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur**, The Hague: International Criminal Court (ICC), 2008; INTERNATIONAL CRIMINAL COURT, **Case Information Sheet: Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09)**, International Criminal Court. Available at: <https://www.icc-cpi.int/CaseInformationSheets/albashirEng.pdf>. Accessed: 11 dec. 2020, (ICC-PIDS-CIS-SUD-02-006/18_Eng); OFFICE OF THE PROSECUTOR, **Eighth Report of the Prosecutor of the International Criminal Court to the Security Council Pursuant to UNSCR 1593 (2005)**, The Hague: International Criminal Court (ICC), 2008, para. 11.

reasoned that the evidence demonstrated that the attacks by Al Bashir's militiamen targeted villages that were inhabited by the Fur, Masalit and Zaghawa ethnic groups. Per the OTP's evidence, these groups when not killed were forced out of their lands, but even as IDPs, they continued to be targeted. The attacks against this population consisted of killings, rapes, torture, destroying the means of livelihood, and inflicting on them "conditions of life calculated to bring about their physical destruction, in particular by obstructing the delivery of humanitarian assistance."[232]

Based on the evidence, the Prosecutor held that there were reasonable grounds to believe that Al Bashir bears criminal liability in relation to 10 counts: three counts of genocide, five counts of crimes against humanity and two counts of war crimes.[233] For the crime of genocide, the Prosecution accused Al Bashir for the acts of killing members of the Fur, Masalit and Zaghawa ethnic groups, causing serious mental harm, and deliberately inflicting conditions of life calculated to bring about their physical destruction in part. In regard to crimes against humanity, Al Bashir was responsible for acts of murder, extermination, forcible transfer of the population, torture and rapes. And responsible for the war crimes of intentionally directing attacks against the civilian population and pillaging.[234]

The OTP placed a huge focus on substantiating the argument that between the crimes committed by the president of Sudan it was the crime of genocide.[235] The OTP argued that the genocidal campaign began in March 2003, which was after the failed attempt of the second round of the Inter-Sudanese Peace Talks on the Conflict in Darfur. In that moment, Bashir "publicly instructed the army to quell the rebellion in two weeks and not to 'bring back any prisoners of wounded.'"[236] These actions were directed towards the lands and villages mainly populated by the

[232] OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**, para. 10.
[233] OFFICE OF THE PROSECUTOR, **ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur**.
[234] OFFICE OF THE PROSECUTOR, **Prosecutor's Statement on the Prosecutor's Application for a warrant of Arrest under Article 58 Against Omar Hassan Ahmad AL BASHIR**, p. 2; OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**, para. 1, emphasis in the original.
[235] This can be seen through the length of the description of the genocide charges compared to the crimes against humanity and war crimes charges in the Prosecutor's Application. See OFFICE OF THE PROSECUTOR, **Public Redacted Version of Prosecution's Application under Article 58 filed on 14 July 2008**.
[236] OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**, para. 12.

Fur, Masalit and Zaghawa. Per the OTP, the evidence as to this targeting was that it can be clearly seen that Arab villages were spared, "even where they were located very near target groups villages."[237] In terms of the *means rea*, for the Prosecutor, "Al Bashir's intent to commit genocide became clear with the well coordinated attacks on the 2.450.000 civilians who found a haven in the camps."[238] Ocampo, therefore, inferred that Al Bashir intended "to destroy in part the Fur, Masalit, and Zaghawa groups, on account of their ethnicity."[239] Instead of direct killings, the Sudanese Head of State used other weapons such as rapes, hunger, and fear, which, according to Ocampo, was "efficient, but silent."[240] The OTP's argument for accusing Al Bashir of committing genocide relied, therefore, on the evidence of killings (article 6(a) - Count 1), inflicting serious bodily and mental harm (article 6(b) - Count 2), creating conditions of life that resulted in the physical destruction of groups (article 6(c) - Count 3).[241]

In the following months, the Judges of PTC I, Judge Akua Kuenyehia, Judge Anita Ušacka and Judge Sylvia Steiner, requested that the OTP submitted additional supporting material in relation to the Prosecution Application under Article 58 for an arrest warrant against Omar Al Bashir, which comprised the inclusion of a vast number of excerpts from witness statements and other documentary evidence.[242] The Prosecution acquiesced with the Chamber's request and submitted further material to the PTC I.[243]

[237] *Ibid*., para. 13.
[238] OFFICE OF THE PROSECUTOR, **ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur**.
[239] OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**, para. 12.
[240] OFFICE OF THE PROSECUTOR, **ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur**.
[241] OFFICE OF THE PROSECUTOR, **Summary of Prosecutor's Application under Article 58**, paras. 12-36.
[242] OFFICE OF THE PROSECUTOR, **Prosecution's Submission of Further Information in Compliance with "Decision Requesting Additional Supporting Materials in relation to the Prosecution's Request for a Warrant of Arrest against Omar Hassan Al Bashir" dated 15 October 2008**, The Hague: International Criminal Court (ICC), 2008, p. 3–4.
[243] *Ibid*.

On 4 March 2009, the PTC I ruled on the Prosecution request, issuing a warrant of arrest for Omar Al Bashir, under the 'reasonable suspicion' criterion.[244] The Chamber held that there were "reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator," for two counts of war crimes and five counts of crimes against humanity.[245] The PTC I highlighted that the Prosecution's Request already acknowledged the absence of any direct evidence regarding Al Bashir's alleged liability for the crime of genocide. For the Chamber's Majority, the inferences brought by the OTP, through official statements and public documents hinting towards a "(pre) existence of a GoS genocidal policy"[246] and by the association of "a genocidal intent from the clear patterns of mass-atrocities allegedly committed by GoS forces […] against the Fur, Masalit and Zaghawa,"[247] failed to create reasonable grounds to believe that the GoS acted with genocidal intent.[248] Even though the evidence might create reasonable grounds to believe that GoS forces were involved in the perpetration of war crimes and crimes against humanity in a widespread and systematic fashion, it does not allow the Chamber to conclude that these actions were carried out with the intent to destroy in whole or in part the Fur, Masalit and Zaghawa ethnic groups.[249] According to the Chamber, this "is not the *only* reasonable conclusion to be drawn."[250]

The PTC I's decision also briefly touched upon the issue of Omar Al Bashir's position as then Head of a state which is not a party to the Rome Statute. According to the Chamber, this situation does not create any effect on the Court's jurisdiction over the case against Bashir for four reasons: (1) the core goal of the Rome Statute of ending impunity for the perpetrators of the most serious crimes of concern to the international community as a whole; (2) the provision under the Statute, under article 27(1), which rules out official capacity as an impediment for the exercise of

[244] PRE-TRIAL CHAMBER I, **Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2009, para. 32, 160-161; PRE-TRIAL CHAMBER I, **Warrant of Arrest for Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2009.
[245] PRE-TRIAL CHAMBER I, **Warrant of Arrest for Omar Hassan Ahmad Al Bashir**, p. 3.
[246] PRE-TRIAL CHAMBER I, **Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir**, para. 164.
[247] *Ibid*., para. 190.
[248] *Ibid*., para. 201 et seq.
[249] *Ibid*., para. 193.
[250] *Ibid*., para. 205.

jurisdiction by the Court over an individual; (3) the Chamber's case law which substantiates that other sources of law can only be resorted if there is a *lacuna* in the Statute, the Elements of Crimes and Rules that also cannot be resolved by the criteria of interpretation in the Vienna Convention on the Law of the Treaties; (4) the UN Security Council, when referring the situation in Darfur to the ICC has agreed that any case resulting from this situation would be tried according to the framework provided for in the Statute, the Elements of Crimes and the Rules.[251]

Judge Anita Ušacka, however, even though agreed that there were reasonable grounds to believe that Al Bashir bears criminal responsibility for war crimes and crimes against humanity and that a warrant should be issued for his arrest, disagreed with the Majority holding that she believed there were reasonable grounds to believe that Al Bashir is also criminally responsible for the crime of genocide.[252] Judge Ušacka reached this conclusion by making reference to the framework provided by the Rome Statute to determine whether the evidence is sufficient.[253] This framework established a progressively higher evidentiary threshold for the three different stages of the proceedings: (1) in the issuance of a warrant of arrest or summons to appear, the PTC only needs to be "satisfied there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court;"[254] (2) in the confirmation of the charges and committal of a person for trial, the PTC must be determined if there is "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged;"[255] and (3) in the conviction of an accused person, the Trial Chamber ought to "be convinced of the guilt of the accused beyond reasonable doubt."[256]

According to Judge Ušacka, if the Chamber intends to interpret the reasonable grounds criteria using the reasonable suspicion standard used in regional human rights courts, "the Prosecution should not be required to meet an evidentiary threshold which would be also sufficient to support a conclusion beyond a

[251] *Ibid*., paras. 41-45.
[252] PRE-TRIAL CHAMBER I, **Separate and Partly Dissenting Opinion of Judge Anita Ušacka**, The Hague: International Criminal Court (ICC), 2009, para. 1.
[253] *Ibid*., para. 7.
[254] **Rome Statute of the International Criminal Court**, art. 58(1).
[255] *Ibid*., art. 61(7).
[256] *Ibid*., art. 66(3).

reasonable doubt at trial."[257] In that sense, the Judge held that "the possession of genocidal intent is one reasonable inference to be drawn from the available evidence."[258] Though such conclusion should not come at the detriment of a determination by the Trial Chamber in a later stage of the case that there are not substantial grounds to believe that Al Bashir possessed a genocidal intent beyond reasonable doubt. It is not, however, up to the PTC to make such evaluation in deciding on the issuance of an arrest warrant.[259]

Once the choice for a warrant of arrest for Omar Al Bashir had been made by the PTC I, the ICC's Registrar issued and transmitted to the GoS a request for the arrest and surrender of Al Bashir,[260] alongside a Request for all the Member States of the Rome Statute and of the UN Security Council asking the same.[261] This decision marked the first time the ICC issued an arrest warrant for a sitting Head of State.

The OTP requested and obtained leave to appeal the PTC I's decision on the arrest warrant against Al Bashir questioning whether "the correct standard of proof in the context of Article 58 requires that the *only* reasonable conclusion to be drawn from the evidence is the existence of reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[262] Upon granting the leave to appeal, the PTC I, composed by Judges Sylvia Steiner, Sanji Mmasenono Monageng and Cuno Tarfusser, underlined that the Majority was not suggesting that to establish reasonable grounds in relation to genocidal intent, the OTP "must show that the only reasonable conclusion from the facts proven by the Prosecutor

[257] PRE-TRIAL CHAMBER I, **Separate and Partly Dissenting Opinion of Judge Anita Ušacka**, para. 9.
[258] *Ibid*., para. 84.
[259] *Ibid*., para. 85.
[260] REGISTRAR, **Request to the Republic of the Sudan for the Arrest and Surrender of Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2009.
[261] REGISTRAR, **Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2009; REGISTRAR, **Request to All United Nations Security Council Members that are not States Parties to the Rome Statute for the Arrest and Surrender of Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2009.
[262] OFFICE OF THE PROSECUTOR, **Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"**, The Hague: International Criminal Court (ICC), 2009, para. 13 [emphasis in the original].

is the existence of genocidal intent beyond reasonable doubt."[263] Rather, the Chamber required a demonstration that "the only reasonable conclusion from the facts" is that there are reasonable grounds to believe that these acts were perpetrated with genocidal intent.[264] On 6 July 2009, the OTP submitted to the Appeals Chamber its considerations positing that the PTC I's Majority "applied the wrong legal test to draw inferences for determining 'reasonable grounds,'" imposing an inappropriate evidentiary burden on the Prosecution.[265] The OTP argued, alongside the lines of Judge Ušacka's dissenting opinion, that requiring that the evidence presented that the intent to commit genocide was the only reasonable conclusion, in order to issue a warrant of arrest for the crime of genocide, was a too rigorous evidentiary test for this stage of proceedings.[266]

On 3 February 2010, the Judges of the Appeals Chamber, Judge Erkki Kourula, Judge Sang-Hyun Song, Judge Ekaterina Trendafilova, Judge Daniel David Ntanda Nsereko and Judge Joyce Aluoch, unanimously ruled that the PTC I should also include the accusation of the crime of genocide in the warrant of arrest for Omar Al Bashir, reversing the PTC I assessment on the standard of proof for the counts of genocide.[267] This means that the Appeals Chamber found that the PTC I had acted erroneously when it denied to issue a warrant of arrest for the crime of genocide for the incapacity of determining that the genocidal intent was only one amongst several reasonable conclusions on the evidence presented by the OTP.[268] The Judges of the Appeals Chamber held that at the warrants of arrest or summonses to appear stage there is no requirement for the evidence to present for "certain that that person committed the alleged offence," which means eliminating any reasonable doubt, that only demanded during the trial stage of proceedings.[269] The Appeals Chamber, then, returned the decision whether or not the arrest warrant

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[263] PRE-TRIAL CHAMBER I, **Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"**, The Hague: International Criminal Court (ICC), 2009, p. 6.
[264] *Ibid*., p. 7.
[265] OFFICE OF THE PROSECUTOR, **Prosecution Document in Support of Appeal against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"**, The Hague: International Criminal Court (ICC), 2009, para. 1.
[266] *Ibid*., para. 3.
[267] APPEALS CHAMBER, **Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"**, The Hague: International Criminal Court (ICC), 2010.
[268] *Ibid*., para. 1.
[269] *Ibid*., para. 31.

should be extended to cover the charge of genocide to the PTC for it to evaluate the substance of the matter using the correct standard.[270]

The PTC I, under Sylvia Steiner, Sanji Mmasenono Monageng and Cuno Tarfusser, re-examined the application of the standard of proof in relation to the OTP's evidence that sought to indicate Al Bashir's genocidal intent.[271] In its 12 July 2010 decision, the PTC I pointed that in its earlier decision it already determined "the existence of reasonable grounds to believe that the suspect acted with a specific genocidal intent," finding that even though it might be a reasonable conclusion, it was not the only reasonable one.[272] The Chamber held that it already found that there were reasonable grounds to believe that the Al Bashir acted with a specific genocidal intent. Therefore, the Chamber, evaluating the matter on the basis of the standard of proof as identified by the Appeals Chamber, concluded that there were reasonable grounds to believe that the suspect had the specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups.[273] The Chamber commented that the conclusion reached in the first decision did not require an examination regarding if the material elements, common and specific, of each of the alleged counts of genocide were met by the evidence presented by the Prosecution. However, this was a necessary step to be completed in this revision.[274] Upon scrutiny under the standard of evidence determined by the Appeals Chamber, the PTC I considered that there were reasonable grounds to believe that the two common elements of the three counts of the crime of genocide were present:

> [T]he villages and towns targeted as part of the GoS's counterinsurgency campaign were selected on the basis of their ethnic composition and that towns and villages inhabited by other tribes, as well as rebel locations, were bypassed in order to attack towns and villages known to be inhabited by civilians belonging to the Fur, Masalit and Zaghawa ethnic groups.
> […]
> [T]he attacks and acts of violence committed by GoS against a part of the Fur, Masalit and Zaghawa groups were large in scale, systematic and followed a similar pattern—as found by the Chamber in the First Decision—there are reasonable

[270] *Ibid*., para. 42.
[271] PRE-TRIAL CHAMBER I, **Second Decision on the Prosecution's Application for a Warrant of Arrest**, The Hague: International Criminal Court (ICC), 2010, para. 2.
[272] PRE-TRIAL CHAMBER I, **Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2010, para. 4.
[273] PRE-TRIAL CHAMBER I, **Second Decision on the Prosecution's Application for a Warrant of Arrest**, para. 5.
[274] *Ibid*., para. 6.

> grounds to believe that the acts took place in the context of a manifest pattern of similar conduct directed against the target group.[275]

As to the specific material elements of the counts of genocide, the Chamber found that the killings, acts of rape, torture and forcible displacement, and deliberately inflicting conditions of life calculated to bring about the group's physical destruction were committed against members of the targeted ethnic groups.[276] The PTC I thus concluded that there were reasonable grounds to believe that the material elements, common and specific, for each count of the crime genocide, provided for in articles 6(a), (b) and (c) of the Rome Statute, were present by the evidence presented by the Prosecution.[277] Together with its decision, a second warrant was issued for Omar Al Bashir by the PTC I, which listed, along with crimes against humanity and war crimes, three counts of the crime of genocide.[278] To assure cooperation with the Court's arrest warrant, a request for the arrest and surrender of Al Bashir was sent to a vast number of States, including States Parties, Non-States Parties Members of the United Nations Security Council and the Republic of the Sudan.[279] With this decision, besides being the first time the ICC issued an arrest warrant for a sitting head of state, it was also the first arrest warrant that included the crime of genocide.

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[275] *Ibid*., paras. 11 and 16.
[276] *Ibid*., para. 23, 30 and 39.
[277] *Ibid*., p. 28.
[278] PRE-TRIAL CHAMBER I, **Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir**; PRE-TRIAL CHAMBER I, **Second Decision on the Prosecution's Application for a Warrant of Arrest**, p. 28.
[279] REGISTRAR, **Supplementary Request to All States Parties to the Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2010; REGISTRAR, **Supplementary Request to All United Nations Security Council Members that are not States Parties to The Rome Statute for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2010; REGISTRAR, **Request to all The States Parties to the Rome Statute that Ratified the Statute after 4 March 2009 for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2010; REGISTRAR, **Request to All United Nations Security Council Members that are not States Parties to the Rome Statute and that were not Members of the Security Council on 4 March 2009 for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2010; REGISTRAR, **Supplementary Request for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir to States that were United Nations Security Council Members on 4 March 2009 and are not States Parties to the Rome Statute**, The Hague: International Criminal Court (ICC), 2010; REGISTRAR, **Supplementary Request to the Republic of the Sudan for the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2010.

1.
The Politics of International (Criminal) Law: the play of the law–politics divide in the scholarship and international legal practice

The events just narrated are not uncommon in the everyday life of international justice. As we can grasp from the OTP's narrative, international law – in this case having the atrocities that took place in Darfur investigated and tried by the ICC – bears a promise. It is portrayed as the answer, as the means to place "constraints on the abuses of hegemonic power" or still "as the source of a pre-packaged programme of reforms which can solve the problems of domestic politics."[280] ICC Prosecutor Luis Moreno Ocampo made that position clear in an interview in 2009, where he affirmed:

> "I'm sorry if I disturb those who are in negotiations, but these are the facts." [...]
> "Mr. Bashir could not be an option for [negotiations on] Darfur, or, in fact, for the South. I believe negotiators have to learn how to adjust to the reality. The court is a reality."
> […]
> Maybe [that makes] the negotiation more difficult, but it's more promising.[281]

Escaping the subjectivism of political negotiations should take precedence in the Prosecutor's viewpoint. It does not mean that they should not take place, but they must deal with a parallel reality which is the guarantee of the rule of law.

Imbued in this stance is the notion that the "fight for an international Rule of Law is a fight against politics," for the triumph of international law is dependent on defending certain moral values.[282] The international legal project seeks to "spread the rule of law globally as a means to achieve a certain type of world order" and that makes it better than politics or even "the better politics."[283]

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[280] ORFORD, Anne, A jurisprudence of the limit, *in*: ORFORD, Anne (Ed.), **International law and its others**, Cambridge: Cambridge University Press, 2006, p. 1–2.
[281] ALLEN, Elizabeth, **Seven Questions: Prosecuting Sudan**, Foreign Policy. Available at: <https://foreignpolicy.com/2009/02/12/seven-questions-prosecuting-sudan/>. Accessed: 29 nov. 2021.
[282] KOSKENNIEMI, **The Politics of International Law**, p. 36.
[283] HOFFMANN, Florian, International Legalism and International Politics, *in*: ORFORD, Anne; HOFFMANN, Florian (Eds.), **The Oxford Handbook of the Theory of International Law**, Oxford: Oxford University Press, 2016, v. 1, p. 957.

This is not an uncommon argument amongst international legal practitioners. It tries to establish a clear division between what belongs in the realm of law and what does not. However, this drawing of margins does not stay restricted to the practice of international law, it is also very much present in the scholarship. The present chapter seeks to unravel these arguments that explore the relationship between international law and politics in both professional practice and academic discipline. The two major sections in this chapter work with these realms: the separation of the legal practice from politics; and the disciplinary divide that happens as a consequence of this division of labour established in the practice of international law. For doing so, the chapter unfolds in a movement that first looks at the practice in international law, in general, then to the regime of international criminal law and, later, goes on to explore what does it mean for interdisciplinarity between the fields of International Law and International Relations.

The first part of the chapter works through international legal practice as a discursive field. That means exploring "its suppositions, deformities, proclivities and patterns of thought" developed through the practice and in the doctrine.[284] This section, firstly, unravels the rules that underlie the manufacturing of a rationalization in international law that seeks to justify its objectivity in a move to create an opposition with politics' subjectivity. Drawing mostly from the work of Martti Koskenniemi, this section identifies the discursive structural tendencies present in the field of international law. Secondly, it looks at the effects of this trend of regulating the political practice with international law, the legalization of the international realm, which is the proliferation and specialization of international law in regimes of knowledge. This discussion explores how the creation of technical vocabularies within those specialized regimes creates an environment where particular fields seek to influence the course of general international law. It still covers how the instrumentalization of international law has profound implications for its practice. The final issue covered by the first part of the chapter is the way this instrumentalization of the international legal craft takes place in international criminal law and its implications for the way the practice of the field sees the place of politics.

[284] SIMPSON, Gerry J., **Law, war and crime: war crimes trials and the reinvention of international law**, Cambridge: Polity, 2007, p. 2.

The second part of the chapter examines the politics of international law as an academic practice. It first follows the "master narratives" in the historical portrayal of the relationship between the disciplines of International Law and International Relations.[285] In this exploration, it presents the way the history of this relationship has marked by fluctuations between close association and boundary drawing. In a second moment, a particular moment of this chronicle is scrutinized, the 'Legalization' project. Deemed as the rebirth of International Law and International Relations' interdisciplinarity this movement not only generated a lot of attention for provocation the return of the open engagement between disciplines but also was the focus of intense criticism for the very particular agenda that it advanced. This section also covers the critical debate that this project received. The discussion, then, moves to an analysis of a second project created in response to the first, which was labelled 'counterdisciplinarity.' This movement calls for a step back in relation to the enthusiasm over interdisciplinarity between International Law and International Relations and tries to propose that international legal academia focuses on approaches that are able to safeguard the law from turn it into a mere instrument. After the introduction of the proposal for counterdisciplinarity, it moves to an overall assessment of the current state of interdisciplinarity between International Relations and International Law, which find three general tendencies of approaching it, the first two being the abovementioned projects. The third encompass the scholarly engagement that at the same time is aware of the pitfalls of an interdisciplinary endeavour and aims to create ways of doing interdisciplinary work that is mindful of the traps that lie along the way. In light of the possibility presented by this third avenue, lastly, this section draws a proposal for an interdisciplinary attempt at theorizing at the border between International Relations and International Law.

[285] ORFORD, Anne; HOFFMANN, Florian, Introduction: Theorizing International Law, *in*: ORFORD, Anne; HOFFMANN, Florian (Eds.), **The Oxford Handbook of the Theory of International Law**, Oxford: Oxford University Press, 2016, p. 11.

1.1.
International law as a professional practice: the expansion of international law

The events narrated at the Interlude No. 1 are thoroughly embedded in the complex interplay between politics and law in the international realm. A conflict blemished by ethnic, racial and religious layers needs to be translated into legal terms in order to become an active investigation before an international court. Adding intricacy to the situation, simultaneous to the judicialization of these events are the ongoing processes of conflict resolution that overflow the clash taking place in Darfur.

International law's interference in ongoing conflicts frequently raises the spectre of justice impairing peace or vice-versa. It creates a cloud of arguments that, among other things, contend that the threat of prosecutions can be used as a policy tool; that trials have the ability of ruining the prospects of peace, which is usually received on the other end as an attempt to undermine the Court's credibility; or that there is 'no peace without justice,' emphasizing the importance of achieving justice to guarantee lasting peace. The literature on the peace versus justice dilemma is extensive and, though inevitable due to the specificities of the case study of this dissertation, is not the focus of this work.[286] It is useful, however, to raise the debate regarding the place of politics in international legal proceedings.

Conceptions about the relationship between international law and politics can be understood in different ways and mostly have to do with one's standing point. The most traditional narratives that accompany the establishment of the regime of international criminal justice, especially after the 1990s, unmistakably frame its

[286] On the peace versus justice debate within the scope of international criminal trials, see KERSTEN, **Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace**; GISSEL, Line Engbo, **The International Criminal Court and peace processes in Africa: judicialising peace**, London; New York: Routledge, 2018; WEGNER, Patrick Sebastian, **The international criminal court in ongoing intrastate conflicts: navigating the peace-justice divide**, Cambridge: Cambridge University Press, 2015; KERSTEN, Mark, No Justice Without Peace, But What Peace Is on Offer?, **Journal of International Criminal Justice**, v. 18, n. 4, p. 1001–1015, 2020; OETTE, L., Peace and Justice, or Neither?: The Repercussions of the al-Bashir Case for International Criminal Justice in Africa and Beyond, **Journal of International Criminal Justice**, v. 8, n. 2, p. 345–364, 2010; VINJAMURI, Leslie, The ICC and the Politics of Peace and Justice, *in*: STAHN, Carsten (Org.), **The law and practice of the International Criminal Court**, First edition. Oxford: Oxford University Press, 2015, p. 13-.

interventions as a matter of principle, arguing that the realization of justice is a "giant step forward in the march towards universal human rights and the rule of law."[287] However, less emphasized but unmistakably present are the accounts that portray international criminal trials as "little more than a public relations device."[288]

These positions mean more than simply two distinct opinions regarding international criminal trials. As the ensuing discussion brings to light, these conceptions are part of a broader tendency in international legal practice, they reflect the very structure of the international legal argument. In order to place this discussion in the general dynamics of the debate in international law, the next pages will examine the overall discursive tendencies in international legal practice.

1.1.1. Attempting to tame international politics: objectivity to the rescue

The legalization of world politics brought about the (re)affirmation of law in new spaces, accountability for individuals in post or ongoing conflict situations being an example of that expansion.[289] Alongside this phenomenon came the displacement of authority from the political towards the legal arena. The project that gave shape to this process was international legalism.[290] Two discursive flags that are central to international law overlapping politics are international peace and justice. These two banners are evoked so that "international lawyers justify their 'intervention' in international politics, notably as a morally, sociologically and perhaps even politically necessary shifting of language games, out of politics and

[287] ANNAN, Kofi A., Secretary-General's 1998 Letter to Professor Charif Bassiouni.
[288] HOLBROOKE, Richard C., **To end a war**, New York: Modern Library, 1999, p. 190.
[289] Legalization is not synonymous with Law – as in the field – or law. These two refer to the body of norms, institutions etc. which make up the legal framework in the different historical moments. Legalization, on the other hand, refers to the dynamics through which this body of rules is transformed either being shortened or expanded. Thus, the set of norms and rules that exist today is a result of the legalization process. ABBOTT, Kenneth W.; SNIDAL, Duncan, Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars, *in*: DUNOFF, Jeffrey L.; POLLACK, Mark A. (Eds.), **Interdisciplinary perspectives on international law and international relations: the state of the art**, Cambridge: Cambridge University Press, 2013, p. 34.
[290] HOFFMANN, Florian, Facing the Abyss: International Law Before the Political, *in*: GOLDONI, Marco; MCCORKINDALE, Christopher (Eds.), **Hannah Arendt and the law**, Oxford ; Portland, Or: Hart Pub.2, 2012, v. 4, p. 179.

into law."[291] Peace and justice, in that sense, are achieved through law. In this narrative, these values are not in opposition, they must walk alongside one another. ICC Prosecutor Moreno-Ocampo has repeatedly championed this notion. In a speech at Nuremberg, he declared that "[i]nternational justice […] and peace negotiations can and must work together; they are not alternative ways to achieve a goal; they can be integrated into one comprehensive solution."[292]

In its movement of expansion and consequent need to differentiate itself from international politics, international legal practice has developed a way of standing its ground. The attempt of boundary drawing by international lawyers has as one of its main goals the preservation of international law from being encapsulated by international politics. Two features would need to be constantly reinforced in order to maintain law's independence from politics: law's normativity and concreteness. The former would be bolstered by assuring that it is not reflective of State's interests or volition, otherwise the law would be a "non-normative apology," while the latter would be ensured through refraining from a natural morality, once such principles are utopian and of a unreliable nature.[293] These two attributes would be paramount in assuring law's objectivity and consequently its independence from politics.[294] This notion comes from the common assumption in international legal practice that politics acquiesces to subjective beliefs. Even though law materializes out of politics, the objectivity present in the practice international law would distance it from behaviour-descriptive subjective politics.[295] While one stands regardless of the circumstances the other is negotiated in accordance with the interests of the States.[296]

International legal practice time and again is either charged with falling into an apologist demeanour – in other words, having an excessive proximity to State's behaviour – or being based on tentative utopias – a law divorced from the practice.

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[291] *Ibid*., p. 180.
[292] MORENO-OCAMPO, Luis, Building a Future on Peace and Justice: The International Criminal Court, *in*: AMBOS, Kai; LARGE, Judith; WIERDA, Marieke (Eds.), **Building a Future on Peace and Justice**, Berlin; Heidelberg: Springer Berlin Heidelberg, 2009, p. 9–13.
[293] KOSKENNIEMI, Martti, **From Apology to Utopia: The Structure of International Legal Argument**, Cambridge; New York: Cambridge University Press, 2006, p. 17.
[294] KOSKENNIEMI, **The Politics of International Law**, p. 38.
[295] *Ibid*.
[296] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 16.

All those accusations have in common the notion that international law is not 'legal' enough. Such conception would derive from a position that relies on a "domestic analogy," a transposition of "the experience of individual men in domestic society to the experience of states."[297] An orderly international society would have to resemble as much as possible the domestic conditions, or else it would be closer to a state of nature.[298] As R.B.J. Walker describes it, in this conceptualization "the possibility of justice is permitted within, the extreme difficulty of order is affirmed without."[299] The solution lies in creating an international society that resembles as much as possible the domestic setting. This would be achieved through the construction a rule-based international order.[300] Such narrative purports that "[t]o a large degree the history of civilization may be described as a gradual evolution from a power oriented approach, in the state of nature, towards a rule oriented approach."[301] This movement clearly establishes how, even though law comes from politics, it is able to set clear boundaries and separate itself through the creation of an international law that is concrete and normative.[302] Such framing paints the picture of a (liberal) international law emerging as the saviour for a conflict-ridden state of nature international sphere ascribing to it the quality of a community of values.[303] Such international law is purportedly able to deal concomitantly with threats against the sovereign State and the excesses of States when fighting such menaces.[304] It would allow States to maintain relations and constrain their

[297] BULL, Hedley, **The anarchical society: a study of order in World politics**, 4. ed. New York: Columbia University Press, 2012, p. 44.
[298] *Ibid*.; CARTY, Anthony, **The decay of international law? a reappraisal of the limits of legal imagination in international affairs**, Manchester; Dover: Manchester University Press, 1986, p. 16.
[299] WALKER, R. B. J., **Inside/outside: international relations as political theory**, Cambridge; New York: Cambridge University Press, 1993, p. 70.
[300] HURD, Ian, The international rule of law and the domestic analogy, **Global Constitutionalism**, v. 4, n. 3, p. 365–395, 2015, p. 365.
[301] JACKSON, John Howard, **The world trading system: law and policy of international economic relations**, 2. ed. Cambridge: MIT Press, 1997, p. 110; See, also, DUNOFF, Jeffrey L, The Politics of International Constitutions: The Curious Case of the World Trade Organization, *in*: DUNOFF, Jeffrey L.; TRACHTMAN, Joel P. (Eds.), **Ruling the world? constitutionalism, international law, and global governance**, Cambridge; New York: Cambridge University Press, 2009, p. 185.
[302] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 22.
[303] HOFFMANN, International Legalism and International Politics, p. 968.
[304] ORFORD, A jurisprudence of the limit, p. 1; KOSKENNIEMI, **The Politics of International Law**, p. 59.

behaviour so that law does not become a mere tool that empowers the State in the pursue of its politics.

The mainstream discourse in international law holds tight to the belief that, even if international law is 'political' in any possible sense, its essence, which lies in the assurance of peace and justice, remains self-preserved from the influence of political interests and positions. It retains, in that sense, its objectivity.[305] To safeguard international law from politics, international legal doctrine establishes that the remedies to any problems it must solve are found in international law itself. This means that law is conceived as the repository of regulations that will ground any decision. Its validity is based on the two characteristics that warrants its objectivity: concreteness and normativity.[306]

International law is, in that sense, "objectified."[307] This demarcation can be seen repeatedly in international legal practice. For example, in a judgement of the International Court of Justice (ICJ), the Judges observed that the ICJ

> [I]s a Court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.[308]

The effort of demarcating what is either international law or politics inescapably involves defining it in relation with/to the other. However, these attempts at boundary drawing are under the assumption that one can be accurately separated from the other.[309] As Martti Koskenniemi draws from Hegel, we must bear in mind that "things exist in and through the boundaries which delimit them from other things."[310] The belief that law can be separated from non-law (in this case, politics) is one of the central elements of what Judith Shklar has termed as the

[305] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 24.
[306] *Ibid*., p. 25.
[307] *Ibid*., p. 31.
[308] INTERNATIONAL COURT OF JUSTICE, **South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase**, The Hague: International Court of Justice (ICJ), 1966, para. 49.
[309] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 16.
[310] *Ibid*.

"legalistic ethos."[311] Legalism, then, describes this posture within the international legal doctrine of privileging legal objectivism over any political influence.[312] The ICC Prosecutor, by affirming that the Court is a reality that peace negotiators will have to face, is privileging a legal objectivism over any political consideration that might prevent the achievement of justice (and consequently, according to their narrative, peace).

As established, the structure of argumentation developed by the modern international legal project works through the reuniting of an "utopian legalism and the apology of sovereignty."[313] This modern project of international law, however, was and has been stained by a major inherent contradiction.[314] This very much naturalized way of conceiving international law's objectivity in a clear opposition to politics is anything but, for international law and politics are "irredeemably interdependent."[315] The concreteness and normativity of international law "thinly hides from sight political choices which are inevitable in the solution of practical disputes" and further "provides no criteria on which such choices can be made."[316] In that sense, "[l]awyers' law is constantly lapsing either into what seems like factual description or political prescription," which makes its characterization as objective a failure.[317] International legal argument inhabits in an everlasting oscillation between apology and utopia "in ways that frustrate any attempt at definitive legal closure."[318] International law can never be both at the same time, for these characteristics are mutually excluding. On the one hand, by seeking concreteness international legal practitioners might lose themselves in an apologetic practice that misses out all its normative nature. Sticking to utopian standards, on the other hand, creates a vacuum of communication between the

[311] SHKLAR, Judith N., **Legalism: law, morals, and political trials**, 4. ed. Cambridge: Harvard University Press, 1986, p. 3.
[312] HOFFMANN, International Legalism and International Politics, p. 960.
[313] *Ibid*., p. 966.
[314] HOFFMANN, Facing the Abyss: International Law Before the Political, p. 180.
[315] SINGH, Sahib, The Critic(-al Subject), *in*: WERNER, Wouter; DE HOON, Marieke; GALAN, Alexis (Eds.), **The Law of International Lawyers**, Cambridge: Cambridge University Press, 2017, p. 200–201.
[316] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 541.
[317] *Ibid*., p. 16.
[318] MÉGRET, Frédéric, Thinking about What International Humanitarian Lawyers 'Do': an Examination of the Laws of War as a Field of Professional Practice, *in*: WERNER, Wouter; DE HOON, Marieke; GALAN, Alexis (Eds.), **The Law of International Lawyers**, Cambridge: Cambridge University Press, 2017, p. 265.

idealized law and the actual practice of international law. The argumentative structure of international law is in a continuous transit amidst the two contrasting positions. Some doctrines even try to work on reconciling the two but end up being incoherent or silently privileging one over the other, which still leaves them open to criticism.[319]

These patterns of argumentation are connected to a dual structure of authorities that makes these positions justifiable. For one, law is external to State behaviour. It draws its authority from "a normative code."[320] State obligations are drawn from a moral code that is based on "justice, common interests, progress, nature of the world community or other similar ideas to which it is common that they are anterior, or superior, to State behaviour, will or interest."[321] The other position finds authority in the very source the utopian view tries to override: the behaviour, will, and interest of the State. State practice, will, and interest determine the direction the law must point to for it provides a superior source than that of the moral code. In that sense, the source of authority is always about either international community or State, values or sovereignty, and so on. One position will always convey to supporters of the other the appearance of subjectivity. Although the two ultimate sources of authority are accommodated into the structure of international legal argumentation, the incompatibility between the two excludes the chance of finding "a middle position."[322]

One major outcome of the contradictory premises upon which the practice of international law, and consequently the structure of international legal argumentation, is grounded is the fact that it ends up forming and subsequently following patterns. And, depending on which of the two postulations one chooses to side, there will be a preferred answer to the legal dispute. This means that every international legal decision is taking a stance and privileging a rationality which will allow them to solve the matter. Defending one rationality consequently means that certain arguments will be accepted whereas others will not.[323] This demonstrates that, even if the legalist position claims to distance international law

[319] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 58–65.
[320] *Ibid*., p. 59.
[321] *Ibid*.
[322] *Ibid*.
[323] *Ibid*., p. 67–69.

from politics, the very articulation of placing itself in opposition to international politics "is itself a political project," one that is defending international law as the better international politics.[324] Besides, the reduction of international law to an apparatus of rules that are concrete and normative "appears to deny – and *does* deny – the colourful multiplicity of the world," it presupposes a distance from politics that it does not actually have, making it appear "grey and bureaucratic."[325] A better depiction of the relationship between international law and politics needs to rethink the boundaries between them and recognise that politics is inherent in any legal practice. "It is impossible to make substantive decisions within the law which would imply no political choice."[326]

1.1.2.
The politics of fragmentation: creating specialized hegemons

In the mainstream narrative of international legal practitioners, the solution to any predicament lies in the growing judicialization of international politics. In the legalist mindset, power could only be tamed by the rule of law. This means that the problems of the international legal system are associated with the existence of areas outside the reach of the law. Covering these law-absent gaps was the way for a complete system, as envisaged by Hans Kelsen and Hersch Lauterpacht.[327] The process of developing a legal system that would regulate the many different areas of international politics gained traction during the 1990s.[328]

However, the idealized project for a constitutionally oriented structure for international law did not grow into the imagined synergetic composition of legal rules. Conflicts of applicable law and jurisdiction were increasingly coming into sight. The worries of some international legal practitioners were expressed by the

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[324] HOFFMANN, Facing the Abyss: International Law Before the Political, p. 180.
[325] KOSKENNIEMI, Martti, Foreword, *in*: JOHNS, Fleur; JOYCE, Richard John; PAHUJA, Sundhya (Eds.), **Events: the force of international law**, Abingdon, Oxon; New York: Routledge, 2011, p. xix.
[326] KOSKENNIEMI, **The Politics of International Law**, p. 61.
[327] KELSEN, Hans, **Pure theory of law**, Clark: Lawbook Exchange, 2005; LAUTERPACHT, Hersch, **International Law: Collected Papers**, Cambridge: Cambridge University Press, 1975.
[328] KOSKENNIEMI, Martti; LEINO, Päivi, Fragmentation of International Law? Postmodern Anxieties, **Leiden Journal of International Law**, v. 15, n. 3, p. 553–579, 2002, p. 559.

President of the ICJ, Judge Gilbert Guillaume, which framed it as "the problem raised for international law and the international community by the proliferation of international courts." [329] According to the Judge, the rapid development of international legal regulations in the many subfields of international law was creating two problems for its operation: cases of overlapping jurisdictions, leading to the problem of forum shopping which distorts the operation of justice; and situations of conflicting jurisprudence, as a result of the differing interpretations to the same rule of law in different cases.[330] The proliferation of international legal institutions not only described the expansion of regulation in the international domain. It also referred to the rise of new and specialized subfields of international legal practice.[331] The ICC and specially the *ad hoc* international criminal tribunals were founded amidst this trend. The phenomenon of normative and institutional expansion and specialization was described as the fragmentation of international law. The choice of wording as fragmentation, instead of other more suitable terms, such as specialization, pluralization or diversification, bears a negative connotation. It emphasizes the concern that these "specialized courts and tribunal bodies would 'develop greater variations in their determinations of general international law' and thereby 'damage the coherence of the international legal system.'"[332]

In light of the amount of attention the issue of fragmentation received, international lawyers divided amongst those that identified in this phenomenon the erosion of general international law and those that perceived the proliferation of international rules and courts as a problem of a more technical nature that could be addressed by coordination.[333] The topic "Risks ensuing from the fragmentation of

[329] GUILLAUME, Gilbert, **Address by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the United Nations General Assembly**, New York: United Nations General Assembly, 2000, p. 5.
[330] *Ibid*.; GUILLAUME, Gilbert, **Speech by H.E. Judge Gilbert Guillaume, President of the International Court of Justice, to the General Assembly of the United Nations**, New York: United Nations General Assembly, 2001, p. 1.
[331] PETERS, Anne, The refinement of international law: From fragmentation to regime interaction and politicization, **International Journal of Constitutional Law**, v. 15, n. 3, p. 671–704, 2017, p. 673.
[332] PETERS, Anne, Fragmentation and Constitutionalization, *in*: HOFFMANN, Florian; ORFORD, Anne (Eds.), **The Oxford Handbook of the Theory of International Law**, Oxford: Oxford University Press, 2016, p. 1012–1013.
[333] INTERNATIONAL LAW COMMISSION, **Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi**, Geneva: United Nations General Assembly, 2006, para. 9.

international law" was added to the agenda of the International Law Commission (ILC) for the year 2000.[334] The UN General Assembly afterwards requested that the discussion be moved to the long-term programme of the ILC, which was incorporated by the Commission in 2002 under the renamed topic of "Fragmentation of international law: difficulties arising from the diversification and expansion of international law."[335] A Study Group was tasked with producing a report with preliminary conclusions on the matter and identified a series of conflicts between international legal regimes.[336] The report concluded that, even though new regimes had been developing their own special rules, the institutions always used general international law as reference, as the "frame within which they exist."[337] It further affirmed that international law is a legal system and no regime was autonomous from international law.[338]

The academic debate surrounding fragmentation, however, often missed the point.[339] Although the proliferation of international legal regimes gained traction after the end of the Cold War, international law has always been characterized by the absence of a clear hierarchy between institutions and norms. International law has been at all times exposed to the possibility of different judicial instances coming up with potentially conflicting rulings. The heart of the matter in the fragmentation debate lies "not so much in the emergence of new sub-systems but in the use of general law by new bodies representing interests or views that are not identical with those represented in old ones."[340] At stake in this process of specialization is "the

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[334] *Ibid*., para. 1; INTERNATIONAL LAW COMMISSION, **Report of the Working Group on Long-term Programme of Work**, Geneva: International Law Commission, 2000, p. 24–43.
[335] INTERNATIONAL LAW COMMISSION, **Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi**, para. 1.
[336] *Ibid*., paras. 2 et seq; KOSKENNIEMI; LEINO, Fragmentation of International Law?, p. 560.
[337] KOSKENNIEMI, Martti, The Fate of Public International Law: Between Technique and Politics, **Modern Law Review**, v. 70, n. 1, p. 1–30, 2007, p. 17; See, also, INTERNATIONAL LAW COMMISSION, **Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions**, Geneva: United Nations General Assembly, 2006, p. 7–25.
[338] INTERNATIONAL LAW COMMISSION, **Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Conclusions**, p. 7.
[339] KOSKENNIEMI; LEINO, Fragmentation of International Law?, p. 578; ELLIS, Jaye, Form Meets Function: The Culture of Formalism and International Environmental Regimes, *in*: WERNER, Wouter; DE HOON, Marieke; GALÁN, Alexis (Eds.), **The Law of International Lawyers: Reading Martti Koskenniemi**, Cambridge; New York: Cambridge University Press, 2017, p. 98.
[340] KOSKENNIEMI; LEINO, Fragmentation of International Law?, p. 561.

world of legal practice […] being sliced up in institutional projects that cater for special audiences with special interests and special ethos."[341]

This means that international legal practice may be read in a systemic perspective and the existing body of law provides that no clear situations of *non liquet* occur in its practice. The problematic facet of fragmentation arises when these specialized regimes begin "to reverse established legal hierarchies in favour of the structural bias in the relevant functional expertise."[342] The existing international legal system, however, only informs the way decisions should be made: "by *legal* institutions, in particular institutions populated by public international lawyers."[343] The very way the system is conceived allows for its specialized institutions to have their own structural bias. This dynamic works as far as the bias is shared. Each special regime becomes hegemonic. That is the real loss of control that is veiled (and mourned) in the discourses on the dangers of fragmentation.[344] The proliferation of international tribunals, overlapping jurisdictions and the fragmenting of legal orders is really a problem because they bring to light the way international legal practice is imprinted with bias. They are a part of the politics of international law and not "technical mistakes or unfortunate side-effects of some global logic."[345]

Considering this scenario, the questions to be asked are about who ascribes meaning to rules within each special regime and what kind of biases they are reproducing.[346] As the empirical research of this thesis unfolds and introduces the disputed definition of whether ICC States Parties are obliged to arrest and surrender Al Bashir, it will be possible to see that the answers to these questions are also under contestation. Two events reflect well the intra-regime dynamics. The first was the Pre-Trial Chamber (PTC) I's Malawi non-compliance decision (see Interlude No. 4). The Chamber quoted *ipsis litteris* the interpretation of the ICJ *Arrest Warrant* Judgment given by the Special Court for Sierra Leone (SCSL). The Appeals Chamber of the latter in the trial of Charles Taylor proffered a very controversial reading of the ICJ Judgment in which it concluded that heads of state and other state

[341] KOSKENNIEMI, **The Politics of International Law**, p. 65.
[342] *Ibid*., p. 334.
[343] KOSKENNIEMI, The Fate of Public International Law, p. 18.
[344] *Ibid*., p. 23.
[345] KOSKENNIEMI; LEINO, Fragmentation of International Law?, p. 561.
[346] KOSKENNIEMI, **The Politics of International Law**, p. 229.

officials would not be entitled to personal immunities before international criminal courts.[347] Although the ICJ did not cover much ground in relation to immunities before international criminal courts, it sustained that state officials "retain their personal immunities before courts (especially national courts) even when there are allegations of international crimes."[348] This "diverse application of the immunity rules" is a sound example of fragmentation.[349] Another moment where international criminal judges placed themselves as the interpreters was in the Democratic Republic of the Congo (DRC) non-compliance decision (see Interlude No. 5). The Chamber interpreted the content of UNSC Resolution 1593 (2005), paragraph 2, inferring an 'implicit waiver' of immunities by the Council. These two situations are very telling of the structure of the field. Cases at international criminal courts have emphasized the existence of gaps in matters of substantive and procedural law, a task which has been entrusted to ICC organs, in particular judges, to fill.[350] This means placing judges in the position of "developers of the law."[351] Over time, there has been a transformation regarding the valued expertise from academic towards practical experience, which in turn affected the way law is practiced in the field, "as evidenced in the criticism of international criminal courts."[352] The way these international criminal courts officers are interpreting the ICJ jurisprudence or the UNSC Resolution are expressions of institutional moves to advance the field's agenda "under the guise of legal technique."[353] It is nothing more than a *hegemonic* struggle to make its particular bias be identified with the general interests.

The specialization of international law being about the capacity to affect the outcomes of international legal practice comes about as a competition between

[347] APPEALS CHAMBER, **Decision on Immunity from Jurisdiction**, Freetown: Special Court for Sierra Leone (SCSL), 2004, para. 51.
[348] CRYER, Robert, Prosecuting the Leaders: Promises, Politics and Practicalities, **Goettingen Journal of International Law**, 2009, p. 64.
[349] LATTANZI, Flavia, Introduction, *in*: VAN DEN HERIK, Larissa; STAHN, Carsten (Eds.), **The diversification and fragmentation of international criminal law**, Leiden; Boston: Martinus Nijhoff Publishers, 2012, p. 5.
[350] VAN DEN HERIK, Larissa; STAHN, Carsten, 'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?, *in*: VAN DEN HERIK, Larissa; STAHN, Carsten (Eds.), **The Diversification and Fragmentation of International Criminal Law**, Leiden; Boston: Martinus Nijhoff Publishers, 2012, p. 80.
[351] CHRISTENSEN, Mikkel Jarle, The Judiciary of International Criminal Law: Double Decline and Practical Turn, **Journal of International Criminal Justice**, v. 17, n. 3, p. 537–555, 2019, p. 537.
[352] *Ibid*., p. 555.
[353] KOSKENNIEMI; LEINO, Fragmentation of International Law?, p. 561–562.

expert vocabularies to change the general bias in the law. According to Koskenniemi, this could be achieved through attempts of advancing a new interpretation of a general legal vocabulary or by arguing "in terms of a patterned exception."[354] The argument for the latter would work following a predictable narrative:

> [O]wing to 'recent developments in the technical, economic, political, or whatever field […], new needs or interests have emerged that require a new treatment. The new regime […] seeks to respond to new 'challenges' not by replacing the old rule but merely by creating an 'exception' to it. Sometimes, however, the exception may gain more ground until it becomes the new rule.[355]

The dispute over the applicable law in the Al Bashir Case fits very much into this description. Most legal practitioners, even those that believe States Parties to the Rome Statute are not under the obligation to arrest and surrender Al Bashir to the ICC, agree with the contention that there is an international law exception that bars the invoking of immunities before international courts for cases that involve the perpetration of international crimes. The conflict in question gets to be decided through referencing a technical idiom that brings alongside an entire expertise related to the very idiom. Also coming along is the structural bias, which has a set of favoured solutions, actors, and interests.[356]

Koskenniemi has termed this dynamic as the politics of redefinition. It is associated with the making the idiom of the specific institution or regime and making it universal. The calls for the universality of international law are actually a universality of one's law. And this process is not only about being the authority of decision but ensuring "that the decisions seems to emanate from some external logic or method that is neutral among the participants, that what is at work is not really 'one's' method but the universal […] method – or, even better, that at work is not a 'method' at all but *reality* itself."[357] The transformation into a technical idiom, however, obscures that the decisions are not made on the basis of a neutral technique, but are a matter of choice, partiality and bias. Vocabularies have the effect of making us automatically associate them with certain images and agendas

[354] KOSKENNIEMI, **The Politics of International Law**, p. 66.
[355] *Ibid*.
[356] *Ibid*., p. 67.
[357] *Ibid*., p. 68.

and "fragmentation may not seem too serious as long as the bias is well established, widely known, and resonates in the community to which the institution speaks."[358]

Professional vocabularies are opened to disputed choices. In the end, it is all a matter of committing to one's opinion. Gerry Simpson has identified the idioms that through their dialectic relationship have shaped the field of international criminal law. The regime has been about the constant struggle:

> between politics and law; between local justice and cosmopolitan reckoning; between collective guilt and individual responsibility; between making history and performing justice; between legitimating dominant political forces and permitting the expression of dissident views; between the idea of impartial and honourable justice, and the spectre of the war crimes trial as a show trial; between the instinct that war, at worst, is an error, and the conviction that war is a crime; and between projects dedicated to the elimination of 'enemies of mankind' through political action and regimes intended to provide for the prosecution and trial of adversaries.[359]

The politics of international criminal justice is all about these relationships translated into discursive practices. Through its specialized vocabulary the structure of argumentative practices in this field reproduces the oscillation between apology and utopia, which will be further explored in Chapter 2.

1.1.3. The (many) politics of international criminal trials and legalism's call to arms

In the past decades, "international criminal lawyers have proclaimed the arrival of a new order where impunity for war criminals is extinguished or wept aside" through the proliferation of international criminal tribunals.[360] This process of judicialization of international politics was understood by practitioners as movement of replacing politics with international law. International criminal law's promise, however, was an impossible endeavour for a set of reasons. Its incapacity for delivering a law devoid of any politics ended up disappointing many of its believers. Through his search for the structural tendencies of international criminal

[358] KOSKENNIEMI, The Fate of Public International Law, p. 6.
[359] SIMPSON, **Law, war and crime: war crimes trials and the reinvention of international law**, p. 1.
[360] *Ibid*., p. 133.

law, Simpson found a constant need by the field's practitioners of affirming their craft as law against politics. Their practice is constantly making distinctions as to the activities or discourses that belong to the political and those under the category of the juridical. The language of law and politics are imprinted in the daily operations of international criminal law and became integral to the way its practitioners make sense of their field of practice and how their work fits into it.[361]

However, talking about the politics of international criminal trials does not mean the same in every argumentative practice. The political epithet can summon up different kinds of politics in these proceedings. One is the politics of international law that serves as the point of departure for this thesis adheres to the notion that the very practice of international law is a matter of choice, contrary to those who describe it as an autonomous, legal craft. It does not attach to this characterisation any negative connotation, nor a lack of foundation in law itself. Another kind of politics that manifests itself in these trials is the particular politics on trial. Every institutional project is political, whether good or bad. This means that what is being tried in international criminal proceedings are not just acts of killing, torturing or enlisting child soldiers. These acts are part of a broader plan. Otherwise, they would not figure as a crime against humanity. The leaders on trial at the ICC and other international or hybrid criminal courts are placed in such positions for the execution of a political project that has been considered a crime. International criminal law and its institutions are also a political project, which reunites "a compromise between a liberal cosmopolitanism with its roots in procedural justice, equality before the law and individualism, and an illiberal particularism (anti-formal, violent, sometimes chauvinistic, exceptional and collective)."[362] Politics can also come to describe the larger process of negotiations that do not necessarily is bound by international legal regulations.

The legalistic approach that has been described in the previous pages of this chapter, accepted by most international legal practitioners, is similar to the position assumed in this thesis in that it identifies politics as a matter of one's opinion. But that is as far as these positions go when it comes to their likeness. The legalist view sees opinion as something that does not belong in the judicial practices. The proper

[361] *Ibid*., p. 2–4.
[362] *Ibid*., p. 12.

practice of international law needs to be able to transcend politics. Politics, in such narrative, is possible to be contained. Mapping the patterns of thinking about politics in international criminal law, Simpson found two trends amongst legalists in terms of framing the relationship between law and politics in international criminal trials. He labelled these views as deformed legalism and transcendent legalism.[363]

Deformed legalism would stand for the position that the international law being practiced in these trials are a bad kind of law, which would render the proceedings illegitimate. This position has been voiced in many ways to raise questions about the Court's authority or jurisdiction. The bad law that creates and determine the proceedings, in these arguments, is associated with pure political decisions. Examples are many, from Judge Pal in the International Military Tribunal for the Far East (IMTFE), who saw the criminalization of aggression by the Tribunal as a political act, to Dusko Tadić's Defence, that argued that the ICTY had no authority, considering that the UN Charter does not give the UNSC the power to establish an international criminal tribunal. The notorious accusation of victor's justice would also fit within this line of argumentation since its idea is to portray the trial as a law created to punish the losing side. The international legal practitioner that adopts this stance is concerned with the deformation of the law that is present in these trials. They are, therefore, legal purists.[364]

The second perspective regarding the portrayal of politics in international criminal tribunals has "an overwhelming sense of mission."[365] More than anything else, international criminal law bears a promise. The creation of the *ad hoc* Tribunals and the ICC was a move towards an international politics "organized normatively around the promises of establishing a near global rule of law that would end impunity."[366] These transcendent legalists believe that a cosmopolitan legal order is the answer to the atrocities committed and defend this project through the language of 'universality' and 'humanity.' Any kind of politics would mean a compromise of law. For the international legal regime to be fair and meaningful it

[363] *Ibid*., p. 14.
[364] *Ibid*., p. 15–18.
[365] *Ibid*., p. 19.
[366] CHRISTENSEN, Mikkel Jarle, The emerging sociology of international criminal courts: Between global restructurings and scientific innovations, **Current Sociology Review**, v. 63, n. 6, p. 825–849, 2015, p. 826.

must be unblemished from politics. “For these war crimes enthusiasts, there is only prosecution and trial on one hand, and the failures of politics on the other. Only the merits of the case matter.”[367]

The two positions, despite having their differences, advance the idea that the environment of the Court should not have any involvement from politics. International law should not bend to politics. These argumentative practices are frequently recited by international law practitioners, especially Judges and Prosecutors from the international criminal courts. These discourses rely on the specialized knowledge from the regime to demarcate the sides of the battle of law against politics. The “fight against impunity,” which also figures as a guidon in the Preamble of the Rome Statute, maybe is the main banner of this call to arms.[368] In almost biblical rationality, if you are not defending accountability, then you are “on the wrong side [, that of] impunity.”[369]

Such discourses play an important part in the turf war for influencing the development of general international law. The ‘fight for the end of impunity’ rhetoric is iterated so many times that it becomes a creed. The discourse gains such proportion that advocating for certain values, even if said value is a cardinal one in the history of international relations, also comes to mean the defence of impunity. The ‘wrong side’ in former Prosecutor Carla Del Ponte’s narrative does not only refer to leaders or State representatives that prevent accountability to take place. It is an admonition also directed at international legal practitioners. In this sense, the law becomes an instrument of evangelization. The special regime of knowledge tries to pass on its values and ethos, providing “the *conditions* within which international actors may pursue their purposes.”[370] This means uttering that these values take precedence over anything else, even if this is less universal, and because of it, empire is inescapable.

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[367] SIMPSON, **Law, war and crime: war crimes trials and the reinvention of international law**, p. 20.
[368] BENSOUDA, Fatou, The International Criminal Court and Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability, *in*: **GIMPA Law Conference 2016**, Accra: International Criminal Court, 2016, p. 9.
[369] DEL PONTE, Carla, **Madame Prosecutor: confrontations with humanity’s worst criminals and the culture of impunity: a memoir**, New York: Other Press, 2009, n.p.
[370] KOSKENNIEMI, Martti, Constitutionalism, Managerialism and the Ethos of Legal Education, **European Journal of Legal Studies**, v. 1, n. 1, p. 1–18, 2007, p. 2.

1.1.4.
Flying too close to the sun: managerialism and the deformalisation of international law

International criminal law's impunity rhetoric is part of a wider trend which Koskenniemi labelled managerialism. It stands for the operationalization of the specialized vocabulary in the global scale which means the relinquishment of the norms' substance for the greater project of advancing the purposes of the special regime.[371] "In managerialists' hands, […] international law has become a set of 'rules of thumb or soft standards that refer to the best judgement of the experts in the [sub-disciplinary] box' from which they emanate." [372] The practice of international (criminal) law makes two movements in opposite directions. The move towards becoming technical is a dive for an ever more specific and detailed, while the upwards effort of managing regulation on a global level means having open standards that leave experts enough space to have a legal rule that is actually able to govern on a wider scale.[373]

> Any rule with a global scope will almost automatically appear as either over-inclusive or under-inclusive, covering cases the law-maker would not wish to cover, and excluding cases that would need to be covered but were not known of at the time when the rule was made. To forestall this, most law with a universal scope refrains from rule-setting and instead calls for 'balancing' the interests with a view of attaining 'optimal' results to be calculated on a case-by-case basis.[374]

This means that the expert knowledge will have to be there at the end to resolve the matter under dispute, which reinforces a certain problem manager role for the international legal practitioner. This refraining from the establishment of rules with substance and instead creating very open parameters, like 'necessity' and 'gravity,' is nothing more than the balancing of interests in a contextual manner, a "deformalized fashion."[375]

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[371] *Ibid*., p. 6–8.
[372] JOHNS, **Non-Legality in International Law: Unruly law**, p. 16.
[373] KOSKENNIEMI, Constitutionalism, Managerialism and the Ethos of Legal Education, p. 8.
[374] KOSKENNIEMI, The Fate of Public International Law, p. 9.
[375] KOSKENNIEMI, Martti, 'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law, **The Modern Law Review**, v. 65, n. 2, p. 159–175, 2008, p. 166.

The convergence between legal practice and instrumentalism took place alongside the rise of the discipline of international relations in the United States after the Second World War.[376] The change from the vocabularies of power to a language of law left the interdisciplinary-oriented international lawyer with two equally problematic escape routes: "'accept the self-image as an underlaborer to the policy agendas of (the American) international relations orthodoxy' or to 're-imagine [international] law's job as having to do with the resolution of the 3,000-year old enigma about objective morality.'" [377] This is the result of what Koskenniemi termed the "managerialist mindset." [378] International legal practitioners with their specialized regimes and their ambition to have their interests reflected in general international law flew too close to the sun. And just like Icarus took a hard fall.

The story about the way international legal practitioners have perceived their own work in relation to politics is not only a tale about the practice of international law it is also about a scholarly interdisciplinary engagement. The next section and second part of this chapter covers the development of the relationship between international law and international politics as academic disciplines and critically assesses the possibilities for an academic practice of international law through an interdisciplinary approach.

1.2.
International law as a scholarly practice: theorizing the disciplinary divide between International Law and International Relations

Efforts of theorization within the disciplines of International Law and International Relations have taken different forms in the past century, incorporating different actors, sources of knowledge and ways of apprehending them. Many times, these paths have crossed, and scholars have attempted to portray in their research the way both fields are connected, and under which conditions this

[376] JOHNS, **Non-Legality in International Law: Unruly law**, p. 14.
[377] *Ibid*., p. 15; KOSKENNIEMI, Martti, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960**, Cambridge; New York: Cambridge University Press, 2001, p. 484, 493–494.
[378] KOSKENNIEMI, **The Politics of International Law**, p. 356.

interaction takes place. Considering the point where the last section left off and the objective of understanding the way the discourse on the relationship between international law and politics plays out and affects international legal practice, a discussion on the emergence of the discipline of International Relations and its association with international law as a field of study and practice seems to be indispensable. This second part of the chapter takes on the task of making sense of how the scholarly engagement between the disciplines of International Law and International Relations has influenced the way international legal practitioners have felt the need to demarcate their turf in relation to politics. It is both an historical and critical assessment in that it explores previous attempts of engagement between the disciplines and underlines the critiques that have been formulated in relation to these experiments. It also takes the opportunity to put forward this thesis position in relation to and own experimentation with an interdisciplinary approach between the International Law and International Relations scholarship.

1.2.1.
Crossing the threshold: International Relations and International Law and the interdisciplinary tryouts

Beginning the story of the relationship between the disciplines of International Law and International Relations always takes us to the moment of the creation of the latter. As the tale tell us, the discipline of International Relations was established in 1919, in Wales.[379] Set up to deal with the theme of the recurrence of wars and how to avoid them, it had a commitment with democracy, international

[379] Like all narratives, the account on the creation of the discipline is one of the "founding myths" that pervades both disciplines. As a myth, this narrative is "consequently and necessarily partial and incomplete. Neither true nor false, they tell the story of IR from the standpoint of particular actors (states) and from the consideration of certain values (such as order and stability, for example) as intrinsically superior and desirable." Therefore, myth, here, takes shape in the sense used by Booth, not as an absolute fairy tale, but as narratives that are partial. These myths work in ways that shape ideologies, and, in that sense, align with Robert Cox's reading regarding theories, they are also meant for someone and for some purpose. The founding myths of IR "have helped discipline the discipline." MOULIN, Carolina, Narrative, *in*: NÍ MHURCHÚ, Aoileann (Org.), **Critical imaginations in international relations**, London; New York: Routledge, 2016, p. 141; 75 years on: rewriting the subject's past – reinventing its future, *in*: SMITH, Steve; BOOTH, Ken; ZALEWSKI, Marysia (Eds.), **International Theory**, Cambridge; New York: Cambridge University Press, 1996, p. 328.

institutions and law.[380] The interest in these themes set up for a very close proximity between the two. The creation of a specific chair for the study of international politics happened in a scenario in which the question of the international had been dealt with, so far, through divisions within university departments. The designing of a chair dedicated to the study of international relations, at the University of Aberystwyth, was characterized in itself as an interdisciplinary effort since the field of international studies brought together interests from different areas.[381] The practice of articulating between the different areas that somehow developed international studies remained for the following two decades.

The outbreak of a new world war, however, caused the discipline of International Relations to be questioned. The failure to avoid a major new war was attributed to the lack of scientific rigor of the scholarship. Perspectives that supported the idea that the establishment of norms and institutions were of great importance for a peaceful relationship between States were largely discredited.[382] This led the discipline of International Relations to distance itself from "normative reasoning and utopian vistas" and establish closer proximity with "scientism under the influence of the behaviouralist turn in the United States."[383] After this disassociation between the two disciplines, both began to define their identity in juxtaposition.[384] In other words, there was a movement of separation between disciplines that established a division of labour between what belonged to the realm of international law and what was in the sphere of international politics. Even Morgenthau, an international lawyer by formation, in his *Politics Among Nations*, defended that "the political realist maintains the autonomy of the political sphere […] He thinks in terms of interest defined as power [...] the lawyer, of the

[380] HOFFMANN, Andrea Ribeiro; SOUZA, Igor Abdalla Medina de, Relações Internacionais e Direito Internacional: uma nova geração de colaboração interdisciplinar?, *in*: MENEZES, Wagner (Org.), **O Direito Internacional e o Direito Brasileiro: Homenagem a José Francisco Rezek**, Ijuí: Unijuí, 2004, p. 264.
[381] AALTO, Pami *et al*, Introduction, *in*: AALTO, Pami; HARLE, Vilho; MOISIO, Sami (Eds.), **International Studies Interdisciplinary Approaches**, London: Palgrave Macmillan, 2011, p. 11; HOFFMANN; SOUZA, Relações Internacionais e Direito Internacional: uma nova geração de colaboração interdisciplinar?, p. 264.
[382] DUNOFF, Jeffrey L.; POLLACK, Mark A., International Law and International Relations: Introducing an Interdisciplinary Dialogue, *in*: DUNOFF, Jeffrey L.; POLLACK, Mark A. (Eds.), **Interdisciplinary perspectives on international law and international relations: the state of the art**, Cambridge: Cambridge University Press, 2013, p. 3.
[383] AALBERTS, Tanja E., The Politics of International Law and the Perils and Promises of Interdisciplinarity, **Leiden Journal of International Law**, v. 26, n. 3, p. 503–508, 2013, p. 504.
[384] *Ibid*., p. 504.

conformity of action with legal rules." [385] In the following decades, while International Relations focused on constructing its science of power, international legal academia exercised domain over discussions that revolved around international legal rules (especially, their integrity), trying to emphasize their ability to "tame the political."[386]

The distance between disciplines grew larger until the end of the Cold War when the phenomenon of international norms and institutions' proliferation gained traction.[387] This trend towards greater legalization of international, therefore, marks the reconnection between the disciplines of International Law and International Relations. Academic approaches that sought to challenge the separation between disciplines established in the previous decades emerged.[388] Since then, those efforts for interdisciplinarity have been gaining ground in literature of both disciplines. However, this has not been a cohesive or unified movement and many of its propositions have been exposed to a lot of criticism.[389]

Dunoff and Pollack identify three works that would demarcate this "rebirth" of interdisciplinarity between the two scholarships.[390] The first of these is the article by Kenneth Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*. Besides narrating the period of separation between the two disciplines, Abbott indicates an opportunity for a rapprochement between them due to the emergence of International Relations' theories such as the Theory of Regimes.[391] Abbott appeals to international legal practitioners switching from their formalism to a functionalism, which takes advantage of the conceptual approaches offered by the discipline of International Relations.[392]

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[385] MORGENTHAU, Hans J., **Politics among nations: the struggle for power and peace**, New York: McGraw-Hill, 1993, p. 13.
[386] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 5.
[387] DUNOFF; POLLACK, International Law and International Relations: Introducing an Interdisciplinary Dialogue, p. 3.
[388] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 5.
[389] See, for example, GOLDSTEIN, Judith *et al*, Introduction: Legalization and World Politics, **International Organization**, v. 54, n. 3, p. 385–399, 2000, p. 386.
[390] DUNOFF; POLLACK, International Law and International Relations: Introducing an Interdisciplinary Dialogue, p. 8.
[391] ABBOTT, Kenneth W., Modern International Relations Theory: A Prospectus for International Lawyers, **Yale Journal of International Law**, v. 14, n. 2, 1989.
[392] DUNOFF; POLLACK, International Law and International Relations: Introducing an Interdisciplinary Dialogue, p. 8.

Anne-Marie Slaughter's *International Law and International Relations Theory: A Dual Agenda* is the second work that marks this movement toward greater integration between disciplines.[393] Slaughter's article, according to Dunoff and Pollack,[394] as well as Abbott's work, traces a historical panorama of the relationship between the two disciplines since the end of the Second World War. The author, however, has a slightly different purpose. Slaughter seeks to advance the institutionalist agenda, whose central focus is the improvement of international institutions in order to make them more effective.[395]

The third work is published within a special edition of the Journal *International Organization* on 'Legalization and World Politics,' which later became a book under the same title. The publication by Judith L. Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter began by observing that a movement towards International Law was taking place in the field of international Relations.[396] All the pieces published in this special edition sought to provide an overview of ways and consequences of International Relations' research on international law. However, unlike Abbott and Slaughter's works, the article by Goldstein, Kahler, Keohane and Slaughter does not make an explicit call for an interdisciplinary engagement.[397]

1.2.1.1. The Legalization research agenda

In contrast to the Realist position, which renders international law as useless, and at times harmful since "it detracts attention from the hard, unalterable, realities of political life," and holding that international law plays an important role in international politics, the liberal view on law has been articulated with different

[393] SLAUGHTER, Anne-Marie, International Law and International Relations Theory: A Dual Agenda, **The American Journal of International Law**, v. 87, n. 2, p. 205, 1993.
[394] DUNOFF; POLLACK, International Law and International Relations: Introducing an Interdisciplinary Dialogue, p. 8–9.
[395] SLAUGHTER, International Law and International Relations Theory.
[396] GOLDSTEIN *et al*, Introduction.
[397] DUNOFF; POLLACK, International Law and International Relations: Introducing an Interdisciplinary Dialogue, p. 9.

agendas.[398] The one that is perhaps the most widely circulated is the agenda of 'Legalization,' an effort by International Relations' scholars of bringing law into international politics. This liberal commitment for a progressive analysis of international order that pays attention to law calls for an interdisciplinary move with the discipline of International Law.[399] The 'Legalization' agenda gained a lot of attention after *International Organization* published the aforementioned special issue titled "Legalization and World Politics," which sought to explore further this 'move towards the law' throughout the issue-areas of international politics. With the goal of theorizing on the manner through which this move impacted actors' interests, their organization in institutions and the way they practiced international law, the authors of this edition defined legalization as a particular set of characteristics that may or may not be seen in international institutions.[400] The pieces published in this special edition adopt a very specific conception of legalization. The authors argue that legal rules have three elements: obligation, precision, and delegation. These three aspects serve as parameters to determine how legal is the rule. The maximization of all these elements would mean reaching the ideal type of legalization.[401] Even though it discussed a theoretical ideal of hard legalization, the authors posited that "most international law is 'soft' in distinctive ways."[402] Whereas hard law in the literature of legalization would stand for precise legally binding obligations, this is not the most desirable form of rules for the actors, because, since it requires a commitment to "a background set of norms," it can come to shape their behaviour in such a way that might compromise their sovereignty.[403] Soft law, in turn, would stand for the legal arrangements that would not observe fully one of the three dimensions – obligation, precision and delegation. Abbott and Snidal considered that this type of law should not be dismissed, as Realist

[398] LEANDER, Anna; WERNER, Wouter, Tainted love: the struggle over legality in international relations and international law, *in*: RAJKOVIC, Nikolas M.; AALBERTS, Tanja E.; GAMMELTOFT-HANSEN, Thomas (Eds.), **The Power of Legality: Practices of International Law and their Politics**, Cambridge: Cambridge University Press, 2016, p. 77.
[399] *Ibid*., p. 78.
[400] ABBOTT, Kenneth W. *et al*, The Concept of Legalization, **International Organization**, v. 54, n. 3, p. 401–419, 2000, p. 419.
[401] *Ibid*.
[402] ABBOTT, Kenneth W.; SNIDAL, Duncan, Hard and Soft Law in International Governance, **International Organization**, v. 54, n. 3, p. 421–456, 2000, p. 421.
[403] *Ibid*., p. 422.

perspectives do.[404] Such design can sometimes be the result of a deliberate choice, since it offers advantages for States. From this assessment, Abbott and Snidal concluded that hard law becomes more interesting in situations where the actors want to establish stronger commitments, while soft law is their option in cases where actors rationally understand that a harder arrangement can be costly and unpredictable, making it preferable to loosen up on one or more aspects of the legal rule, in either the obligation, precision or delegation.[405]

After the amount of the debate that the 2000 publication generated (see next section), in 2013, Abbott and Snidal reassessed the agenda of legalization.[406] They sought to reaffirm legalization as an approach that does not privilege one field of research over the other. Their work, however, had an explicit programmatic nature that sought to establish a research agenda based on the conciliation of some pairs treated in a dichotomous manner, such as International Relations/International Law, law/politics etc.[407] Their effort was described as a "well-rehearsed script."[408]

1.2.2. When interdisciplinarity goes wrong: the instrumentalization of international law

Despite being a call for an approximation with the discipline of International Law, the attempts to promote greater interdisciplinarity have been heavily criticized in many aspects. In one of these critical assessments, Martha Finnemore and Stephen Toope, through an analysis of the empirical applications of legalization in the volume, argued that the connection established by the 'Legalization' scholars between international law and politics are dealt with superficially, which is a result

[404] *Ibid*., p. 423.
[405] SIMMONS, Beth A., International Law, *in*: CARLSNAES, Walter; RISSE-KAPPEN, Thomas; SIMMONS, Beth A. (Eds.), **Handbook of international relations**, Second edition. Los Angeles: SAGE, 2013, p. 360.
[406] ABBOTT; SNIDAL, Law, Legalization, and Politics: An Agenda for the Next Generation of IL/IR Scholars.
[407] YAMATO, Roberto V., Às margens (Inter)disciplinares de Direito Internacional e Relações Internacionais: uma "leitura dupla" do problema de normas, regras e instituições na ordem internacional, *in*: JUBILUT, Liliana L. (Org.), **Direito internacional atual**, Rio de Janeiro: Elsevier, 2014, p. 26.
[408] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 79.

of their narrow conception of international law.[409] Although very careful with concepts and definitions, these works have some fundamental problems. Two of them of particular importance: "nowhere in the volume is there any cautionary discussion to situate the authors' very particular understanding of law's role in a larger context of the possible roles law might play;" and, because of this, they do not take into consideration the impact of such specific endeavour in the other direction, not making any assessment of the impact of law in politics.[410]

The 'Legalization' movement, according to Leander and Werner, can also be criticized for reversing their role as Liberal scholars and ending up in a position previously occupied by Realists: the defence of politics "in all its decentralized, local and varied forms against intrusive and abusive legalizations at the international level."[411] These 'Legalization' authors place themselves in another contradictory position. The very solutions that they bring forward to preserve this space of politics are heavily based on conceptions of law. Another problem that has been stressed in the literature is that the two disciplines are insufficiently represented by the 'Legalization' authors. For example, greater emphasis is placed on some International Relations theories over others. Dunoff and Pollack note that the three pieces that marked the "rebirth" of interdisciplinarity ignored many approaches, such as constructivism, whose work has been in the vanguard of the movement towards an integration of the two disciplines, and clearly adopt a rationalistic orientation. In addition, the fields of International Relations and International Law are portrayed as if each scope of work was completely separate from the other.[412] Further, these pieces reproduced an essentialized understanding that one discipline has in relation to the other.[413] For them, International Relations scholars see International Law as an area that lacks theoretical development and is marked by an overly normative character. This is actually what these 'Legalization' authors are doing, treating international law as a mere object to be understood with

[409] FINNEMORE, Martha; TOOPE, Stephen J., Alternatives to "Legalization": Richer Views of Law and Politics, **International Organization**, v. 55, n. 3, p. 743–758, 2001, p. 743.
[410] *Ibid*., p. 744–745.
[411] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 78.
[412] DUNOFF; POLLACK, International Law and International Relations: Introducing an Interdisciplinary Dialogue, p. 9.
[413] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 8.

the analytical tools of its own field.[414] For them, "[t]here is a more sophisticated international law literature in the international relations subfield of political science." [415] Meanwhile, for them, international legal academia sums up International Relations to political realism, even though this perspective clearly characterizes international law as a mere epiphenomenon of international relations.[416]

Leander and Werner conclude that the discipline of International Law ends up being the "most immediate victim" of the Legalization' movement. This approach rearticulates International Law's relationship with International Relations in such a way that law is mobilized to the latter's own benefit, which is making politics deserving of turning into the centre of observation and practice for studies of legality.[417] This stance does not do anything but reaffirm a hierarchy between disciplines, one where International Relations becomes the most important. The legalization project is problematic once it creates disagreements "about the way law is (ab)used" and "who's law figures and should figure in the legalization story."[418]

Looking at this endeavour as an epistemological project also raises a question regarding the kinds of authorizations and legitimations it makes. It advances a certain position – the sovereign and disciplinary centre occupied by rationalist analysis of International Relations –, which treats law in an atemporal manner, while at the same time affirming its dynamic character. Abbott and Snidal, by reaffirming the place of law as subject to politics, exercise the sovereign prerogative of legitimizing a certain disciplinary practice.[419] Particularly critical international legal scholars "strongly objected to what they saw as a cooptation attempt by the ('American') liberal mainstream of classical ('European') international law," which represented, on a structural level, "an emerging triumphalism of the West over the

[414] KOSKENNIEMI, **The Politics of International Law**, p. 72.
[415] GOLDSMITH, Jack L.; POSNER, Eric A., **The limits of international law**, Oxford; New York: Oxford University Press, 2005, p. 15.
[416] AALBERTS, The Politics of International Law and the Perils and Promises of Interdisciplinarity, p. 504–505.
[417] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 78–79.
[418] *Ibid*., p. 82.
[419] YAMATO, Às margens (Inter)disciplinares de Direito Internacional e Relações Internacionais: uma "leitura dupla" do problema de normas, regras e instituições na ordem internacional, p. 28.

rest." [420] This 'Legalization' project was the emblematic example of the instrumentalization of International Law.

1.2.3.
Counter-disciplinarity: a rallying cry against the threat of the liberal interdisciplinary research agenda

The obstacles for a genuine interdisciplinary approach end up turning many authors against its use. Some have very convincingly made the case for "redrawing the boundaries between their disciplines." [421] Koskenniemi already had been championing through his scholarship an attempt to "reconstruct international law as the disciplinary antonym to 'international relations.'" [422] His scheme on the structure of international legal argumentation was a word of caution. The idea was "to warn international lawyers against the siren song of objectivity and neutrality that can be found in some schools in international relations today."[423]

Koskeniemmi has argued that interdisciplinarity is usually embedded in a context of ambiguous policies and many times such approaches end up constructing a caricatured view of the other discipline. [424] In that sense, "any attempt for interdisciplinary bridge building is doomed to fail and result in imperialism."[425] At some point, these endeavours cease to have a tone of cooperation between fields and become a practice of conquest.[426] For Koskenniemi, the establishment of an interdisciplinary agenda by the Liberal Institutionalists alongside the

[420] YAMATO, Roberto Vilchez; HOFFMANN, Florian Fabian, Counter-disciplining the Dual Agenda: towards a (re-)assessment of the interdisciplinary study of International Law and International Relations, **Revista Brasileira de Política Internacional**, v. 61, n. 1, 2018, p. 2.
[421] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 75.
[422] YAMATO; HOFFMANN, Counter-disciplining the Dual Agenda: towards a (re-)assessment of the interdisciplinary study of International Law and International Relations, p. 2.
[423] WERNER, Wouter; DE HOON, Marieke; GALAN, Alexis, Introduction: The Law of International Lawyers, *in*: WERNER, Wouter; DE HOON, Marieke; GALAN, Alexis (Eds.), **The Law of International Lawyers: Reading Martti Koskenniemi**, Cambridge: Cambridge University Press, 2017, p. 1.
[424] KLABBERS, Jan, Counter-Disciplinarity, **International Political Sociology**, v. 4, n. 3, p. 308–311, 2010, p. 308.
[425] AALBERTS, The Politics of International Law and the Perils and Promises of Interdisciplinarity, p. 505; See, also, KOSKENNIEMI, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960**, p. 483–484.
[426] KOSKENNIEMI, **The Politics of International Law**, p. 324.

misrepresented vision about the field of International Law is part of an academic project that has imperial characteristics. This project aims 'the salvation of the law,' transforming it into an instrument for decision-making.[427] This phenomenon also takes place through international legal approaches, but the theories of International Relations are the ones that suffer most from accusations of instrumentalization of concepts imported from other disciplines.[428]

Koskenniemi took his criticism even further and developed an agenda for what he calls "counterdisciplinarity."[429] His argument is underpinned in the idea that International Law is not a social science for it is not about demonstrating empirical truths. Therefore, it does not fit into the vocabulary of sciences. Interdisciplinary vocabularies, such as "'scholarship' and 'science'[,] miss what for most international lawyers is the most obvious aspect" of the international legal practice: "its being above all practice."[430] Trying to transpose into International Law the logic of other sciences, as to establish an interdisciplinary dialogue, makes no sense. The character of the legal praxis is a pragmatic one, which does not allow room for argumentative moves such as identifying the equivalence of Realism or Positivism in the discipline of Law. The discipline of International Law should be approached as practice through hermeneutics of interpretation rather than something that is theoretical or verifiable, for "[International] Law is an interpretative craft."[431]

The 'counterdisciplinary' project proposes a "step backwards," inviting the international law scholar to refrain "re-imagining law as either 'in fact' moral philosophy or descriptive sociology: that is to say, a kind of natural law."[432] International Relations, in Koskenniemi's line of argumentation, is the new Natural Law.[433] Movements like the contemporary turn in international law to ethical

[427] KOSKENNIEMI, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960**, p. 484.
[428] LONG, David, Interdisciplinarity and the Study of International Relations, *in*: AALTO, Pami; HARLE, Vilho; MOISIO, Sami (Eds.), **International Studies Interdisciplinary Approaches**, London: Palgrave Macmillan, 2011, p. 61.
[429] KOSKENNIEMI, Martti, Law, Teleology and International Relations: An Essay in Counterdisciplinarity, **International Relations**, v. 26, n. 1, p. 3–34, 2012.
[430] *Ibid*., p. 19.
[431] *Ibid*.
[432] *Ibid*., p. 19–20.
[433] KOSKENNIEMI, Martti, Miserable Comforters: International Relations as New Natural Law, **European Journal of International Relations**, v. 15, n. 3, p. 395–422, 2009, p. 411.

vocabularies of humanitarianism portray a wish "to get rid of social conflict by glossing it with languages of passion, engagement and moral necessity."[434] This "new empirically oriented 'realist' language" voices particular interests, forms of authority and hierarchy of influence, which "feeds on the habit of international lawyers to articulate the founding certainties of the profession in sociological, instrumental terms," such as the international's state of nature.[435]

> Because there is no truth superior to that provided by each such system or vocabulary, each will recreate within itself the sovereignty lost from the nation-state. Hence managerialism turns into absolutism: the absolutism of this or that regime, this or that system of preferences. The lawyer becomes a counsel for the functional power-holder speaking the new natural law: from formal institutions to regimes, learning the idiolect of 'regulation', talking of 'governance' instead of 'government' and 'compliance' instead of 'responsibility'. The normative optic is received from a 'legitimacy', measured by international relations — the Supreme Tribunal of a managerial world.[436]

The way forward, per Koskenniemi, is an international legal scholarship that is able to account for all forms of legal power.[437] Klabbers, in turn, comes with the seemgly mad notion that "inter-disciplinarity is only possible by embracing counter-disciplinary." How these project aims for a "salvation of the law" without collapsing into the exact problems they emphasize is yet to be understood.[438] The only possible conclusion from the 'counterdisciplinary' project is that it is actually "a counter-IR-disciplinarity. Or more specifically, a counter-IR-as-an-American-social science-disciplinarity, which at least partially reflects the central concerns of the Third Debate within IR itself (with Kratochwil as one of its propagators)."[439]

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[434] KOSKENNIEMI, Law, Teleology and International Relations, p. 20.
[435] KOSKENNIEMI, Miserable Comforters, p. 411.
[436] *Ibid*.
[437] KOSKENNIEMI, Law, Teleology and International Relations, p. 24.
[438] DUNOFF, Jeffrey L., From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti's Method?, **Temple International and Comparative Law Journal**, v. 27, n. 2, p. 309–337, 2013.
[439] AALBERTS, Tanja E., Interdisciplinarity on the Move: Reading Kratochwil as Counter-Disciplinarity Proper, **Millennium: Journal of International Studies**, v. 44, n. 2, p. 242–249, 2016, p. 244.

1.2.3.1.
The "three-way junction" of the politics of interdisciplinarity and the way forward

International legal scholars must make a fundamental choice when engaging with their academic production, which will have an important ramification: whether to engage with international politics. On one hand, choosing an analysis of international law as a self-contained field, and therefore devoid of politics, means not engaging with, and even rejecting, the effort of theorizing, or, in other words, "to dispense with trying to understand one's practice and to derive an ethical stance therefrom, to relinquish independent judgement."[440] Opting for the consideration of politics, on the other hand, in the study of international law, implies adopting a theoretical stance to respond to the discussion over whether international law is regarded as a solution or a problem to international relations.[441]

However, as pointed by Anna Leander and Wouter Werner, any kind of analysis that takes politics into consideration, either for interdisciplinarity or boundary-drawing efforts, "contributed to the construction of specific concepts of law and politics," for these fields can only be defined in relation to one another, but also to how these concepts "are related to the distribution of disciplinary (and disciplining) power."[442] These efforts would be, as differentiated by Florian Hoffmann, respectively, "revealing 'the politics of international law' and rendering the discipline [of International Law] more overtly political," which are two very different things.[443] Koskenniemi and Klabbers, would fall into the first category, which means that, even though they consider that there is a relationship between international law and politics, they still seek to guarantee the "integrity of law."[444]

[440] HOFFMANN, International Legalism and International Politics, p. 972.
[441] *Ibid*.
[442] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 75.
[443] HOFFMANN, International Legalism and International Politics, p. 958.
[444] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 76.

Upon analysis of the current state of the International Relations/International Law interdisciplinary project, Yamato and Hoffmann consider that is faces "a three-way junction:"[445]

> [S]traight ahead lies (1) the IR mainstream's "dual agenda" itself, with its consolidated theoretical premises and its delimited objectives, but with little direct resonance in IL. Then, forking off to one side is (2) critical IL's counter-disciplinarity project, which seeks to actively resist that "dual agenda" by essentially removing IL from the remit conventional disciplinarity as such; it, instead, frames IL as a formalized performative practice, which brings (procedural) justice to bear against the "disciplining" power of functional regimes (IR, which is the neoliberal world order) […].
> On the other side lies (3), an as yet little explored path which begins with a necessarily meta-theoretical conversation on the nature of the respective disciplinarities of IL and IR.[446]

The first group, in general, scrutinizes – and advocates for – the legalization of international politics as an important step towards taming anarchy. However, as they champion this process of legalization, they "*also* express anxiety about the illegitimacy of technocratic legalistic managerial rule," in other words, "they reinstate the primacy of politics anchored in better rules and procedures," but "by insisting on better rules and procedures, the door they just tried to close on law is reopened."[447]

The second cluster of scholars position themselves as against the 'Legalization' project, the more vocal and significant elaborations being those of Koskenniemi and Klabbers. Even though they have a progressive approach regarding the political nature of international law, they consider themselves as defenders of International Law against the incursions of international politics.[448] These authors understand the politization of law and interdisciplinarity as the biggest threats to the international legal discipline that comes specially from certain liberal approaches such as the one that emphasizes universalism and the rational choice.[449] With that, they fall into the same trap as the first group: while showing

[445] YAMATO; HOFFMANN, Counter-disciplining the Dual Agenda: towards a (re-)assessment of the interdisciplinary study of International Law and International Relations, p. 13.
[446] *Ibid*.
[447] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 75.
[448] *Ibid*., p. 76.
[449] *Ibid*., p. 88.

the intrinsic relationship between law and politics, and with that recognizing the political nature of International Law,[450] which clearly opens the door to politics into an analysis of law, by highlighting the need for ethics and responsibility to safeguard the integrity of international law, they steer away all disciplinary politics.[451] For example,

> Given that, at the time, the ("European") IL mainstream would also not engage in any debate it viewed as (extra-doctrinally) theoretical, this stance by IL "crits" essentially confined the "dual agenda's" reception to the "American" IL scene.[452]

This means that, under attack in the accounts of both authors are two very specific projects, which are the ones of realist and rationalist perspectives within North American International Relations, which leads us to understand that their depiction of the field of International Relations is also a caricatured one.[453] Their approach ends up joining disciplinary marginalization once "it excludes any and all [International Relations] scholars from the conversation."[454]

These two stances, even though being antagonistic, display the same paradox, one that according to Leander and Werner is difficult to escape. Through these definitions and enactments, which, as seen, impose and break the disciplinary borders, the fields of international law and politics are constantly being drawn. However, it is important to note that the same caricatured depiction they are trying to change is being reinforced by their own definitions.[455]

Lastly, what can be considered as a third avenue are the proposals of scholars that see a possibility of working through the disciplines without, first, falling into the same paradox, by affirming the presence and absence of politics in law at the same time, and, second, by privileging one of the disciplines through depicting the

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[450] KLABBERS, Jan, **International Law**, 2. ed. Cambridge; New York: Cambridge University Press, 2017, p. 14.
[451] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 75–76.
[452] YAMATO; HOFFMANN, Counter-disciplining the Dual Agenda: towards a (re-)assessment of the interdisciplinary study of International Law and International Relations, p. 2.
[453] POLLACK, Mark A., Is International Relations Corrosive of International Law? A Reply to Martti Koskenniemi, **Temple International and Comparative Law Journal**, v. 27, n. 2, p. 339–375, 2013, p. 364.
[454] YAMATO; HOFFMANN, Counter-disciplining the Dual Agenda: towards a (re-)assessment of the interdisciplinary study of International Law and International Relations, p. 13.
[455] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 76.

other in a caricatured way.[456] According to Leander and Werner, whose work would fall under this category, there is a need to go beyond the vision that an effort of working between the disciplines of International Relations and International Law is doomed, "it is essential to rewrite the scripts so that they inform the redrawing of boundaries."[457]

There has been in the past two decades a number of efforts of rewriting these scrips. One of them is a section called 'Contributions to the Forum' in *International Political Sociology* dedicated to tackle the relationship between the fields of law and politics.[458] Some authors in both disciplines have sought to incorporate the social character of international law, understanding, in this sense, not being possible a separation between the two fields. The authors of the 'constructivist turn,' such as Nicholas G. Onuf and Friedrich Kratochwil, demonstrate this position by bringing back law to the analysis of international politics.[459] Another example is the book organized by Nikolas Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen, *The Power of Legality*, which emphasizes the need to explore the links between international law and politics still bearing an uneasiness with the possibility that interdisciplinarity runs the risk of befalling into the well-known disputes between scholarships.[460]

[456] YAMATO; HOFFMANN, Counter-disciplining the Dual Agenda: towards a (re-)assessment of the interdisciplinary study of International Law and International Relations.
[457] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 97.
[458] KESSLER, Oliver, So Close Yet So Far Away? International Law in International Political Sociology: Introduction, **International Political Sociology**, v. 4, n. 3, p. 303–304, 2010; KLABBERS, Counter-Disciplinarity; KRATOCHWIL, Friedrich, International Law and International Sociology, **International Political Sociology**, v. 4, n. 3, p. 311–315, 2010; LISTE, Philip, The Politics of (Legal) Intertextuality, **International Political Sociology**, v. 4, n. 3, p. 318–321, 2010; ONUF, Nicholas, Old Mistakes: Bourdieu, Derrida, and the "Force of Law", **International Political Sociology**, v. 4, n. 3, p. 315–318, 2010; WERNER, Wouter, The Use of Law in International Political Sociology: The Use of Law, **International Political Sociology**, v. 4, n. 3, p. 304–307, 2010.
[459] KESSLER, So Close Yet So Far Away? International Law in International Political Sociology: Introduction, p. 303.
[460] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 9.

1.2.4.
Rewriting the scripts: an interdisciplinary approach on the politics of the practice of international criminal law

On his championing of the 'counterdisciplinarity' project, Klabbers posited that the "more sophisticated sociological approach to international relations" would be, similarly to the liberal institutionalist school, using international law for the advancement of its own agenda.[461] In the same vein,

> It too instrumentalizes, and often downplays law: in arguing—persuasively, as such—that law is often a tool in the hands of oppressors, be it as Foucauldian governmentality or Agambenian desolation, the sociological approach ends up suggesting that the world would be a better place without international law. What is more, both the institutionalists and the sociologists end up commodifying international law, in much the same way as die-hard realists have always been doing. The institutionalists use international law to celebrate liberal values, and are happy to employ more cost-efficient ways to promote liberal values. The sociologists, in turn, use international law to criticize contemporary state practices, almost suggesting that law should be resisted. In both cases, law is utilized as the vehicle of political projects and a fig leaf for the exercise of power, either real power (as with the institutionalists, who hail mostly from the US and some of whom move effortlessly back and forth between government and academia) or hoped-for power, as with the sociologists (who are politically more marginalized and move between academia and civil society, if they move at all); neither school entertains the idea that there is beauty in the technical analysis of an international legal decision, or that there is something to be admired in the sheer craftsmanship involved in drafting a treaty.
>
> This is as it should be, of course. Neither the liberal institutionalist nor the sociologically inclined international relations scholar can be expected to appreciate such things.[462]

Arguably, most scholarly production within International Relations on international law have failed to engage with central elements of its practice. These explorations fail to grasp that norms and institutions are not just another element of analysis in itself but are inserted in a field which has its own "structuring structures."[463] Nonetheless, to claim that an international relations' analysis would not be able to appreciate international legal craft might be somehow conceited. Some contributions in International Relations have worked through the intricacies

[461] KLABBERS, Counter-Disciplinarity, p. 309–310.
[462] *Ibid*., p. 310.
[463] BOURDIEU, Pierre, **The logic of practice**, Cambridge; Oxford: Polity Press; B. Blackwell, 1990, p. 53.

of international law making, being able to address issues and engage in fruitful discussions with international lawyers, demonstrating a clear appreciation for the craft of international law.[464] None of these approaches suggest that the world would be a better place without international law, nor are using law to criticize state practices (though there might be some level of critique, it is not directed exclusively towards States).

Contrary to Klabbers, this thesis presents itself as an interdisciplinary work between the fields of International Relations and International Law that appreciates the 'sheer craftsmanship' involved in international legal practice. Through Interludes No. 1 to 6, it dives into its analysis of the Al Bashir Case in the ICC, covering in detail the steps of the Case from the triggering procedures to the Chambers' decisions. Alongside this empirical exercise of technical analysis of the Case, the thesis' chapters mobilize the scholarly production on the wide range of topics that are reunited in the Al Bashir Case, such as contestation, interpretation, and the politics of international law. So that this can be an interdisciplinary endeavour that avoids the problems that befalls both 'Legalization' and 'counterdisciplinarity' projects, it adopts a sociological approach. It defends that incorporating the social dimension is the condition of possibility to avoid the misuse of interdisciplinarity. It does not mean that every sociological undertaking will manage to avoid caricaturing, essentializing or even colonializing the other discipline. The point is that sociology provides enough tools so that these issues can be avoided. The building of disciplinary walls between International Relations and International Law can only result in instrumentalization, for the relationship of symbiosis between the two fields does not allow for the other to be ignored. This thesis then advocates for a (interdisciplinary) political sociology of international law.

[464] LEANDER, Anna, Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program, **Leiden Journal of International Law**, v. 26, n. 4, p. 811–831, 2013; KESSLER, Oliver; WERNER, Wouter, Expertise, Uncertainty, and International Law: A Study of the Tallinn Manual on Cyberwarfare, **Leiden Journal of International Law**, v. 26, n. 4, p. 793–810, 2013; STAPPERT, Practice theory and change in international law; STAPPERT, Nora, A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals, **Leiden Journal of International Law**, v. 31, n. 4, p. 963–980, 2018.

> Rather than politics trumping law, a political sociology of law lays bare how such strategic play with the rules requires knowledge of how to play by the rules – how to speak the language of law and turn a political argument into a legally valid one.[465]

The use of a 'practice approach' in this thesis has the objective of being able to precisely grasp the daily practices of international law both empirically and theoretically. This works sustains that such proposal "has the potential of leaving disciplinary boundaries behind altogether."[466] The missteps in the 'Legalization' project's interdisciplinarity that is heavily criticized is one that, I contend, can be overcome. The problem seems to be much more disciplinary than an interdisciplinary one. As Aalberts argued, the difficulty in establishing any kind of interdisciplinary dialogue is less centred on the issue of hierarchy – or even colonialism – between disciplines, but on the boundaries that are established between the different ontological, methodological, and epistemological assumptions. Given that both disciplines are strongly marked not only by theoretical pluralism, but also visions of science and academic research, there is a strong fragmentation between perspectives. Before this scenario, it is easier to establish communication, both at the theoretical and meta-theoretical level, with similar perspectives from other disciplines than within the field itself. While such a situation is productive, by facilitating focus on particular issues, it can also be harmful.[467] The cooperation between perspectives that have similarities represents

[465] AALBERTS, Tanja; WERNER, Wouter, International Law, *in*: GUILLAUME, Xavier; BILGIN, Pinar (Eds.), **Routledge Handbook of International Political Sociology**, New York: Routledge, 2016, p. 39.

[466] STAPPERT, Practice theory and change in international law, p. 6.

[467] The matter of fragmentation within the discipline of International Relations raised the question of whether it was the end of Intenational Relations Theory. The debate that ensued proposed interesting ways of facing this issue. See, DUNNE, Tim; HANSEN, Lene; WIGHT, Colin, The end of International Relations theory?, **European Journal of International Relations**, v. 19, n. 3, p. 405–425, 2013; BROWN, Chris, The poverty of Grand Theory, **European Journal of International Relations**, v. 19, n. 3, p. 483–497, 2013; JACKSON, Patrick Thaddeus; NEXON, Daniel H., International theory in a post-paradigmatic era: From substantive wagers to scientific ontologies, **European Journal of International Relations**, v. 19, n. 3, p. 543–565, 2013; SYLVESTER, Christine, Experiencing the end and afterlives of International Relations/theory, **European Journal of International Relations**, v. 19, n. 3, p. 609–626, 2013; VAN DER REE, Gerard, Saving the Discipline: Plurality, Social Capital, and the Sociology of IR Theorizing, **International Political Sociology**, v. 8, n. 2, p. 218–233, 2014; GUZZINI, Stefano, The ends of International Relations theory: Stages of reflexivity and modes of theorizing, **European Journal of International Relations**, v. 19, n. 3, p. 521–541, 2013; LAKE, David A., Theory is dead, long live theory: The end of the Great Debates and the rise of eclecticism in International Relations, **European Journal of International Relations**, v. 19, n. 3, p. 567–587, 2013; REUS-SMIT, Christian, Beyond metatheory?, **European Journal of International Relations**, v. 19, n. 3, p. 589–608, 2013.

a limitation of what can be known, that is, it blocks the scholar's gaze towards other phenomena. For Aalberts, "[i]f there is too much ontological euphony or common sense, there is the risk of things 'going without saying.' And this can equally impede academic and reflective dialogue because of over-ingrained categories, implicit assumptions, and caricatures."[468]

1.3.
The law and politics divide: a tale of hegemons

This chapter explored some possibilities through which the politics of international law is manifested. The politics of international law as a professional practice comes through its argumentative structure that mostly revolves around two positions that either affirm its concreteness or its normativity.[469] In an endless coming and going between the two, the practice of international law has managed to ascertain its objectivity. This reasoning allows the legalist not only to differentiates international law from politics, but to preserve it from its influence. A considerable number of international legal practitioners that defend the idea that international legal practice needs to create ways to steer clear from politics subscribe to the view that the way to do it is through covering all the lawless gaps of international political practice with law. This process, which gained a lot of ground in the 1990s, resulted in the proliferation and the specialization of international norms and institutions. This move, however, created an environment that became heavily embedded in between regimes disputes to have a say of the course of general international law. The result was an international law that is heavily fragmented. Not in terms of coherence. The practice of international law still attains to the norms and principles which makes it as a system. The fragmentation that complexifies the dynamic of international law is its

[468] AALBERTS, The Politics of International Law and the Perils and Promises of Interdisciplinarity, p. 506.

[469] It is worth noting, however, that there are marginal practices that "have worked in and sometimes challenged" this structure, acting "in a conceptual and professional world where every move they make is both law and politics simultaneously and demands both coolness and passion." KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 617.

compartmentalization into regimes of knowledge. The regimes have become spaces where particular interests gain space and, as to have its preferences reflected in general international law, these specialized areas develop vocabularies that aim to convince to be in the best interests of the whole system of international law. These vocabularies, however, stand for nothing more than a very open regulation that allows ample space for interpretation.

The introduction of this discussion paves the way for understanding some important positions in relation to the possibility of a deeper communication between the disciplines that have, as their object of study, law and politics. Though its history of comings and goings, the relationship between the disciplines of International Law and International Relations has been through a series of attempts at establishing a dialogue that end up mistreating the other. Interdisciplinarity between the two disciplines have been marked by accusations of instrumentalization, that result in proposals for a complete separation between them. In face of this scenario, this thesis advances a proposal for an interdisciplinary approach that analysis that departs from the field of International Relations that does not treat international law as a mere epiphenomenon, but instead engages with the scholarly production from both International Relations and International Law.

It is within this reality that this thesis develops its study on the Al Bashir Case. The immersion into the politics of international law as scholarly and professional practice allows a better look into what is at stake in the politics of boundary drawing between the two fields in both qualities. The legalist discursive practices of the Court's officials, as the ones introduced in Interlude No. 1 and throughout this chapter, are embedded within this larger setting. The need for reaffirming the space of international law, in this sense, plays an important part within this setting: that of justifying its own practice.

This chapter has introduced the function of the law versus politics narrative in international legal practice. These discourses play a central part in the politics of international law. Through the specialized vocabularies, international legal discourses are able to authorize and limit certain practices. The next interlude and chapter explore the features of international law that condition this process, explaining how international law can be at the same time open-ended and determined.

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Interlude No. 2: The African Contestation begins: the non-compliance by ICC Member States with the Arrest Warrants for Omar Al Bashir

The issuance of the warrants of arrest by the ICC for Omar Al Bashir generated different types of reactions from States and international organizations. After submitting the first request for an arrest warrant for Al Bashir to the PTC I, the Prosecutor's actions were at the same time praised by the US government and the UN and viewed with scepticism by the Chinese, the Arab League, the AU chairman and Commission and even Sudanese opposition parties. These reservations regarding the warrants were voiced as fears as to what they could come to mean for attempts at peace in Sudan.[470] Although the issue of peace remained a constant throughout the past fifteen years, the reason that created conflict and that drew all the attention to the Case was related to whether States Parties to the ICC were obliged to comply with the ICC's arrest warrants for the Sudanese Head of State or respect his immunities. The leading narrative that criticized the ICC activity in the situation in Darfur was to change in the aftermath of the OTP's request for an arrest warrant for Omar Al Bashir.

The warrants of arrest against the President of Sudan were put to the test from the outset. Many ICC Member States received Al Bashir in their territories and did not arrest and surrender him to the Court. This situation occurred repeatedly over the last decade. It gave the Court many opportunities to provide a convincing substantiation for its position that Al Bashir's immunities did not stand before its jurisdiction.

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[470] **Sudan angered by genocide claims**, BBC News. Available at: <http://news.bbc.co.uk/2/hi/africa/7506670.stm>. Accessed: 17 oct. 2020; BUCKLEY, Chris, **China says heed fears about Bashir genocide charges**, Reuters. Available at: <https://www.reuters.com/article/uk-china-sudan-darfur-idUKPEK27243720080718>. Accessed: 17 oct. 2020; **Arab League Slams ICC Prosecutor**, Arab News. Available at: <https://www.arabnews.com/node/313946>. Accessed: 17 oct. 2020; MCDOOM, Opheera, **Sudan opposition warn ICC Bashir warrant threatens peace**, Reuters. Available at: <https://www.reuters.com/article/uk-warcrimes-sudan-opposition-idUKMCD43698220080714>. Accessed: 17 oct. 2020; **Arab leaders back "wanted" Bashir**, BBC News. Available at: <http://news.bbc.co.uk/2/hi/7971624.stm>. Accessed: 17 oct. 2020; **Arab leaders seek common ground**. Available at: <https://www.aljazeera.com/news/2009/3/30/arab-leaders-seek-common-ground-2>. Accessed: 17 oct. 2020.

Soon after the issuance of the second warrant of arrest by the PTC I, Omar Al Bashir went on a visit to Chad to attend a summit of the Sahel-Saharan States between 21 and 23 July 2010.[471] Chad became the first State Party to receive the Sudanese president after he was indicted by the ICC. The PTC I, composed by Judges Cuno Tarfusser, Sylvia Steiner and Sanji Mmasenono Monageng, raised the issue that article 87 of the Rome Statute gives the Court "the authority to make requests to States Parties for cooperation."[472] According to the Judges, the Republic of Chad had the obligation to cooperate with the ICC regarding the enforcement of its warrants of arrest. In face of its non-compliance, the PTC I informed the UNSC and the ASP about Al Bashir's visit to Chad "in order for them to take any action they may deem appropriate."[473]

In the following month, Al Bashir was received in Kenya for the signing of a new Constitution.[474] Once again, based on the notion that contracting parties have the obligation to cooperate with the ICC arrest warrants, the PTC I, under the same composition as in the Chad Decision, on 27 August 2010, informed the UNSC and the ASP about Al Bashir's presence in the territory of a State Party so that they could take the appropriate measures.[475] The Prosecution notified the PTC I that Al Bashir had a second visit scheduled to Kenya that would take place at 30 October 2010 for a summit of the Inter-Governmental Authority for Development.[476] Once notified by the OTP, the PTC I reiterated its request for cooperation to the Republic of Kenya as a contracting State of the Rome Statute and asked that the State inform the Chamber about any problem which would impede or prevent the arrest and

[471] PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad**, The Hague: International Criminal Court (ICC), 2010, p. 3.
[472] **Rome Statute of the International Criminal Court**, art. 87(1)(a).
[473] PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad**, p. 3.
[474] **Sudan's al-Bashir, wanted for war crimes, attends Kenyan ceremony**, CNN. Available at: <https://edition.cnn.com/2010/WORLD/africa/08/27/kenya.new.constitution/index.html>. Accessed: 17 oct. 2020.
[475] PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya**, The Hague: International Criminal Court (ICC), 2010, p. 4.
[476] OFFICE OF THE PROSECUTOR, **Prosecution notification of possible travel to a State Party in the case of The Prosecutor v Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2010, para. 9 et seq.

surrender of Al Bashir once in Kenyan territory.[477] The Chamber evoked article 97 of the Rome Statute which poses that any problems that would impede or prevent the execution of a request from the ICC shall be consulted with the Court so that the matter can be resolved.[478] In light of the pressure from the ICC on Kenya to arrest Al Bashir, the meeting of the Inter-Governmental Authority for Development was postponed in order to be relocated to Addis Ababa.[479] Differently from Kenya, Ethiopia is not a party to the Rome Statute and as a consequence does not have the obligation to arrest and surrender the Sudanese President to the Court. Responding to the PTC I's request for information about a second visit from Omar Al Bashir, on 28 October 2010, Kenya's Attorney General simply indicated that the summit was not to be held in Kenya and, hence, Al Bashir would not be in Kenyan territory.[480] On 29 October 2010, the Ministry of Foreign Affairs of the Republic of Kenya further emphasized that Kenyan government was "not aware of any impending visit by Mr. Omar Hassan Al Bashir […] to the Republic of Kenya."[481]

On 30 November 2010, newsfeeds made the Court aware of a possible official visit by Omar Al Bashir to another ICC Member State, the Central African Republic (CAR).[482] The visit that would take place in the following day had the Chamber request that, should Al Bashir arrive in CAR's territory, its authorities take all the necessary steps to assure that he is arrested and surrendered to the ICC. As a

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[477] PRE-TRIAL CHAMBER I, **Decision requesting observations from the Republic of Kenya**, The Hague: International Criminal Court (ICC), 2010, p. 4.

[478] PRE-TRIAL CHAMBER I, **Decision requesting observations from the Republic of Kenya**; PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya**, art. 97.

[479] ONYIEGO, Michael, **IGAD Summit Postponed Amid Controversy Surrounding Bashir Attendance**, Voice of America News. Available at: <https://www.voanews.com/a/article--igad-summit-postponed-amid-controversy-surrounding-bashir-attendance-106107494/156507.html>. Accessed: 17 oct. 2020; **Sudan president on safer ground as summit shifted**, BBC News. Available at: <https://www.bbc.com/news/world-africa-11636340>. Accessed: 17 oct. 2020; **Kenya to move Sudan summit, denies Bashir pressure**, Reuters. Available at: <https://www.reuters.com/article/ozatp-sudan-president-kenya-20101027-idAFJOE69Q0AW20101027>. Accessed: 17 oct. 2020.

[480] REGISTRAR, **Transmission of the reply from the Republic of Kenya**, The Hague: International Criminal Court (ICC), 2010, p. 3.

[481] REGISTRAR, **Addendum to the report of the Registrar entitled "Transmission of the reply from the Republic of Kenya"**, The Hague: International Criminal Court (ICC), 2010, p. 3.

[482] **Sudan's Bashir heading to Central African Republic on Wednesday: report**, Sudan Tribune. Available at: <https://sudantribune.com/article36814/>. Accessed: 18 oct. 2020; **Central African Republic must arrest Omar al-Bashir during visit**, Amnesty International. Available at: <https://www.amnesty.org/en/latest/news/2010/12/central-african-republic-must-arrest-omar-al-bashir-during-visit/>. Accessed: 17 oct. 2020.

contracting party to the Rome Statute, the CAR is obliged to the Courts' decisions, including the request for cooperation regarding arrest warrants. The Chamber also stressed that any situation that might impede or prevent the arrest and surrender of Al Bashir during his stay at the CAR, should be informed to the Court.[483] In light of the lack of further information on said visit, the Chamber did not enrol in any proceeding in relation to the CAR.

In the case of Djibouti, another ICC Member State, the Court got confirmation of Al Bashir's presence in its territory for the inauguration of President Ismael Omar Guelleh on 8 May 2011.[484] Once again the PTC I, still composed by Judges Tarfusser, Steiner and Monageng, noted that Rome Statute contracting States have "the obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest," obligations that derive from article 87 of the Statute and from UNSC Resolution 1593, which urges all States to cooperate fully with the ICC.[485] Considering that in this situation the Court got confirmation that Djibouti had indeed received Al Bashir in its territory and had failed to arrest and surrender him to the Court, the PTC I informed the ASP and the UNSC so that these entities could take the appropriate measures regarding Djibouti's non-cooperation.[486]

Three months later, once again the Court was aware of Al Bashir travelling to the territory of a State Party. On 9 August 2011, the Registry confidentially filed a report informing the PTC I that Al Bashir had been in Chad for the inauguration ceremony of Chadian President Idriss Déby Itno, which took place on 7 and 8 August 2011.[487] The PTC I noted it was the second time Al Bashir was allowed to

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[483] PRE-TRIAL CHAMBER I, **Demande de coopération et d'informations adressée à la République Centrafricaine**, The Hague: International Criminal Court (ICC), 2010, p. 4; PRE-TRIAL CHAMBER I, **Pre-Trial Chamber I requests the cooperation of the Central African Republic to execute the warrants of arrest of Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2010.

[484] PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti**, The Hague: International Criminal Court (ICC), 2011, p. 3; INTERNATIONAL CRIMINAL COURT, **Pre-Trial Chamber I informs the Security Council and the Assembly of States Parties about Omar Al Bashir's visit to Djibouti**, The Hague: International Criminal Court (ICC), 2011.

[485] PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti**, p. 3.

[486] *Ibid*.

[487] PRE-TRIAL CHAMBER I, **Decision requesting observations about Omar Al-Bashir's recent visit to the Republic of Chad**, The Hague: International Criminal Court (ICC), 2011, p. 4.

enter in Chadian territory without being arrested and surrendered to the ICC and, therefore, invited the competent authorities of the Republic of Chad to submit observations in accordance with regulation 109 of the Regulations of the Court regarding its alleged failure to comply with the Court's arrest warrants.[488] The Chadian authorities claimed that they could not comply with the Court's request in light of the common position adopted by the AU in regards to the warrant of arrest issued against Al Bashir (see Interlude No. 3). It was added that, under regulation 109(3) of the Regulations, the Republic of Chad must be given the possibility to be heard before the Court.[489]

Concomitantly, the same proceedings were being put in place in regard to the Republic of Malawi, also an ICC Member State. The Registry filed on 18 October 2011 a report to the PTC I indicating that Al Bashir had been in Malawi territory on 14 October 2011 for a summit of the Common Market for Eastern and Southern Africa and was not arrested and surrendered to the ICC.[490] The PTC I requested observations from the Malawi authorities concerning the alleged failure to cooperate with the Court.[491] The Malawi Ministry of Foreign Affairs informed the Registry that it had granted President Al Bashir with the "immunities in line with the established principles of public international law," in light of the fact that Sudan is not a party to the Rome Statute.[492] The Malawi authorities further pointed that "Article 27 of the Statute which, *inter-alia*, waives the immunity of the Heads of State and Government, is not applicable."[493] The Ministry finished this note highlighting that "Malawi, as a member of the African Union, fully aligns itself with the position adopted by the African Union with respect to the indictment of the sitting Heads of State and Government of countries that are not parties to the Rome Statute."[494]

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[488] *Ibid*., p. 5–6.
[489] REGISTRAR, **Rapport du Greffe relatif aux observations de la République du Tchad, Al-Bashir, Annex 1**, The Hague: International Criminal Court (ICC), 2011, p. 3.
[490] PRE-TRIAL CHAMBER I, **Decision requesting observations about Omar Al-Bashir's recent visit to Malawi**, The Hague: International Criminal Court (ICC), 2011, p. 3–4.
[491] *Ibid*., p. 5.
[492] REGISTRAR, **Transmission of the observations from the Republic of Malawi, Annex 2**, The Hague: International Criminal Court (ICC), 2011, p. 2.
[493] *Ibid*.
[494] *Ibid*.

As the responses from the Malawi and Chadian authorities show, the Court was not only dealing with a continuous pattern amongst African States of receiving Al Bashir in their territory despite the Court's requests for the arrest and surrender of the Sudanese President and reiterations that States Parties were under the obligation to do so. States were responding to the Court and in these replies was a reaffirmation of a common position amongst AU members regarding the indictment of Al Bashir. Consequently, the Pre-Trial Judges began to develop a new pattern following the non-compliances by ICC Member States. In the following non-compliance decisions, Pre-Trial Judges started to engage in the task of justifying the existence for States Parties of an obligation to comply with the ICC's arrest warrants.[495]

Responding to the observations from the Malawi and Chadian authorities, the PTC I determined, that Malawi and Chad, when receiving Bashir in their respective territories, violated their obligations towards the Court.[496] Even though the PTC I recognised the existence of an inherent tension between articles 27(2) and 98(1) of the Rome Statute, on 12 December 2011, Judges Monageng, Steiner and Tarfusser reasoned that Malawi (and by extension, the AU) would not have any reason to allege a tension to the matter of immunities of Heads of State before international criminal courts. The Judges claimed that the challenge to the warrant of arrest issued by the ICC was not an issue, for Omar Al Bashir's immunity as Head of State of Sudan had already been rejected upon the issuance of the warrant for his arrest by the Chamber when it affirmed that "in accordance with article 27 of the Statute, "the current position of Omar Al Bashir as Head of a state which is not a

[495] See, for example, PRE-TRIAL CHAMBER I, **Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2011; PRE-TRIAL CHAMBER I, **Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir**, The Hague: International Criminal Court (ICC), 2011.

[496] PRE-TRIAL CHAMBER I, **Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir**; PRE-TRIAL CHAMBER I, **Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**.

party to the Statute, has no effect on the Court's jurisdiction over the present case."[497]

As to justify its position that customary international law had created an exception to Head of State immunity in situations where the international court sought a Head of State for the perpetration of international crimes, the Chamber embarked on a historical overview of the issue of immunity of Heads of State in international proceedings. It covered dispositions in the statutes and judgments from the International Military Tribunal at Nuremberg (IMT) and the IMTFE through the more recent trials in the *ad hoc* and hybrid tribunals and ICJ to affirm that immunities of either former or sitting Heads of State cannot be invoked to oppose a prosecution by an international court.[498] The irrelevance of immunities before an international court, according to the PTC I, was, at that point, already an established practice that could be evidenced by trials such as the ones of Slobodan Milošević, in the ICTY, Charles Taylor, in the SCSL, and Muammar Gaddafi and Laurent Gbagbo, in the ICC. This list of cases coupled by the 120 signatures to the Rome Statute – which amounts to the approval of article 27(2) – would prove that "initiating international prosecutions against Heads of State have gained widespread recognition."[499]

However, within this jurisprudential tour, the PTC I dived into the *Arrest Warrant* Judgement to substantiate its argument through the same reading proffered by a heavily criticised and controversial decision of the SCSL. The Appeals Chamber of the SCSL, deciding on Charles Taylor's immunity from jurisdiction, in 2004, interpreted the referred ICJ Judgement. In the Chamber's reading heads of state and other state officials would not be entitled to personal immunities before international criminal courts.[500] The *Arrest Warrant* Judgment as a matter of fact was extremely vague in regard to where immunities stand before international criminal courts and only affirming that state officials "retain their personal immunities before courts (especially national courts) even when there are

[497] PRE-TRIAL CHAMBER I, **Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, para. 14.
[498] *Ibid*., paras. 23 et seq.
[499] *Ibid*., para. 39.
[500] APPEALS CHAMBER, **Decision on Immunity from Jurisdiction**, para. 51.

allegations of international crimes."[501] Hereupon, the Chamber concluded that there is no justification for Malawi to argue in line with article 98(1) and that the State must cooperate with the ICC's request.[502]

The decision by the PTC I, issued on 13 December 2011, on the refusal of Chad to comply with the cooperation requests from the Court, mostly quotes the arguments from the Malawi decision.[503] In the same fashion, the Chamber concluded that "the Republic of Chad may not validly rely on article 98(1) of the Statute to justify its failure to comply with the Cooperation Requests," which meant that Chad had failed to comply with its obligations before the ICC.[504] The PTC I then decided to refer both the Malawi and Chadian non-compliances to the United Nations Security Council and to the Assembly of States Parties to decide on the matter.[505]

In his last report to the UNSC regarding the situation in Darfur, Prosecutor Luis Moreno Ocampo affirmed that as to the situation in Darfur, "[t]hose who bear the greatest responsibility have been indicted. The current challenge is their arrest," as a way to have the Council adopt measures to ensure compliance with the Court's arrest warrants.[506] The Prosecutor quoted a speech from the Costa Rican Minister for Foreign Affairs before the UNSC in which he urged the Council to do something regarding the matter of non-compliance with the ICC arrest warrants in the situation in Darfur. Ocampo finalized his remarks by presenting this situation as a direct

[501] CRYER, Prosecuting the Leaders, p. 64.
[502] PRE-TRIAL CHAMBER I, **Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, paras. 36-44.
[503] PRE-TRIAL CHAMBER I, **Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir**, para. 13.
[504] *Ibid*., para. 14.
[505] PRE-TRIAL CHAMBER I, **Corrigendum to the Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir**, para. 47; PRE-TRIAL CHAMBER I, **Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir**, para. 14.
[506] OFFICE OF THE PROSECUTOR, **Fifteenth report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)**, The Hague: International Criminal Court (ICC), 2012, para. 13.

challenge to the UNSC's authority in a desperate move to galvanize the Council's reaction.[507]

During the year of 2012, even though Al Bashir continued to travel to ICC Member States, the Court limited the practice of referring the matter to the UNSC and the ASP.[508] There were changes in the Court's composition that might have influenced these dynamics. On 15 March 2012, the Presidency of the ICC performed the timely task of reassigning judges to Pre-Trial divisions. This action must be periodically performed mostly due to the end of judges' terms of office and their reassignment to other Chambers. As a result of this process, the situation in Darfur was from then on assigned to the PTC II, composed by Judges Cuno Tarfusser, Hans-Peter Kaul and Ekaterina Trendafilova.[509] The second change took place on 15 June 2012. The then Deputy Prosecutor of the ICC, Fatou Bensouda, began her elected mandate as the Court's Chief Prosecutor.[510]

In the beginning of 2013, the Court was back to the old dynamics. On 15 February 2013, the OTP informed the PTC II of the possibility of a visit from Omar Al Bashir to the Republic of Chad and Libya between 16 and 17 February 2013.[511] The PTC II, under Judges Trendafilova, Kaul and Tarfusser, reinforced the previous rulings of the PTC I that Chad as a State Party was under the obligation to execute the Court's decisions concerning the arrest and surrender of Al Bashir.[512] The Registry confirmed to the Chamber that there had been media reports that indicated that Al Bashir had been in Chadian territory and no measures for complying with

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[507] *Ibid*., para. 54 et seq.
[508] VERDUZCO, Deborah Ruiz, The Relationship between the ICC and the United Nations Security Council, *in*: STAHN, Carsten (Org.), **The law and practice of the International Criminal Court**, Oxford: Oxford University Press, 2015, p. 47.
[509] PRESIDENCY, **Decision on the constitution of Pre-Trial Chambers and on the assignment of the Democratic Republic of the Congo, Darfur, Sudan and Côte d'Ivoire situations**, The Hague: International Criminal Court (ICC), 2012, p. 3–4.
[510] **Gambia's Fatou Bensouda sworn in as ICC prosecutor**, BBC News. Available at: <https://www.bbc.com/news/world-africa-18455498>. Accessed: 17 oct. 2020; **Fatou Bensouda sworn in as ICC prosecutor**, Al Jazeera. Available at: <https://www.aljazeera.com/news/2012/6/15/fatou-bensouda-sworn-in-as-icc-prosecutor>. Accessed: 17 oct. 2020.
[511] OFFICE OF THE PROSECUTOR, **Prosecution notification of possible travel in the case of The Prosecutor v Omar Al Bashir, pursuant to Article 97 of the Rome Statute**, The Hague: International Criminal Court (ICC), 2013, para. 8.
[512] PRE-TRIAL CHAMBER II, **Order Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad and to the State of Libya**, The Hague: International Criminal Court (ICC), 2013, para. 10.

the ICC's arrest warrant had been taken by the government of Chad.[513] In light of such events, the PTC II requested explanations from the authorities of Chad regarding the alleged failure to arrest and surrender (or to consult in case of any problems which might have impeded to do so) Al Bashir to the Court.[514] By the deadline established by the Chamber, the Republic of Chad had not submitted any response.[515]

Another notification regarding a visit of the Sudanese President to the Republic of Chad was submitted by the OTP a month later. The Prosecution highlighted that said visit was to take place on 18 March 2013.[516] However, Al Bashir's visit in the previous month was still under scrutiny. The Registry reported to have received, on 20 March 2013, the observations from the Republic of Chad on the visit of Al Bashir on February 2013.[517] The government of Chad justified once again its non-compliance based on the common position adopted by the AU regarding the immunities recognized by sitting Heads of State, which had just been reaffirmed in its Assembly of Heads of State and Government held in January 2013. The Chadian authorities further stated that their position had already been presented by its delegation before the ASP in its 2011 meeting and was reiterated in the 2012 Session of the ASP.[518] Deciding on the matter, the PTC II affirmed that the government of the Republic of Chad was "engaging in a consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate in the arrest and surrender of Omar Al-Bashir, but also the

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[513] REGISTRAR, **Report of the Registry on the execution of the "Order Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad and to the State of Libya"**, The Hague: International Criminal Court (ICC), 2013, p. 6.
[514] PRE-TRIAL CHAMBER II, **Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad**, The Hague: International Criminal Court (ICC), 2013, p. 6.
[515] REGISTRAR, **Report of the Registry on the execution of the "Decision Requesting Observations on Omar Al-Bashir's Visit to the Republic of Chad"**, The Hague: International Criminal Court (ICC), 2013, para. 3 et seq. PRE-TRIAL CHAMBER II, **Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir**, The Hague: International Criminal Court (ICC), 2013, para. 13.
[516] OFFICE OF THE PROSECUTOR, **Prosecution notification of possible travel in the case of The Prosecutor v Omar Al Bashir pursuant to Article 97 of the Rome Statute**, The Hague: International Criminal Court (ICC), 2013, para. 11.
[517] REGISTRAR, **Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir's visit to the Republic of Chad**, The Hague: International Criminal Court (ICC), 2013, p. 3–4.
[518] REGISTRAR, **Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir's visit to the Republic of Chad, Annex 1**, The Hague: International Criminal Court (ICC), 2013, p. 3–4.

Security Council Resolution 1593(2005)."[519] The PTC II reasoned that ICC Member States must comply with the arrest warrants even in cases triggered by a UNSC referral, such as the situation in Darfur, otherwise no referral would achieve its ultimate goal and become futile.[520] Due to the lack of mechanisms to deal properly with such situation, the Chamber then referred the matter to the UNSC and the ASP.[521] On 10 May 2013, the OTP reported once again that Al Bashir was travelling to Chadian territory.[522]

Al Bashir travelled once again to a State Party, this time to Nigeria on 15 July 2013.[523] On the same say, the Chamber requested Nigeria to immediately arrest and surrender Al Bashir to the ICC.[524] The Nigerian authorities responded that Al Bashir's visit was not because of an invitation from the Government of Nigeria, but because of a special Summit of the AU on HIV/AIDS. It was further informed that Al Bashir's stay in Nigeria was marked by a sudden departure due to his acknowledgment of a discussion between the relevant Nigerian governmental agencies "considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations."[525] The Chamber accepted the explanation provided by the Nigerian authorities and, due to its discretionary power granted by article 87(7) of the Statute, decided that the situation did not warranted a referral to the UNSC and the ASP.[526]

In 2014, Al Bashir was still travelling to ICC States Parties. The OTP notified and later confirmed to the PTC II of Al Bashir attendance of a Common Market for Eastern and Southern Africa summit in the Democratic Republic of the Congo

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[519] PRE-TRIAL CHAMBER II, **Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir**, para. 21.
[520] *Ibid*., para. 22.
[521] *Ibid*., p. 11.
[522] OFFICE OF THE PROSECUTOR, **Prosecution Notification of Possible Travel in the Case of The Prosecutor v Omar Al Bashir, pursuant to Article 97 of the Rome Statute**, The Hague: International Criminal Court (ICC), 2013, para. 7.
[523] OFFICE OF THE PROSECUTOR, **Prosecution's notification of travel in the case of The Prosecutor v Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2013, para. 1.
[524] PRE-TRIAL CHAMBER II, **Decision Regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria**, The Hague: International Criminal Court (ICC), 2013, para. 7.
[525] REGISTRAR, **Report of the Registry on the "Decision regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria", Annex 4**, The Hague: International Criminal Court (ICC), 2013, p. 4.
[526] PRE-TRIAL CHAMBER II, **Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court**, The Hague: International Criminal Court (ICC), 2013, para. 13.

(DRC), on 26 and 27 February 2014.[527] The Chamber issued a request to the DRC asking for compliance with the Court's warrants of arrest.[528] The authorities of the DRC, though, disregarded the warnings from the Chamber which emphasized that, as a Member State, it had a duty to arrest and surrender Al Bashir to the ICC.[529] As a result of its non-compliance with the Court's decision, the PTC II invited the competent authorities of the DRC to submit observations with regard with their failure to arrest and surrender Al Bashir to the ICC or in case of any problems to consult with the Court.[530] In its response to the PTC II, the DRC authorities affirmed that the enforcement of the decision "was obstructed by two major obstacles, namely: - time constraints; and - a series of legal constraints."[531] The time constraints referred to the short "time lapse between President Omar Al-Bashir's arrival on DRC territory in the evening of 25 February 2014, receipt of the Court's decision on 26 February 2014 and his departure in the morning of 27 February 2014 prior to the end of the summit."[532] According to the authorities, this situation placed the DRC "in a delicate and unmanageable situation given the sensitive context of making a decision within such a short lapse of time."[533] As to the legal constraints, they recognized that, pursuant to articles 87 and 89 of the Rome Statute, the DRC had the obligation to arrest Al Bashir. However, according to the DRC authorities, articles 87 and 89 must be read in conjunction with article 98(1) of the Statute. Considering that the DRC is a member of the AU, which had decided in its 2013 Extraordinary Session that "no serving AU Head of State or Government […] shall

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[527] OFFICE OF THE PROSECUTOR, **Prosecution's Notification of Possible Travel in the Case of The Prosecutor v Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2014, para. 1; OFFICE OF THE PROSECUTOR, **Addendum to the Prosecution's notification of possible travel in the Case of The Prosecutor v Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2014, para. 2.

[528] PRE-TRIAL CHAMBER II, **Decision regarding Omar Al-Bashir's visit to the Democratic Republic of the Congo**, The Hague: International Criminal Court (ICC), 2014, p. 5.

[529] REGISTRAR, **Report of the Registry on the "Decision regarding Omar Al-Bashir's visit to the Democratic Republic of the Congo"**, The Hague: International Criminal Court (ICC), 2014, p. 4.

[530] PRE-TRIAL CHAMBER II, **Decision requesting observations on Omar Al-Bashir's visit to the Democratic Republic of the Congo**, The Hague: International Criminal Court (ICC), 2014, p. 6.

[531] REGISTRAR, **Transmission to Pre-Trial Chamber II of the observations submitted by the Democratic Republic of Congo pursuant to the "Decision requesting observations on Omar Al-Bashir's visit to the Democratic Republic of Congo" dated 3 March 2014, Annex 2**, The Hague: International Criminal Court (ICC), 2014, p. 5.

[532] *Ibid*., p. 6.

[533] *Ibid*.

be required to appear before any international court or tribunal during their term of office,"[534] the DRC authorities answered the PTC II request by saying that there were two conflicting international law obligations and, therefore, they would invoke article 98(1) "to respect the immunities that come with the position of Head of State."[535] The response further noted that

> [S]everal recent international practices caused the DRC to wonder about the decision it should take, since Mr Omar Al-Bashir has already visited States parties to the ICC such as Chad, Djibouti, Kenya and Nigeria. We wondered whether these countries were guided by the principle of immunity since he was a sitting Head of State. However, for want of time, we did not analyse the matter further in order to reach a decision.[536]

On 9 April 2014, the PTC II, which was still composed by Judges Trendafilova, Kaul and Tarfusser, issued a decision on the DRC's non-compliance with the arrest warrants issued for Al Bashir.[537] This time, the Chamber changed the line of reasoning to justify why ICC States Parties, in this case the DRC, were obliged to abide by the Court's request to arrest and surrender Al Bashir. This decision no longer used the logic of grounding the irrelevance of immunities on customary international law. Instead, it focused on a new reasoning rooted in the UNSC Resolution 1593 (2005). The inexistence of Al Bashir's immunity before the ICC was no longer a question of a newly established practice but a result of its waiver from the UNSC when it decided that Sudan "*shall* cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution."[538] According to the PTC II, taking into consideration that "immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities," meaning that with such phrasing the UNSC Resolution "implicitly

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[534] ASSEMBLY OF THE AFRICAN UNION, **Decision on Africa's Relationship with the International Criminal Court (ICC)**, Addis Ababa: African Union, 2013, p. 2.
[535] REGISTRAR, **Transmission to Pre-Trial Chamber II of the observations submitted by the Democratic Republic of Congo pursuant to the "Decision requesting observations on Omar Al-Bashir's visit to the Democratic Republic of Congo" dated 3 March 2014, Annex 2**, p. 7.
[536] *Ibid*., p. 8.
[537] PRE-TRIAL CHAMBER II, **Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court**, The Hague: International Criminal Court (ICC), 2014.
[538] UNITED NATIONS SECURITY COUNCIL, **Resolution 1593 (2005)**, para. 2.

waived the immunities" conferred to Al Bashir under international law.[539] Furthermore, the PTC II posed that this implicit waiver, by force of article 103 of the UN Charter,[540] would trump any obligations they might have had under international law, including those by virtue of its membership to the AU, consequently rendering their eliciting of 98(1) unsuitable for this situation.[541] In light of the DRC's non-compliance with the Court's decision, the Chamber called upon the UNSC and the ASP to take the necessary measures.[542]

The Prosecution once again informed the PTC II that Al Bashir was travelling to Chadian territory, this time for a forum of tribes living in the border areas which would take place from 25 to 29 March 2014.[543] As usual, the Chamber responded by requesting that the Republic of Chad arrest and surrender Al Bashir to the Court.[544] The Registry informed later to the Chamber that the visit had taken place but Al Bashir was not arrested. It also notified the Chamber that the Chadian authorities had acknowledged receipt of the Court's requests but did not provide any reply.[545]

Upon being notified of a potential visit of Al Bashir to the Republic of South Africa, on 28 May 2015, the Court reminded the South African authorities of their obligation as a ICC Member State of its obligation to arrest and surrender Al Bashir to the Court and, should there be any difficulty to implement the request, to consult with the Court.[546] On 12 June 2015, upon request of the South African authorities,

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[539] PRE-TRIAL CHAMBER II, **Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court**, para. 29.
[540] Article 103 of the UN Charter reads:
In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.
UN Charter, San Francisco: United Nations, 1945, art. 103.
[541] PRE-TRIAL CHAMBER II, **Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court**, para. 31.
[542] *Ibid*., para. 32.
[543] OFFICE OF THE PROSECUTOR, **Prosecution's urgent notification of travel of Suspect Omar Hassan Ahmad Al–Bashir in the case of The Prosecutor v Omar Al Bashir , pursuant to article 97 of the Rome Statute**, The Hague: International Criminal Court (ICC), 2014, para. 1.
[544] PRE-TRIAL CHAMBER II, **Decision Regarding Omar Al-Bashir's Potential Visit to the Republic of Chad**, The Hague: International Criminal Court (ICC), 2014, p. 6.
[545] REGISTRAR, **Report of the Registry on the "Decision regarding Omar Al-Bashir's potential visit to the Republic of Chad"**, The Hague: International Criminal Court (ICC), 2014, p. 4.
[546] PRE-TRIAL CHAMBER II, **Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2015, para. 3.

the Presiding Judge of the PTC II, Judge Cuno Tarfusser, in the presence of representatives of the Registry and the OTP, met with the South African delegation for consultations pursuant to article 97 of the Statute regarding Al Bashir's imminent trip to South Africa, which should be noted was the first time such procedure happened in the ICC.[547] In their request, the South African authorities claimed that, besides not being responsible for the invitations for the summit, per "the Agreement between the Government of the Republic of South Africa and the African Union on the hosting of the Summit, representatives of Member States of the African Union are accorded immunity from personal arrest or detention."[548] The South African authorities claimed that in light of this situation it would be the case for the application of article 98(2) of the Statute. The purpose of Article 98(2), according to the South African authorities, is precisely to address the dilemma of conflicting obligations. Their response further affirmed that South Africa is first and foremost a Member State of the AU and the "narrow interpretation of the cooperation obligations" of the AU Member States that are also States Parties to the Statute adopted by the Chambers of the Court, places these States "at risk of a finding of non-cooperation when hosting African Union Summits."[549] And this situation, in turn, "would severely undermine the work of the African Union, also in its primary goal of ensuring peace and security in Africa, which coincides with South Africa's own foreign policy objectives."[550] The situation of conflicting obligations, in the South African position, would require a flexible interpretation of South Africa's obligations under the Rome Statute, since it would allow a balancing

[547] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 1**, The Hague: International Criminal Court (ICC), 2015, p. 2; OFFICE OF THE PROSECUTOR, **Prosecution's Urgent Response to the Registry's submission titled "Urgent request from the Authorities of South Africa" (ICC-02/05-01/09-239-Conf)**, The Hague: International Criminal Court (ICC), 2015, para. 1; PRE-TRIAL CHAMBER II, **Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir**, para. 4; REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015**, The Hague: International Criminal Court (ICC), 2015, p. 4.

[548] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 1**, p. 2.

[549] *Ibid*., p. 3.

[550] *Ibid*.

of these obligations in a way to stabilise the relationship between the ICC and the AU.[551]

During the article 97 consultations at the Hague, the South African Ambassador to the Netherlands, Bruce Koloane, reiterated all the arguments from the written request when presenting South Africa's motives for requesting the consultation.[552] In response, the OTP claimed that all the issues raised by the South African authorities had been "completely litigated and disposed of before in very clear, precise public decisions which cover each and every argument" made by the South African delegation.[553] These matters had all been clarified, according to the Prosecution, in the 2014 DRC Decision.[554] Judge Tarfusser also defended that there was no ambiguity in the law and argued that in either route of interpretation, the fact that there is a pending warrant of arrest for Omar Al Bashir does not change. In the words of the Judge:

> But what can a flexible interpretation be? Or if we go one line or we go the other, there is no possibility, there is an arrest warrant pending. There is a clear, very clear decision, which is not, certainly the last, but there is another one before this on the same line taken by the Chambers of this Court interpreting what now is considered a conflicting -- conflicting obligations which we consider are not conflicting but very clear. So I think that here it is the State who has to take responsibility for himself and just to decide to go one or the other way and then accepting the consequences of one or the other outcome of this way. I don't think we can here, now and here start sort of an exchange or trying to find a third solution, because there is no third solution. There is only a decision to be taken by South Africa if President Al Bashir comes to South Africa.
> […]
> So I think I'm afraid there is not very much space to deal with. I mean, we have a clear position and this clear position is stated in judicial decisions. No such thing like trying to compromise is at this stage possible. There is this pending arrest warrant. It has to be implemented by a member State. If the member State doesn't implement the warrant of arrest, there are consequences like was in the decisions referred to by

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[551] *Ibid*.
[552] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 2**, The Hague: International Criminal Court (ICC), 2015, p. 4–6; PRE-TRIAL CHAMBER II, **Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir**, para. 4.
[553] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 2**, p. 7.
[554] *Ibid*.

> the OTP. That's it. I mean, I don't think there is much space to make any other consideration.[555]

The Single Judge cleared that there is no room for negotiation. Once South Africa chooses its route, the Court will "follow what is the law or what is the law which was agreed upon by all States, South African as well."[556] The Prosecution's legal advisor, then, intervened affirming that there was no alternative other than following the existing case law.[557] Before such manifestations, the South African Ambassador expressed feeling blindsided by the occasion for he believed the hearing he was participating was a request for consultations which would take place in a later stage with authorities from his delegation that would be more capable of presenting South Africa's positions and arguments on the matter. [558] The Ambassador additionally included that the issue of conflicting obligations was going to reappear eventually and that unless they found institutional mechanisms to deal with these issues through a process by experts on both parties, they would not be "doing justice to the issue."[559] Judge Tarfusser responded that the Ambassador was right and that was a request for consultation, but added that

> [A]s it was urgent, […] I thought we shorten the whole thing and make out of your request of consultation a consultation. This is what -- how I saw it, because we have to come to a -- we didn't know what you, what your government will bring to us in terms of material to be consulted upon. So this was -- we just didn't go the long way, but the very short way to have not only a request, a request for consultation and then some consultation, but we shortened the whole thing and did it this way.[560]

The Judge went on to affirm that the problem with holding further consultations is that there is no conflict of obligations, because the Court has already decided what legally prevails and also having consultations does not implicate in suspensive effects for South Africa's obligation to comply with the arrest warrants.[561] However, by the end of the article 97 consultations, the Single Judge indicated that, though the Chambers' position towards the conflicting

[555] *Ibid*., p. 8–9.
[556] *Ibid*., p. 10.
[557] *Ibid*.
[558] *Ibid*., p. 11 and 16.
[559] *Ibid*., p. 12.
[560] *Ibid*., p. 12–13.
[561] *Ibid*., p. 17 and 19.

obligations is one at the moment, it does not mean that it will not change. In the words of Judge Tarfusser

> […] [O]f course you can raise the same questions again in another, in another similar case, and maybe all three Judges, another Chamber could decide in a slightly different way. I cannot imagine completely opposite, but in a slightly different way. But before that there must be a procedure ongoing. It's not us here who can decide against a decision taken by - against the initial decision. I could not say to you in any case: Don't worry, don't arrest Al Bashir because tomorrow I'm going to my colleagues and I will withdraw, we will withdraw the arrest warrant. I mean, these are facts.
> I mean, there is an arrest warrant. The Court on the basis of the arrest warrant itself and of decision taken thinks that the State Parties has to comply with it by arresting. Of course, maybe we in a future case of litigation, if South Africa or another State gets into litigation on this issue, it could be that there is a change in the jurisprudence. I don't see very, very optimistically, but as it stays today 12 June, this is the state of art, and this state, there is no novelty in here to what is stated in the decision in the DRC case which is very similar to this one.[562]

Even though it was adamant about there being a clear position from the Chambers regarding the conflicting obligations, the OTP filed on the following day a request for an order clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir.[563] Judge Tarfusser observed that it was unnecessary to further clarify that the South African authorities were under the obligation to arrest and surrender Al Bashir to the ICC. And justified the obligation once again using the 2014 DRC Decision, in which the PTC II took the 'implicit waiver' of immunities route. In this line of reasoning, there would be no bar since the cooperation foreseen in paragraph 2 of Resolution 1593(2005) had the goal of eliminating any impediment to the proceedings before the Court, including the lifting of immunities. As the DRC decision also stated, according to Judge Tarfusser, the argument that the AU decision of non-cooperation would also pose an additional conflicting obligation would also not stand since the Security Council had lifted the immunities of Al Bashir through Resolution 1593.[564]

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[562] *Ibid*., p. 21.
[563] OFFICE OF THE PROSECUTOR, **Prosecution's Urgent Request for an Order clarifying whether Article 97 Consultations with South Africa have Concluded and that South Africa is Under an Obligation to Immediately Arrest and Surrender Omar Al Bashir**, The Hague: International Criminal Court (ICC), 2015, para. 18.
[564] PRE-TRIAL CHAMBER II, **Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir**, paras. 5 et seq.

Whilst Omar Al Bashir was in South African territory, civil society organizations mobilized and, on 14 June 2015, the Southern Africa Litigation Centre (SALC) brought before the South African High Court of Justice in Pretoria an urgent application to have Al Bashir be arrested and transferred to the ICC. The High Court issued an interim order to prevent Al Bashir from leaving the country until the issue could be adjudicated by the High Court.[565] On 15 June 2015, while the South African authorities held public hearings to decide whether or not they had to execute the arrest warrants against Omar Al Bashir, in maybe one of the most publicized moments of Al Bashir's immunity saga, news outlets aired a live image of Al Bashir leaving South African territory.[566] This situation has been the closest that the Court has been to arresting the former Head of State of Sudan.[567]

In light of the situation of having another ICC Member State receiving Al Bashir in its territory and failing to arrest and surrender him to the Court, the PTC II, at this time, under Judges Cuno Tarfusser, Marc Perrin de Brichambaut and Chang-ho Chung, considering that this situation warranted the opening of proceedings pursuant to article 87(7) of the Statute, requested that the South African authorities submit their views on the events surrounding Al Bashir's attendance of the AU summit in its territory, focusing particularly of their failure to arrest and surrender him to the ICC.[568] The Chamber later allowed for the submission to be

[565] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015**, para. 7; MUDUKUTI, Angela, **The state of play in the al-Bashir saga**, Mail & Guardian Thought Leader. Available at: <https://thoughtleader.co.za/southernafricalitigationcentre/2015/09/21/the-state-of-play-in-the-al-bashir-saga/>. Accessed: 12 oct. 2020; **As government backtracks on Bashir, civil society takes action**, ISS Africa. Available at: <https://issafrica.org/about-us/press-releases/as-government-backtracks-on-bashir-civil-society-takes-action>. Accessed: 19 oct. 2020.

[566] ONISHI, Norimitsu, **Omar al-Bashir, Leaving South Africa, Eludes Arrest Again**, The New York Times. Available at: <https://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html>. Accessed: 11 jul. 2019; MUDUKUTI, **The state of play in the al-Bashir saga**.

[567] The matters discussed under South African courts will not be addressed here, since they revolve around the issue of whether South Africa violated its legal obligations under South African domestic law.

[568] PRE-TRIAL CHAMBER II, **Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute**, The Hague: International Criminal Court (ICC), 2015, p. 7.

made when judicial proceedings on the matter before the courts of South African were finalized.[569]

In light of the Registry notification, on 30 November 2016, that the South African domestic proceedings had been concluded,[570] the PTC II scheduled a hearing for 7 April 2017 to discuss:

> (i) whether South Africa failed to comply with its obligations under the Statute by not arresting and surrendering Omar Al Bashir to the Court while he was on South Africa's territory despite having received a request by the Court under articles 87 and 89 of the Statute for the arrest and surrender of Omar Al Bashir; and, if so,
> (ii) whether circumstances are such that a formal finding of non-compliance by South Africa in this respect and referral of the matter to the Assembly of States Parties to the Rome Statute and/or the Security Council of the United Nations within the meaning of article 87(7) of the Statute are warranted.[571]

This move by the Chamber meant that, prior to making a decision on the matter, the State of South Africa would be heard. In that sense, the Chamber requested written and oral submissions on the subject from South Africa for the article 87(7) hearing.[572]

In their submission, the South African authorities reiterated that they were not satisfied with the way the process of consultation with the Court in accordance with article 97 of the Statute. The argument was that there were three errors in the Court's approach to the process: the treatment of the request for consultation as the process of consultation in itself; the carrying out of the process as a diplomatic and political, or quasi-judicial one, without any applicable procedures; and the absence of principles of natural justice and due process.[573]

The South African authorities in their submission claimed to have expected the Court to have procedures in place considering the emphasis the PTCs have put

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[569] PRE-TRIAL CHAMBER II, **Decision on the request of the Republic of South Africa for an extension of the time limit for submitting their views for the purposes of proceedings under article 87(7) of the Rome Statute**, The Hague: International Criminal Court (ICC), 2015, p. 6.
[570] PRE-TRIAL CHAMBER II, **Decision convening a public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa**, The Hague: International Criminal Court (ICC), 2016, para. 10.
[571] *Ibid*., para. 15.
[572] PRE-TRIAL CHAMBER II, **ICC-02/05-01/09-T-2-ENG ET WT 07-04-2017 1-92 SZ PT**, The Hague: International Criminal Court (ICC), 2017, p. 7.
[573] SOUTH AFRICA, **Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute**, The Hague: International Criminal Court (ICC), 2017, para. 29.

in article 97 consultations.[574] In the 2014 DRC decision, for example, the PTC II "lamented the fact that the DRC did not consult with the Court as requested and that Article 87 proceedings may have been avoided [should consultations had been held]."[575] In previous decisions regarding the non-compliance of the warrants of arrest against Al Bashir, the "various Chambers have recognised that States Parties have the obligation to consult with the Court when faced with an issue of competing international law obligations as provided for in Article 98."[576] The Chambers also have previously indicated that "delicate and unmanageable" situations related to article 98(1) warranted consultations with the Court.[577]

Moving to the questions that were to be addressed at the future hearing, the South Africa submission stressed that even though the PTC II claimed that the issues it raised had already been decided upon, meaning that there was no conflicting obligations, and, as a consequence, there was no need for clarification regarding the obligation to comply with the arrest warrant, "the circumstances within which South Africa found itself and the applicable law were not as clear cut" as the Chamber seemed to believe.[578] For the South African authorities, this could be easily exemplified by the different reasonings provided so far by the Chambers as to why there was no immunity for Omar Al Bashir.[579] They hold that South Africa did not fail to comply with its obligation under the Rome Statute by not arresting and surrendering Al Bashir. This position is justified by the argument that article 27(2) of the Rome Statute holds that immunities "shall not bar the Court from exercising its jurisdiction over such person," comprising proceedings before the Court.[580] The customary international law norm of immunity, in turn, operates between States. And there is nothing in UNSC Resolution 1593 (2005) that warrants the interpretation that immunities were implicitly waived. Since Sudan also did not expressly waived Al Bashir's immunities, the Court is precluded from requesting cooperation and South Africa is obliged to respect the immunities of Heads of State in terms of customary international law and its treaty obligations,

[574] *Ibid*., paras. 32 et seq.
[575] *Ibid*., para. 32.
[576] *Ibid*., para. 35.
[577] *Ibid*., para. 35.
[578] *Ibid*., para. 51.
[579] *Ibid*., para. 51.
[580] **Rome Statute of the International Criminal Court**, art. 27(2).

both situations covered by article 98 of the Statute.[581] In the submission by South Africa this argument is further substantiated by the ICJ Arrest Warrant Case, which they add reaches a different conclusion from the PTC I in the Malawi decision.[582] In said case, the ICJ concluded that it was "'unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability…' and that such a finding extends to immunities before national courts."[583] It was also pointed that, by the time the Arrest Warrant decision was issued, the Rome Statute had already entered into force and nothing in this decision suggests that the Statute affected the state of the law in regard to immunities of sitting Heads of State before national courts.[584] Therefore, South Africa *is* under the customary international law obligation to respect Al Bashir's immunities.[585]

Those arguments covered why South Africa's customary international law obligations precludes it from arresting and surrendering Al Bashir to the ICC. As to treaty obligations that also do so, the South African authorities are referring to agreements signed under the auspices of the AU. AU Member States do not require invitations for AU summits. Part of hosting an AU summit involves signing the Host Agreement, which includes the immunities and privileges to Heads of State from African States contained in the General Convention on the Privileges and Immunities of the Organization of African Unity.[586]

The final argument in the South African submission was regarding the 'implicit waiver' of immunities in Resolution 1593 (2005), line of reasoning used in the 2014 DRC decision. Their point was that it cannot be argued that there is such clarity on the matter which is reflected on how it is consistently discussed during consideration of the bi-annual Report of the OTP at the UNSC. According to the South African authorities, "little clarity has been provided […] if the UNSC intended to remove immunity, it could have clarified the situation by adopting

[581] SOUTH AFRICA, **Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute**, para. 52.
[582] *Ibid*., paras. 61-62.
[583] *Ibid*., para. 59.
[584] *Ibid*., para. 60.
[585] *Ibid*., para. 71.
[586] *Ibid*., para. 75 et seq.

another resolution."[587] It further added that the ICC does not have the authority to interpret UNSC Resolutions, quoting a Permanent Court of Justice advisory opinion in which it found that the right of giving an authoritative interpretation of a legal rule belongs solely to the body who has power to modify or supress it.[588]

With these arguments, South Africa requested that the PTC II:

> 102.1 To ensure that in all future cases due process and the principles of natural justice are following in respect of Article 97 consultations;
> 102.2 That South Africa did not act contrary to its obligations under Articles 87 and 89 of the Rome Statute; and
> 102.3 That this matter not to be referred to either the Assembly of States Parties or the UNSC;
> 103. South Africa further requests the Chamber to obtain an authoritative interpretation of UNSC Resolution 1593 from the UNSC, including calling upon the UNSC to request the ICJ for an advisory opinion in terms of Article 96(1) of the UN Charter.[589]

While South Africa defended that it was not acting against a contracted obligation under the Rome Statute, the Prosecution's submission argued the contrary and requested that the matter be referred to the ASP and UNSC.[590] According to the OTP, the Court did everything it could to enable South Africa to comply with the decisions, from holding consultations and considering its submissions to setting out "the applicable law and guiding jurisprudence with precision" thereby removing "any ambiguity with respect to South Africa's obligations under the Statute."[591] For the Prosecution, the matter put before the PTC II in the hearing is primarily procedural and should not focus on the substantive law relating to the alleged immunity of Al Bashir "in the light of purportedly conflicting treaty obligations, since these matters have already been adjudicated by the Chambers."[592] The correct application of the law could only be considered in the context of an appeal of those rulings. The analysis of the hearings should reside on

[587] *Ibid*., para. 90.
[588] *Ibid*., para. 93.
[589] *Ibid*., paras. 102 and 103.
[590] OFFICE OF THE PROSECUTOR, **Prosecution's Submissions in advance of the public hearing for the purposes of a determination under article 87(7) of the Statute with respect to the Republic of South Africa in the case of The Prosecutor v Omar Hassan Ahmad AL BASHIR**, The Hague: International Criminal Court (ICC), 2017, paras. 1-2.
[591] *Ibid*., para. 4.
[592] *Ibid*., para. 52.

South Africa's cooperation duties under the Statute,[593] since once a Chamber has ruled on the interpretation and application of a particular provision, the State Party has to accept the decision on the matter.[594] In light of this, for the OTP, South Africa's failure to comply with the Court's arrest warrants substantiates a formal finding of non-compliance by the Chamber – for the non-cooperation prevents the Court to exercise its powers and functions under the Statute and "the entire judicial process and purpose of the Court is thereby frustrated"[595] – and a referral to the ASP and UNSC – which would promote future cooperation with the Court's decisions.[596]

In the 7 April 2017 hearing held by the PTC II, with representatives from the OTP and South Africa, both parties were given the chance to respond to the arguments made in the written submissions. The positions remained on the core arguments of the submissions.[597]

After analysing both written and oral statements, the PTC II, on 6 July 2017, under Judges Tarfusser, Brichambaut and Chung, issued a decision in which it rejected South Africa's argument that it had acted lawfully by respecting Al Bashir's immunities over its ICC obligations and reaffirmed that South Africa had a duty to comply with the Court's request for the arrest and surrender.[598] The PTC II's majority reasoning posited that it was UNSC Resolution 1593 (2005) that removed Al Bashir's immunities once it rendered Sudan in a situation analogous to a State Party to the Rome Statute,[599] whilst affirming to be "unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court."[600] As a consequence, the immunities that would be held by Al Bashir, derived from his position of sitting Head of State, under customary international

[593] *Ibid*., para. 53.
[594] *Ibid*., para. 59.
[595] *Ibid*., para. 70.
[596] *Ibid*., paras. 104 et seq.
[597] PRE-TRIAL CHAMBER II, **ICC-02/05-01/09-T-2-ENG ET WT 07-04-2017 1-92 SZ PT**.
[598] PRE-TRIAL CHAMBER II, **Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir**, The Hague: International Criminal Court (ICC), 2017, para. 123.
[599] *Ibid*., para. 87.
[600] *Ibid*., para. 68.

law would not be applicable before any State Party to the Rome Statute, and these States would still have the obligation to arrest and surrender him to the ICC.[601] Even though the PTC II decided that South Africa had failed its obligation under the Rome Statute to arrest and surrender Al Bashir to the Court, chose not to refer the situation to the ASP and the UNSC so that they could take the appropriate measures.[602]

However, this was the majority's ruling. In his minority opinion, Judge Marc Perrin de Brichambaut took a completely different route from the previous positions of the PTCs in explaining why Al Bashir would not be entitled to immunity. Judge Brichambaut disagreed with the majority's decision by reasoning that in the "current state of the law," it is not possible to determine by solely relying on the legal effects of UN Security Council Resolution 1593 that it is either article 27(2) or article 98(1) of the Statute that is applicable between the Court, South Africa and Sudan in the matter of the compliance with the arrest warrants against Al Bashir.[603] In this regard, Judge Brichambaut argued that neither hypothesis, the one that considered Sudan in a situation analogous to a state party to the Rome Statute or the one that defended that Al Bashir's immunity was implicitly removed, can be firmly concluded. Moreover, the same is considered towards the argument that posits that it is already customary international law the notion that the involvement of an international court would affect the application of personal immunities.[604] The Judge inaugurates a line of reasoning stemming from the ICC, the combination of

> [A] literal and contextual interpretation of article IV of the Genocide Convention, in conjunction with an assessment of the object and purpose of this treaty, [which can] lead to the conclusion that Omar Al-Bashir does not enjoy personal immunity, having been 'charged' with genocide within the meaning of article VI of the Genocide Convention.[605]

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[601] *Ibid*.
[602] INTERNATIONAL CRIMINAL COURT, **Al-Bashir case: ICC Pre-Trial Chamber II decides not to refer South Africa's non-cooperation to the ASP or the UNSC**, International Criminal Court. Available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1320>. Accessed: 20 nov. 2019.
[603] PRE-TRIAL CHAMBER II, **Minority Opinion of Judge Marc Perrin de Brichambaut**, The Hague: International Criminal Court (ICC), 2017, para. 58.
[604] *Ibid*., para. 99.
[605] *Ibid*., para. 100.

While the Court discussed South Africa's obligation to comply with the warrants of arrest issued for Omar Al Bashir, the Registry notified the PTC II of Al Bashir's visit to Djibouti on 8 May 2016 for attending the inauguration of President Ismail Omer Gaili.[606] The Chamber requested the authorities of the Republic of Djubouti to submit their observations regarding their failure to arrest and surrender Al Bashir while in their territory.[607] On 8 June 2016, Djibouti presented the following justifications:

> (i) it lacks the national procedures required under Part 9 of the Statute for the arrest and surrender of suspects to the Court, including Omar Al-Bashir; (ii) article 98(1) of the Statute precludes the arrest and surrender to the Court of Omar Al-Bashir since he is entitled to immunity as a serving Head of State; (iii) Djibouti, as a member of the African Union, must respect the decision of the African Union directing its member states, in accordance with article 98 of the Statute, not to cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court; and (iv) within the context of the Intergovernmental Authority on Development (IGAD), Djibouti is part of the peace process in the Republic of the Sudan and the Republic of South Sudan.[608]

Responding to the first issue raised by the authorities of Djjubouti, the PTC II Judges, Judge Tarfusser, Judge Brichambaut and Judge Chung, held that the absence of relevant national legislation cannot serve as an impediment for non-compliance with the Court's requests for arrest and surrender.[609] On the topic of article 98(1) of the Statute, the Chamber returned to its 2014 DRC decision, in which it justified the inexistence of Al Bashir's immunities due to the 'implicit waiver' in Resolution 1593 (2005). This argument also makes, according to the Judges, point number three moot, since in this case no decision from the AU would prevail over the UNSC.[610] As to the last point, the PTC II argued that "State Parties to the Statute must pursue any legitimate, or even desirable, political objectives within the boundaries of their legal obligations vis-à-vis the Court."[611] Believing

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606 PRE-TRIAL CHAMBER II, **Decision requesting the Republic of Djibouti to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court**, The Hague: International Criminal Court (ICC), 2016, para. 4.
607 *Ibid*., p. 4.
608 PRE-TRIAL CHAMBER II, **Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute**, The Hague: International Criminal Court (ICC), 2016, para. 6.
609 *Ibid*., para. 10.
610 *Ibid*., paras. 11 et seq.
611 *Ibid*., para. 14.

that the non-compliance by Djibouti had not been justified, the Chamber decided to refer the matter to the ASP and the UNSC.[612]

The Registry also informed the Chamber of Al Bashir's travel to the Republic of Uganda, another Party to the Rome Statute, on 11 May 2016 in order to attend the inauguration ceremony of President Yoweri Museveni.[613] Per usual, the PTC II requested the Uganda authorities to submit their observations with respect to their failure to execute the arrest warrants for Al Bashir.[614] The Ugandan submission argued that the invitation extended to Omar Al Bashir, as sitting Head of State of Sudan, sought the maintenance of good relations, peace and security with the countries in the region and keeping a relationship with Al Bashir is "both important and unavoidable."[615] They also placed the AU decision as an impediment for complying with the Court's warrants of arrest, situation which would be encompassed by article 98 of the Statute.[616] The PTC II reiterated the arguments made in the 2014 DRC decision, also brought in the Djibouti decision, that the AU decision does not prevail over Resolution 1593 (2005).[617] The Chamber decided the matter of Uganda's non-compliance by referring the matter to the ASP and the UNSC to take the appropriate measures.[618]

During 2017 and 2018, the Court's Registry continued to report official visits by Al Bashir to African States Parties to the Rome Statute.[619] However, despite in

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[612] *Ibid*., p. 10.
[613] REGISTRAR, **Report of the Registry on information received regarding Omar Al Bashir's travel to the Republic of Uganda on 12 May 2016**, The Hague: International Criminal Court (ICC), 2016, para. 7.
[614] PRE-TRIAL CHAMBER II, **Decision requesting the Republic of Uganda to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court**, The Hague: International Criminal Court (ICC), 2016, p. 5.
[615] PRE-TRIAL CHAMBER II, **Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute**, The Hague: International Criminal Court (ICC), 2016, para. 7.
[616] *Ibid*., para. 7.
[617] *Ibid*., paras. 11 et seq.
[618] *Ibid*., p. 9.
[619] REGISTRAR, **Report of the Registrar on Action Taken in Respect of Information Received Relating to Travels by Mr Omar Al-Bashir to States not Party to the Rome Statute between 7 April 2017 and 6 March 2018**, The Hague: International Criminal Court (ICC), 2018; REGISTRAR, **Report of the Registry on Information Received regarding Omar Al Bashir's Travels to The Republic of Djibouti on 5 July 2018 and to The Republic of Uganda on 7 July 2018**, The Hague: International Criminal Court (ICC), 2018.

two cases where the Chamber requested observations regarding the failure to arrest and surrender Al Bashir to the Court, no further actions were taken.[620]

In Table 1, the situations of non-compliances and their details are compiled as to create a better sense of the dynamics between African States and the PTCs.

Table 1 – African States non-compliances with ICC arrest warrants for Omar Al Bashir

State	Year	PTC's response after confirmation of visit	State's response	Chamber's legal reasoning
Chad	2010	Referral to ASP and UNSC	-	-
Kenya			-	-
Djibouti	2011		-	-
Chad		Chamber invited State to submit observations	AU common position	CIL exception - ICJ Arrest Warrant Decision
Malawi			AU common position + Al Bashir's assured by public international law since Sudan is not a party to the ICC	
Chad	2013		AU common position + stressed that their position had been presented by its delegation before the ASP in its 2011 and 2012 meetings	-
Chad				
Chad		No follow-up (proceedings in relation to another visit already in place)	-	-
Nigeria		No follow-up after Nigeria indicated it was deliberating over the course of	-	-

[620] PRE-TRIAL CHAMBER II, **Decision inviting the Republic of Uganda to provide submissions concerning its failure to arrest Omar Al-Bashir and surrender him to the Court**, The Hague: International Criminal Court (ICC), 2017; PRE-TRIAL CHAMBER II, **Decision inviting the Republic of Chad to provide submissions concerning its failure to arrest Omar Al-Bashir and surrender him to the Court**, The Hague: International Criminal Court (ICC), 2017.

		action when Al Bashir departed		
DRC	2014	Chamber invited State to submit observations	Art. 98(1) of the Statute + AU common position	UNSC Resolution implicitly waived Al Bashir's immunities under international law
Chad			No reply	-
South Africa	2015	Chamber invited State to submit observations + scheduled hearings	First, immunities were necessary to maintain regional balance Then, moved to defence that South Africa is under the customary international law obligation to respect Al Bashir's immunities in addition to the first line of argumentation	UNSC Resolution rendered Sudan in a situation analogous to a State Party to the Rome Statute + Judge Brichambaut minority opinion: 1948 Genocide Convention
Djibouti	2016		Art. 98(1) of the Statute + AU common position	Same as 2014 DRC Decision
Uganda		-	-	

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2.
Interpreting international law: navigating through the contingent, indeterminate, and conflictual character of legal norms

The non-compliance dynamics explored in Interlude No. 2 were the main driver of the African contestation against the Al Bashir Case in the ICC. Considering that the Court lacks an enforcement mechanism, it relies on States Parties' cooperation to be able to perform its functions. In the absence of alternatives, all that was left for the Chambers to do before the uncooperative stance adopted by some African States was to reinforce its position and insist on requests for cooperation. In that sense, the direct engagement between Chambers and African States took place during the non-cooperation dynamics. These events, therefore, provide the window for the investigation of the African contestation in the Al Bashir Case and the Court's response. Through the analysis of the events examined in Interlude No. 2 it is possible to see a gradual change in both the PTCs and (some) States demeanour. The non-compliance dynamics can be divided into three moments. The first is marked by the reaction of the PTC, upon confirmation of the visit and lack of compliance, of promptly referring the matter to the UNSC and ASP to take the appropriate measures. During this time, which took place in the first years after the issuance of the arrest warrants, the Chamber merely requested that these States arrest and surrender Al Bashir to the Court point that they were under the obligation to do so as States Parties. The second moment is characterised by a move from the Chamber to start giving the non-compliant States the opportunity of submitting observations in relation to the matter. As the Chamber opened the space for these States to engage with the Court, their non-compliances gained another facet, since they began to be associated with the motivations these States were presenting before the Court. In light of the positions that mobilised Rome Statute dispositions and AU decisions, the PTCs also changed its tactics. Instead of sticking with the constant reaffirmation that there these States were under the obligation to comply with the Court's requests followed by a referral to the UNSC and ASP to take the appropriate measures, the Chamber began using its non-compliance decisions to present its legal reasoning for defending its position. The

third phase would come with the South African non-compliance. The Chamber maintained the pattern of requesting cooperation, inviting the State to submit observations upon confirmation of non-compliance, and issuing a decision explaining the reason for the irrelevance of Al Bashir's immunity for the proceedings before the ICC. The difference is reflected in the State's engagement which demonstrated a much more invested posture in trying to find a common ground with the Court.

As to bring together the main elements that builds this thesis framework and to make sense of the events examined in Interlude No. 2, this chapter explores the characteristics of international legal practice that condition the process of interpretation. The chapter is divided into two main sections. The first part is dedicated to the three main features of international legal dynamics: the contingency, indeterminacy and cultural formalism. The section first introduces the fluidity in the making of legality and the constant mobilisation of the legal norm is already participating in its modification. The two following topics are dedicated to the two aspects that condition this process of change, which are the indeterminacy and the culture of formalism. While the first might seem to give upon first glance a character of unpredictability to the practice of international law, the attribution of the epithet indeterminate means to describe the instability of legal discourses between seeking either the concreteness or the normativity of the law. Considering that arguments never stray from one of the two positions these are conditioners of the process of legal change. The final element of international legal dynamics is international law's culture of formalism. The expression reflects how international became "playable" for aiming to be at the same time filled with contextuality and general enough to preserve international legal standards' values.[621] Once the elements of the practice of international law are introduced, the second part of the chapter is dedicated to discussing the contestation of international law, presenting the way legal interpretation is inserted in such phenomenon. The section is first dedicated to arguing that contestation is a common feature of international legal practice, for contestation is the main driver of change in legality. This is followed by a comprehensive look into the literature on contestation of international law,

[621] HOFFMANN, Florian, An Epilogue on an Epilogue, **German Law Journal**, v. 7, n. 12, p. 1095–1102, 2006, p. 1097.

exploring the categorizations that the scholarship has created on these processes in terms of patterns and motivations in legal contestation, and the demarcation of where this thesis and its empirical study part ways with the existing research on practices of international legal contestation.

2.1.
Structuring international legal practice: contingency, indeterminacy and the culture of formalism

Throughout the 2010s, the non-compliances gave the PTCs the chance to provide an answer as to the reason it believed that Omar Al Bashir's immunities were not an impediment for ICC States Parties to arrest and surrender him to the Court. The South African non-compliance decision marked the third differed reasoning given by the PTCs on the matter. If we include Judge Brichambaut's separate opinion, it becomes four different justifications. The first line of argumentation was in the 2011 Malawi decision, in which the Chamber ruled that Al Bashir was not entitled to immunity because of an exception under customary international law for situations that involved the prosecution of international crimes by an international court, decision that was sustained on a controversial interpretation made by the SCSL of the ICJ Arrest Warrant Judgment. The second avenue for arguing the irrelevance of Al Bashir's immunities in relation to the Court's proceedings was tied to paragraph 2 of UNSC Resolution 1593 (2005). The Chamber in the 2014 DRC non-compliance decision argued that paragraph 2 implicitly waived any Sudanese official immunities through its power to take binding decisions under Chapter VII of the UN Charter. The South African non-compliance decision had a different way of justifying the reason why immunities were not to bar States Parties from arresting and surrendering Omar Al Bashir which was that the UNSC Resolution 1593 (2005) placed Sudan in a position analogous to a State Party to the Rome Statute. Doing so, Sudan was bound by the Statute's article 27(2), which provides that immunities should not bar the Court from exercising its jurisdiction. The fourth reasoning was not a decision *per se* but was expressed by Judge Brichambaut in his separate opinion. The judge argued

that, although he believed that Al Bashir was not entitled to immunities and States Parties were under the obligation to arrest and surrender him to the Court, the instrument that removed his immunities were not an exception under customary international law or UNSC Resolution 1593 (2005) but the 1948 Genocide Convention to which Sudan is a party.

In legal disputes like this, the inconsistency amongst the reasonings given by the PTCs to explain the irrelevance of Al Bashir's immunities before the proceedings in the ICC is taken as an anomaly. Such events are taken by international legal practitioners and academics as shaped by conditions considered "as more political, environmental, economic, or innate than legal."[622] In other words, all the problems that might arise out of the ordinary practice of international law is explained by elements that are exogenous to their work. In this rationale there is the assumption that, if these exogenous aspects were tackled, the law would be devoid of any inconsistencies for the system of international law is coherent.[623] However, this thesis follows Koskenniemi in asserting that even if these external "indeterminacies were cleared, the international legal system as a whole would still remain indeterminate."[624]

This section works through the notion that international law is itself characterised for its indeterminacy for it will always be uncapable for providing a completely coherent set of justifications. It has to do with the fact that legal language itself drinks from a contradictory fountain of thought. The aim of the section is to make a more in-depth exploration of the dynamics of the practice of international legal argumentation. The situation examined in Interlude No. 2 represents a common dynamic of the everyday life of international legal operation: a set of interpretations regarding the application of legal norm being put forward by the actors involved in a particular case before an international legal institution. Most of these non-compliances were justified by the existence of another prevailing obligation that created an impediment for these African States to follow through with their duties in relation to the ICC. Meanwhile the Chambers provided a different reasoning in the matter. The attempt to reverse certain legal interpretation

[622] JOHNS, **Non-Legality in International Law: Unruly law**, p. 11.
[623] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 62.
[624] *Ibid*.

consist of the most common way through which actors practice contestation of international law.

2.1.1.
The contingent character of international law: the dynamics of changing legality

The dispute installed after the African States non-compliance with the ICC warrant of arrest for Omar Al Bashir – especially the different ways the Chambers have justified the irrelevance of Al Bashir's immunity in relation to the proceedings before the ICC – emphasizes the contingent character of international legal argumentation. This thesis departs from the understanding that international law is under constant change. Actors evoke a legal reasoning as to justify their international legal practice or perform an action that stands for a certain position regarding their interpretation of international law. Within these practices the notion of legality is constantly raised. The idea of legality became something like a currency that commands some force in world affairs. This means that "political actions are frequently performed and contested with reference to varied legal justifications."[625] The result is that it became even more difficult to uphold the frontier between law and politics, meaning that its borders turned even more blurred. Making such allegation denotes a denial that international law can ever be insulated from social and political processes, because law and politics are in a relationship of identity.[626]

According to Rajkovic, Aalberts and Gammeltoft-Hansen, the role of legality in international politics, even though it has not resulted in "the end of strategic struggles in global affairs," has brought about a substantial change for the actors since they now work with (and within) these mechanisms, using or contesting them, in order to deal with the issues that arise in international affairs.[627] Accounting for these dynamics means looking into both the field where legality is being evoked – not only in the courtrooms, but in different spheres of international politics – and

[625] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 2.
[626] KOSKENNIEMI, **The Politics of International Law**, p. v.
[627] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 2.

also the way actors engage with legal rules throughout different sites and moments. As a result, the idea of legality as is traditionally understood – specially by positivist scholars and practitioners of the legal field – is not enough to grasp the constant movement of international law. From this understanding, the notion of legality in this thesis does not consist of the mere finding if something or someone is in conformity with doctrinal international law. The idea of legality at work agrees with the one pointed out by Rajkovic, Aalberts and Gammeltoft-Hansen, which is found in the nexus between law and politics. It is established through a process of social construction implied by the very understanding of what is legality itself. In other words, the understanding of legality participates in the process of its own constitution.[628]

Adopting the stance that legality is socially constructed means extrapolating the normative frontiers that are established by the traditional take on legality. It problematises something taken as given by the traditional legal scholarship and has been very little problematised to date. This research assumes that the operators of international law make and remake law when working with it on a daily basis. This means that they are routinely creating or reinforcing certain understandings of what they see as legal or what lies outside the realm of law.[629] Sometimes this politics of boundary (re)drawing take place through specialized vocabulary such as accountability/impunity, human/sovereign rights etc. International law, therefore, is something that is in constant movement and is being continually made and remade since it represents what its operators say and do in actions of international governance.[630] "[L]aw is what lawyers think about it and how they go about using it in their work."[631] Thus, the establishment of legal categories such as of law or legality point to these normative practices of the operators who, throughout their enactment of what they claim to fit within such category, also participate in the formation process of what is going to be considered as law or legality. In other words, "international law is what legal professionals say and do in the course of

[628] *Ibid*., p. 3.
[629] JOHNS, **Non-Legality in International Law: Unruly law**, p. 1.
[630] *Ibid*.
[631] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 569.

governing."[632] This process also includes the mobilization by international legal practitioners of the frontier between law and politics.

Legality can be informed by different kinds and readings of norms being applied to several contexts of political contestation. It will be "the product of overlapping practices that order our social world through creating symbols, mobilising concepts and giving legal meanings to entities and actions." [633] Mobilising the Al Bashir Case, this thesis works through the dispute between African States and ICC officials not with the goal of finding the definition of legality that arises out of the process of the African contestation. Rather, this thesis explores the dispute over legality in the Al Bashir Case with the aim of understanding the way through which the ICC officials' perception of these practices affects the capacity of these States of influencing the authoritative interpretation of legality. This means looking into the very understandings of these actors about the legal phenomenon, that is, the way their practices of boundary-drawing regarding legality impacted on the dispute for an authoritative interpretation of legality.

The notion that international law is constantly under change has been a central aspect of the Constructivist research on norms. Researchers under the Constructivist label went against the tide within the majority of International Relations theories and avoided treating international law as a mere epiphenomenon.[634] According to Wiener, once constructivists manage to highlight the role of norms and their impact in States' behaviour, their research agenda became respected and, as a consequence, enlarged with explanations of different processes.[635] Studies on norm diffusion developed under the traditional stream of constructivism sought to examine how norms that are created within a given society spread to actors in other societies.[636] The research agenda on the diffusion of norms

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[632] JOHNS, **Non-Legality in International Law: Unruly law**, p. 9.
[633] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 11.
[634] DOS REIS, Filipe; KESSLER, Oliver, Constructivism and the Politics of International Law, *in*: ORFORD, Anne; HOFFMANN, Florian (Eds.), **The Oxford Handbook of the Theory of International Law**, Oxford: Oxford University Press, 2016, p. 344.
[635] WIENER, Antje, **A theory of contestation**, Heidelberg: Springer, 2014, p. 22.
[636] HOFFMANN, Matthew J., **Norms and Social Constructivism in International Relations**, Oxford; New York: Oxford University Press, 2017; see also RISSE, Thomas; ROPP, Stephen C.; SIKKINK, Kathryn (Eds.), **The Power of Human Rights: International Norms and Domestic Change**, Cambridge: Cambridge University Press, 1999; RISSE-KAPPEN, Thomas, Ideas do not

tended mostly to revolve around the spread of human rights norms to southern countries,[637] but discussions on statehood[638] and European politics[639] were also highly frequent. Also present but without the attention of the aforementioned themes was the debate about how in this process, called socialization, affects both sides involved and how powerful states behave when in the receiving end of this process.[640] Not only those traditional constructivists' studies presented different empirical objects, but also varied in terms stage of the process to focus. Some of the literature paid attention to the emergence of norms, trying to understand how norms come to attain this status;[641] others look to the processes of internalization of norms by national societies;[642] there are also studies that focus on compliance to these norms.[643]

Within this literature, it is worth highlighting Finnemore and Sikkink's article *International Norm Dynamics and Political Change,* where they explain the process through which norms change.[644] The argument is that norms have a "patterned life cycle," which consists of a three-stage process: there is, first, a period of *emergence*, where this norm needs to reach a "tipping point," which means being adopted by a large number of States;[645] then, norms go through a process of *expansion and growth*;[646] and, lastly, there's a movement of

float freely: transnational coalitions, domestic structures, and the end of the cold war, **International Organization**, v. 48, n. 2, p. 185–214, 1994.

[637] RISSE, Thomas; SIKKINK, Kathryn, The socialization of international human rights norms into domestic practices: introduction, *in*: RISSE, Thomas; ROPP, Stephen C.; SIKKINK, Kathryn (Eds.), **The Power of Human Rights**, Cambridge; New York: Cambridge University Press, 1999, p. 1–38; RISSE; ROPP; SIKKINK (Eds.), **The Power of Human Rights: International Norms and Domestic Change**.

[638] See FINNEMORE, Martha, **National interests in international society**, Ithaca: Cornell University Press, 1996.

[639] See CHECKEL, Jeffrey T., Why Comply? Social Learning and European Identity Change, **International Organization**, v. 55, n. 3, p. 553–588, 2001.

[640] HOFFMANN, **Norms and Social Constructivism in International Relations**.

[641] FINNEMORE, **National interests in international society**; FINNEMORE, Martha; SIKKINK, Kathryn, International Norm Dynamics and Political Change, **International Organization**, v. 52, n. 4, p. 887–917, 1998; KLOTZ, Audie, **Norms in International Relations: The Struggle against Apartheid**, Ithaca: Cornell University Press, 2018.

[642] RISSE; ROPP; SIKKINK (Eds.), **The Power of Human Rights: International Norms and Domestic Change**.

[643] RISSE, Thomas; ROPP, Stephen C.; SIKKINK, Kathryn (Eds.), **The Persistent Power of Human Rights: From Commitment to Compliance**, Cambridge: Cambridge University Press, 2013.

[644] FINNEMORE; SIKKINK, International Norm Dynamics and Political Change, p. 895.

[645] *Ibid*.

[646] SIKKINK, Kathryn, **The justice cascade: how human rights prosecutions are changing world politics**, New York: W. W. Norton & Co, 2011.

internalization by actors. Each phase has its own mechanisms and has the participation of different actors. These stages have been explored both in its entirety and separately by several authors through different conceptualizations in order to explain the importance of norms and how they evolve between stages.[647]

In the stage of norm emergence, the main element is the capacity of persuasion by norm entrepreneurs. These entrepreneurs have the task of making the case for new norms. Once this stage is through, it is up to norm leaders to convince other States that this new norm is worth following, a process that when fulfilled successfully results in socialization.[648] There can be different reasons that motivates the process of socialization, but Finnemore and Sikkink emphasize that generally for norm cascades to happen three of them are generally combined: "pressure for conformity, desire to enhance international legitimation, and the desire of state leaders to enhance their self-esteem."[649] When this stage achieves completion norms are internalized, which marks the end of the debate around whether this norm is suitable. It is important to stress that norms can fail to reach the end of this process.[650]

Some new conceptions were built upon this framework in order to develop further the process of norm diffusion. This scholarship production was labelled the "second wave" of norm diffusion.[651] One formulation that has gained a fair deal of attention is Amitav Acharya's norm localization.[652] With this terminology the author is trying to think of a way through which the model of norm diffusion can work better. And this should happen through a dynamic of congruence-building, which is localization. Localization is built from two other concepts of the norm diffusion process: framing and grafting. The former stands for the action by the norm entrepreneur of highlighting a not obvious connection between the norm that

[647] FINNEMORE; SIKKINK, International Norm Dynamics and Political Change, p. 895.
[648] Socialization stands for the process through which "international norms are internalized and implemented domestically." RISSE; ROPP; SIKKINK (Eds.), **The Power of Human Rights: International Norms and Domestic Change**, p. 5.
[649] FINNEMORE; SIKKINK, International Norm Dynamics and Political Change, p. 895.
[650] *Ibid*., p. 895–896.
[651] KENKEL, Kai Michael; DE ROSA, Felippe, Localization and Subsidiarity in Brazil's Engagement with the Responsibility to Protect, **Global Responsibility to Protect**, v. 7, n. 3–4, p. 325–349, 2015, p. 328.
[652] ACHARYA, Amitav, How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism, **International Organization**, v. 58, n. 02, 2004.

is being proposed and already existing norms.[653] The latter is another tactic engaged by norm entrepreneurs which seeks to make a connection of the new norm with one that had already existed. But norm localization goes further than those techniques. It tries to make sense of the new norm in a way that it looks "congruent with a pre-existing local normative order."[654]

Another important reading of change in international law by a more critical approach to constructivism is the work that focuses on how important concepts like sovereignty have a changing nature.[655] Thomas J. Biersteker and Cynthia Weber define sovereignty as a concept that is constituted by the social environment.[656] This means that claims of sovereignty by states are also a fundamental factor for the constitution of themselves as sovereign entities. Since it is created intersubjectively, the concept of sovereignty is in a constant process of change. Biersteker and Weber take their argument further by highlighting how the very effort to conceptualize sovereignty can be an unproductive initiative, because, by seeking a definition for the term, it gets frozen into the present and, thus, have all its specificities historical and cultural, which allowed it to arrive at its current definition, denied.[657] Reus-Smit, in turn, proposes a closer historical look into how this *grundnorm* of international society get constructed based on the influence exerted by human rights.[658] Instead of following the common sense, Reus-Smit raises the argument that not necessarily the notions of sovereignty and human rights are in mutually contradictory relationship.[659] Sovereignty can represent the basis for the realization of human rights. The tension between them does not arise because of the status of each regime that makes them separate and antagonistic, but

[653] FINNEMORE; SIKKINK, International Norm Dynamics and Political Change, p. 908; see also KLOTZ, **Norms in International Relations: The Struggle against Apartheid**.
[654] ACHARYA, How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism, p. 243–244.
[655] BIERSTEKER, Thomas J.; WEBER, Cynthia, The social construction of state sovereignty, *in*: BIERSTEKER, Thomas J.; WEBER, Cynthia (Eds.), **State Sovereignty as Social Construct**, Cambridge: Cambridge University Press, 1996, p. 1–21; REUS-SMIT, Christian, Human rights and the social construction of sovereignty, **Review of International Studies**, v. 27, n. 4, p. 519–538, 2001.
[656] BIERSTEKER; WEBER, The social construction of state sovereignty, p. 1–2.
[657] *Ibid*., p. 2–3.
[658] REUS-SMIT, Human rights and the social construction of sovereignty.
[659] *Ibid*., p. 520.

from modern discourse "that seeks to justify territorial particularism on the grounds of ethical universalism."[660]

A recurrent criticism regarding the traditional Constructivist approach to international law is regarding the model of norm diffusion and its "stability assumption,"[661] which can be seen from the moment a norm is taken as established. Even though it has been conceptualized as an "essentially conflictive dynamic," the way the model is conceived from the stage of diffusion onwards only foresee some "setbacks" into the process of socialization, a vision which downplays the occurrence of major disputes.[662] Some authors suggest that this has to do with social constructivism's search for a place amongst International Relations theories, which was built based on the role of ideational factors in affecting State behaviour, which happens through norms. Facing that situation, any position that would weaken the role of norms in the discipline, i.e. their contestation, meant for them also weakening the role attributed by them for ideational factors.[663] The linearity of this approach has been heavily criticized.[664] There have been more recent efforts trying to overcome this issue of linearity by considering the possibility of erosion into the norm life cycle.[665] However, "those few studies on norm erosion rather mirror the stability bias of early norm research […] missing why revisionists might be more or less successful"[666] and they still are very much stuck into the structuralist view on norms which has a very simple understanding of it through deducing validity from the inexistence of contestation. Naeem Inayatullah and David Blaney question this peacefulness and voluntariness in the depiction of the process through which

[660] *Ibid*.
[661] WIENER, **A theory of contestation**, p. 23.
[662] KENKEL; DE ROSA, Localization and Subsidiarity in Brazil's Engagement with the Responsibility to Protect, p. 328.
[663] WIENER, A Theory of Contestation—A Concise Summary of Its Argument and Concepts.
[664] EPSTEIN, Charlotte, Stop Telling Us How to Behave: Socialization or Infantilization?, **International Studies Perspectives**, v. 13, n. 2, p. 135–145, 2012; see DEITELHOFF, Nicole; ZIMMERMANN, Lisbeth, From the Heart of Darkness: Critical Reading and Genuine Listening in Constructivist Norm Research, **World Political Science Review**, v. 10, n. 1, 2014; DEITELHOFF, Nicole; ZIMMERMANN, Lisbeth, Things We Lost in the Fire: How Different Types of Contestation Affect the Robustness of International Norms, **International Studies Review**, 2018.
[665] This line of argument is quite recent and still growing. The two main forms of erosion being considered are through challenging and non-compliance.
[666] DEITELHOFF; ZIMMERMANN, Things We Lost in the Fire, p. 55.

norms are created and diffused in the norms' diffusion literature.[667] "There is no hint of coercion in this language – no epistemic, structural, or physical violence."[668] In this sense, engagements from critical theorists have tried to point out the flaws of the interpretation given by the norms' Constructivism approach. They have tried to highlight that even though norms go through the life cycle presented by Finnemore and Sikkink,[669] they remain dynamic and open to contestation, which can result into a change of meaning and legitimacy of these norms as they go through the cycle.[670]

Another important dimension highlighted by critical engagements is the neglect of power relations and the exclusions that are enacted and enabled through these "normative matrices."[671] According to Charlotte Epstein, this strand of critique was already being developed in the 1990s by both Constructivists and Poststructuralists that were looking to deconstruct and denaturalize the entrenched unequal power relations in international law.[672] For her, when norms' Constructivism adopts its level of analysis in practices, it does not deal with the order of knowledge that is sustaining these practices. Working only in the level of norms is not sufficient, one has to look at the ordering practices alongside orders of knowledge, because these are the ones that point to the ways of knowledge-power that are immersed in the norms of constructivism.[673] "There is little reason to isolate norms from other types of knowledge and turn them into independent elements,"[674] there should be a focus on the broader spectrum, trying to identify what lies behind those specific processes that are being studied, which means asking "larger and more general questions."[675] That way we can take into consideration the collective

[667] INAYATULLAH, Naeem; BLANEY, David L., Constructivism and the normative: dangerous liaisons?, *in*: EPSTEIN, Charlotte (Org.), **Against International Relations Norms: Postcolonial Perspectives**, Abingdon; New York: Routledge, 2017, p. 28.
[668] *Ibid*.
[669] FINNEMORE; SIKKINK, International Norm Dynamics and Political Change.
[670] KROOK, Mona Lena; TRUE, Jacqui, Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality, **European Journal of International Relations**, v. 18, n. 1, p. 103–127, 2010, p. 106.
[671] EPSTEIN, Charlotte, The postcolonial perspective: why we need to decolonize norms, *in*: EPSTEIN, Charlotte (Org.), **Against International Relations Norms: Postcolonial Perspectives**, Abingdon; New York: Routledge, 2017, p. 3.
[672] *Ibid*.
[673] *Ibid*., p. 3–4.
[674] BUEGER, Practices, Norms, and the Theory of Contestation, p. 127.
[675] *Ibid*., p. 130.

patterns of meaning in norms and overcome the problem of the isolation of norms from other elements that need to be taken into consideration.

Also worth considering are the critiques that look beyond the norms and institutions and raise similar issues regarding the more fundamental dimensions of the international legal system. There is a relatively large body of literature that seeks to emphasize how these norms, beyond their immediate functions, play in the international society the role of a tool for the legitimation of many uneven relations. Authors have engaged with this approach in different ways. In International Relations theory, the work of Edward Keene speaks particularly to the main argument of this thesis. Keene argued that international institutions nowadays have an ambiguous character, at the same time trying to correct certain behaviours deemed inappropriate for some and assuring the sovereign rights of others.[676] For Keene, in the nineteenth century, international society had two patterns of order, or two distinct normative complexes, each one destined for an audience: the one perpetuated only amongst European States, that promoted self-determination among the modern political communities by emphasizing notions such as tolerance and equality between political systems and cultures; and the one intended for people who were beyond the European space, where the Westphalian structure of sovereign equality had no application, which had the sole purpose of promoting civilization.[677] The changes that came with the end of World War II turned concepts such as civilization, that were previously used to separate the Europeans from the rest of the world, no longer suitable. In that moment, these ideas were creating a strife between Europeans themselves due to ideological divisions. However, Keene argues, the notion of a civilization standard was not abandoned, it was instead reinscribed in the new order that emerged after 1945. The two patterns were merged into one normative system suffused with ambiguity.[678] The result is a superficially unified global pattern of political and legal order for the whole humankind that is actually pointing in two directions at once, simultaneously promoting both toleration and civilization. The ensuing inconsistency is clearly apparent in areas

[676] KEENE, Edward, **Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics**, Cambridge; New York: Cambridge University Press, 2002.
[677] *Ibid*., p. 109.
[678] *Ibid*., p. 122.

such as the tension between state sovereignty and human rights.[679] This means having one order that at the same time defends the inviolability of statehood and seeks to civilize those that do not follow the universal standards of ethics and justice, i.e. human rights. Meanwhile, in the International Law scholarship, many authors working within the TWAIL movement have developed similar arguments. This group, which, according to Richard Falk, has as its objective to rethink international law from the Global South, claim that international law lives a false pretence of universalism, "as if there is no hegemony or hierarchy in international life that needs to be taken into account when establishing the norms of substance and procedure that comprise international law."[680] B. S. Chimni takes this argument further by stating that any analysis of international institutions must locate them "within the larger global social order, in particular the historical and political contexts in which they originate, evolve and function," which means being able to see the social forces that are shaping institutions in a certain way.[681]

The more critical literature studying norms within International Relations theories address the way actors, norms and international legal system are constituting each other through their interaction, which provides a better understanding about the contingent character of international law for every time this interaction takes place actors, law and system are (re)constituting each other. This means that the social and material realities have a significant impact on each other, having a relation of co-constitution.[682] By way of this formulation, nothing can be previously determined. Being co-constituted by the international social and material realities makes these rules be affected by and perpetuate a certain unequal distribution of resources within this environment. Consequently, these rules have the capacity of creating certain conditions of rule, which means that they are also in a relation of co-constitution with power.[683] This means that the order that is created by rules, being co-created by social relations, even though it has some

[679] *Ibid*. emphasis in original.
[680] FALK, Foreword, p. 1943.
[681] CHIMNI, B. S., International Institutions Today: An Imperial Global State in the Making, **European Journal of International Law**, v. 15, n. 1, p. 1–37, 2004, p. 3.
[682] ONUF, Nicholas G., **Making sense, making worlds: constructivism in social theory and international relations**, London; New York: Routledge, 2013, p. 36, 40.
[683] HERZ, Monica; YAMATO, Roberto Vilchez, As Transformações das Regras Internacionais sobre Violência na Ordem Mundial Contemporânea, **Dados**, v. 61, n. 1, p. 3–45, 2018, p. 8.

instances which reaffirm the ideals of fairness or equality, is more fundamentally characterised by hierarchy (and/or hegemony, and/or even heteronomy).[684] The term order only implies a certain balance, but actually legitimates privileges.[685]

However, this scholarship only helps this thesis endeavour to a certain point. These approaches lack a more in-depth gaze into the formal dynamics of the international legal system. As argued, international legal argumentative practices are fluid, but this movement has some sense of structure since its operation is constrained by previously established norms and principles. These previously established norms and principles, in turn, are also under constant change, still serving, however, as a frame of reference for they are fixed to a determined time and space.

The practice of international law involves a certain formalism that Norms Constructivism's more open approach is not particularly focused on. International norms can be legal and non-legal in definition. The difference between them being "that legal rules have reached a certain level of formalisation and institutionalisation."[686] Most of the International Relations literature on norms treat legal rules and non-legal rules as essentially the same, since, as Onuf argues, it is possible to apply to legal rules the same divisions established for social rules.[687] It means that the categories of activities that have a social meaning – in other words, all social orderings – are rule-governed, which means that they are already "subject to formalisation and that all rule-related practices are subject to institutionalisation."[688] Once they reach the status of legal rules, which means they are enacted and partially enforced, they become law.[689] The frontier between legal and non-legal rules is crossed once rules are performatively sufficient, reaching a point where they "*do* say what they do."[690] Considering that the object of analysis of this thesis revolves around the definitions established throughout an international

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[684] ONUF, Nicholas, **World of Our Making: Rules and Rule in Social Theory and International Relations**, New York: Routledge, 2012, p. 208–213.
[685] SINCLAIR, Adriana, **International relations theory and international law: a critical approach**, Cambridge; New York: Cambridge University Press, 2010, p. 11.
[686] *Ibid*., p. 16.
[687] ONUF, Nicholas, Do Rules Say What They Do? From Ordinary Language to International Law, **Harvard International Law Journal**, v. 26, n. 2, p. 385–410, 1985, p. 404.
[688] *Ibid*., p. 405.
[689] *Ibid*.; SINCLAIR, **International relations theory and international law: a critical approach**, p. 17.
[690] SINCLAIR, **International relations theory and international law: a critical approach**, p. 17.

court case, the separation between and the crossing of the frontier of what is understood as legal and non-legal rules is paramount. As to comprehend the dynamics of the more structured dimension of the international legal system, the International Law literature comes to the rescue, making this endeavour a truly interdisciplinary one. In this sense, the International Law and International Relations scholarship complement one another for the first contributes to a better understanding of the dynamics of the more formal aspects of international law while the latter facilitates the navigation through both more fundamental aspects and exogenous factors manifesting upon the practice of international law. Law and non-law

> [A]re irredeemably interdependent. International legal argument interminably oscillates between these poles and this structural indeterminacy means that a given legal question cannot be answered by reference to *only* international law. If a given argument is to prevail it has to be infused with, or motored by, political, moral, social (etc.) contexts.[691]

Therefore, while the contingent character of international law means that it is always open for new interpretations that might or might not prevail, it should be considered that in international legal practice "nothing is ever that random."[692] International legal change takes place within a setting that involves systematic constraints. This means to say that to affirm the contingent character of international law is not the same as to assume that any argumentative structure might engender change. Susan Marks has named this false sense of openness of international law "false contingency," meaning that there is very little space for the unpredictable.[693] The following sections precisely explore the characteristics of this structure that constrains international legal change.

[691] SINGH, The Critic(-al Subject), p. 200–201.
[692] KOSKENNIEMI, **The Politics of International Law**, p. 65.
[693] MARKS, S., False Contingency, **Current Legal Problems**, v. 62, n. 1, p. 1–21, 2009, p. 2.

2.1.2.
Between concreteness and normativity: indeterminacy meets contextuality

The contingent character of international law is constrained by its very ambition to place itself against subjective international politics. Therefore, the first dimension of the structure that conditions how change takes place within the international legal system is the modern liberal legal agenda that turns the legal practice into a search for objectivism, which unfolds into to contradictory patterns of argumentation, one that reinforces law's concreteness and other that emphasizes its normativity. International legal argumentation becomes a broken record. However, instead of repeating the same statement, it goes back and forth into the two tendencies.

The line of reasoning of some African States explored in the preceding Interlude brought out two provisions of the Rome Statute, articles 27 and 98. As the relationship between the dispositions is not addressed in the Statute itself, the interpretation as to how these two articles interplay has raised many different opinions. The texts of the referred provisions read:

> **Article 27**
> **Irrelevance of official capacity**
> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.[694]

> **Article 98**
> **Cooperation with respect to waiver of immunity and consent to surrender**
> 1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity
> 2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender

[694] **Rome Statute of the International Criminal Court**.

> a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.[695]

While the PTCs decisions placed all the emphasis on article 27, most of the non-compliant African States stressed article 98 as an outlet for their situation. This is one example as to how the international legal discourse is marked by contradictions. The inevitability of the incoherence of the international argument has to do with the contradictory assumptions that it incorporates to guarantee its objectivity introduced in Chapter 1. On the one hand, there is the belief that law is normative and consequently capable of constraining States' behaviour. Law, on the other hand, has also to be understood as concrete, which means being linked to what States practice and accept. It is easy to see how these two poles are represented in the African quandary with the ICC. The moral values of the international legal system are represented in article 27, which removes any sovereign prerogative barring the exercise of justice, whilst the will of States is assured under article 98, for a non-contracting State cannot have its immunities removed if it has not consented. However, both cannot be assured at the same time: "if it is subjective acceptance which counts, then we lose the law's normativity;" but "[i]f we need the State's acceptance, then we cannot apply the law on a non-accepting State."[696]

Through these two assumptions legal discourse becomes open to conflicts since there is an incapacity to determine a preference for one of them. Both will always be seen as political and subjective. The choice for normativity means living under the pretence that a natural morality exists, while privileging concreteness emphasizes law's incapacity to constrain States behaviour. So that international law escapes from politics, it must have both qualities. The attempt of conciliating concreteness and normativity can either result in incoherence and self-contradiction or in the silent preference for either one, both solutions that are deeply unsatisfactory.[697] Consequently, international law develops in an *ad hoc* fashion, "emphasizing the contextuality of each solution" and "undermining thus its own emphasis on the general and impartial character of its system."[698]

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[695] *Ibid*.
[696] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 64.
[697] *Ibid*., p. 64–65.
[698] *Ibid*., p. 65.

This feature of international legal discourse makes international law indeterminate. Regulation of future conflicts becomes a difficulty for it is not possible to know which of the contradictory premises will be preferred as actors' inclination towards one or the other pattern of argumentation changes across time and space. The unsettledness between these preferences would necessarily mean future dissatisfaction regarding the scope of international regulation. International law, consequently, is (re)created in a way that avoids the ensuing displeasure towards the way regulation was built. The creation of a concrete body of regulations that would keep politics at bay is relegated for a normatively open and weaker international law.[699] The logic behind such strategy is that, besides the fact that "everyone would wish there to be a binding definition to constrain future adversaries, nobody would wish to be hampered in their own action by such definition when action appears necessary."[700] As a result, international law becomes a "framework for deferring substantive resolution."[701]

Thus, indeterminacy is not about a faulty operation of international law that dances between two contradictory discourses. Instead, it portrays the reunion between open international legal standards, the grounds for the creation of said regulations, and other rules and principles that coexist with them. The indeterminacy of international law attaches to it a sense that is "necessary to deviate from a formally unambiguous provision in view of new information or a new circumstance, to sacrifice a smaller good (abstract legality) in view of realizing a larger one."[702] This deformalisation happens once the foundations that made a regulation come to existence trumps the very rule or once rules are balanced amongst one another or in relation to an exception. Such process only reinforces how much the practice of international law is an activity of decision-making.[703]

> In situations of uncertainty (hard cases) we are thrown back into having to argue both what the law's content is and why we consider it binding on the State. To avoid utopianism, we must establish the law's content so that it corresponds to concrete State practice, will and interest. But to avoid apologism, we must argue that it binds the State regardless of its behaviour, will or interest. Neither concreteness nor

[699] *Ibid*., p. 590–592.
[700] *Ibid*., p. 593.
[701] KOSKENNIEMI, **The Politics of International Law**, p. 28.
[702] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 595.
[703] *Ibid*., p. 595–596.

> normativity can be consistently preferred. To seem coherent, individual doctrines, arguments or positions will have to appear as if they laid stress on one or the other. But they will then remain open to challenge by valid legal argument from the opposing perspective. The weakness of international legal argument appears as its incapability to provide a coherent, convincing justification for solving a normative problem. The choice of solution is dependent on an ultimately arbitrary choice to stop the criticisms at one point instead of another.[704]

The result is that neither position can be convincingly justified, for international law at the same time can serve as legitimation for any State practice and cannot provide a convincing narrative to legitimate any practice. International law lacks the capability of providing conclusions or creating convincing justifications to normative problems. Justifications will always privilege either one rationality.[705]

The discussion ensuing the non-compliances by African States examined on Interlude No. 2 has demonstrated precisely that there is a plethora of ways of justifying the preference for either concreteness or normativity. While States have mobilised regional treaties and customary international law, the ICC Judges have evoked the UNSC Resolution, an international treaty, and an exception for the customary international law of Head of State immunity. Any position has a legitimating tool that is liable to challenges.[706] In other words, the legitimating tool is not able to make a wholly legitimate justification.

The indeterminacy of international law makes it so that "it is possible to defend *any* course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards."[707] This is not to say that any legal construction will do. Law after all is a patterned practice, which takes place through the constant demarcation of that which is acceptable and not. Up to this point the international legal argument is indeed determinate. However, it is determined by the liberal doctrine of politics' own contradictions.[708] This structure,

[704] *Ibid*., p. 66–67.
[705] *Ibid*., p. 67–69.
[706] During the Jordan Appeal (see Interlude No. 5), many possibilities for reasoning as to whether ICC States Parties were obliged to arrest and surrender Omar Al Bashir to the ICC were introduced and most of them presented very convincing arguments as to why other lines of argumentation were problematic.
[707] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 591.
[708] *Ibid*., p. 66.

in turn, is not timeless. In this sense, the structure of international legal argument, while governed by a liberal attitude, is determined by the two elements of legal discourse – concreteness and normativity –, but also undetermined as long as both stand in a relation of contradiction with one another. International legal dynamics are about using international law in the relevant contexts. Even if some uses are deemed stable, alternative engagements are always imparting challenges to it in a way that legal meaning is always contestable and in movement.

2.1.3. Practicing international law competently: finding the balance between formalism and the particularities in international legal discourses

The practice of international law, while open ended, is heavily stained by a formal rigour. The second aspect of international legal dynamics that constrains the possibility of change is the need for argumentative practices to follow "the conventions of professional culture and tradition in order to be heard."[709] The competent legal practice is deemed the one that is able to engage with existing rules in a number of ways through the formally determined mechanisms. International law is not like a language, but it is a language. Not in the sense that is a set of words mobilised by practitioners, but what these practitioners make of it throughout the different ways of marshalling it to develop an argument. The practice of international law, in this sense, builds its own field of application as it is (re)worked by the actors using a normative language. These argumentative practices to perform their intended function chooses which aspects of the social dynamics to emphasize while hiding other undesired features. International court's decisions, in that sense, are a matter of justification rather than the creation of a legal solution to a conflict. The judges mobilize the available language through the articulation of a set of rules that justifies the preferred path for answering the matter.[710]

The different decisions proffered by the PTCs' judges in relation to the disputed issue are a very good illustration of this way of understanding the practice

[709] *Ibid*., p. 565.
[710] *Ibid*., p. 568–570.

of international law. In every decision, all the judges were in agreement as to the irrelevance of Al Bashir's immunities in relation to the proceedings before the Court, differing in the matter of why said immunities were not applicable. The legal justifiability followed the formal rite, answering the question in terms of article 27(2) of the Rome Statute, until a certain point. However, just taking the normative route by claiming that per the Statute government officials are not entitled to immunities in situations of perpetration of international crimes and making the case for the application of the referred provision was not enough. The Chamber itself seemed to have noticed it, something we can infer from the change in the non-compliance decisions' dynamics. There was a need for arguing the reason that would make this provision applicable for the case at hand and the judges had to appeal to international law's concreteness as to present the way said norm was grounded on States' practices. The descent from the normative realm to the particular elements brought by the Al Bashir Case displayed the practice of decision-making in relation to the legal justifiability dimension. Judges decided based on the legal route that they perceived as having more force. These reasonings found the States' will in different sites, for some, it lay on UN membership, for others in adhesion to international treaties, and there were those who drew it from a recurring practice. And here competence is paramount, it is reflected in the practitioner's ability to mobilise the field's vocabulary "*in order to generate meaning by doing things in argument*."[711]

This impossible movement of having to bring down general law to meet the particularities of the case under dispute by mobilising the legal justifications in order to ground the actor's preferences still good willingly maintaining the societal shared values was termed by Koskenniemi the "culture of formalism."[712] The expression aims to reflect the "slipperiness" of international legal practice, where "on the one moment you have to really be a formalist, and on the other moment you have to be really culturally embedded in, to be able to deal with something."[713] It

[711] *Ibid*., p. 571.
[712] KOSKENNIEMI, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960**, p. 494–509.
[713] VAN DEN MEERSSCHE, Dimitri, **Interview: Martti Koskenniemi on International Law and the Rise of the Far-Right**, Opinio Juris. Available at: <http://opiniojuris.org/2018/12/10/interview-martti-koskenniemi-on-international-law-and-the-rise-of-the-far-right/>. Accessed: 25 jun. 2020.

amounts to the "balance between extremes," finding an alleged middle-ground in a terrain filled with adversity that is no middle-ground after all.[714] International legal argumentative practices, as portrayed in the previous section, are disputes over the hegemonic interpretation that would come to be seen as the 'universal' position. The middle comes to be wherever the successful argumentation is instead of being a compromise between extreme positions. The practice of interpretation, in that sense, does not operate "on the basis of common understandings and shared beliefs," the consensus instead is coerced as the universal values out of the creation of meaning by the successful argumentative practice.[715] The idea that interpretation is nothing more than a struggle is addressed in the following section.

2.2.
The contestedness of international law: the argumentative practices of interpretation

International legal practice and scholarship have dealt with interpretation as a matter of ascribing meaning to "texts and other statements for the purposes of establishing rights, obligations, and other consequences relevant in a legal context.[716] Such understanding leads to a reading that uncritically relies solely on one type of international legal instrument and one interpretive methodology, respectively: treaties and the 1969 Vienna Convention on the Law of the Treaties (VCLT). The result is that most of the discussion on interpretation of international law has been, as is widely recognised, heavily formalistic.[717] The interpretation of the different sources of international law cannot be reduced to an analysis of VCLT's principles. As the previous section has explored, the argumentative practice of interpreting international law is a much more complex and nuanced

[714] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 597.
[715] *Ibid*.
[716] HERDEGEN, Matthias, Interpretation in International Law (last updated November 2020), *in*: PETERS, Anne; WOLFRUM, Rüdiger (Eds.), **The Max Planck Encyclopedia of Public International Law**, Oxford: Oxford Public International Law, 2013.
[717] PEAT, Daniel; WINDSOR, Matthew, Playing the Game of Interpretation: On Meaning and Metaphor in International Law, *in*: BIANCHI, Andrea; PEAT, Daniel; WINDSOR, Matthew (Eds.), **Interpretation in International Law**, Oxford; New York: Oxford University Press, 2015, p. 3.

dynamic. Nevertheless, on the matter of how to interpret a norm of customary international law, the ICJ has "treated the methodology embodied in the VCLT as declaratory of the customary international law of treaty interpretation, and its application of the VCLT rules has been described as 'virtually axiomatic.'"[718] Movements such as the one made by the ICJ contributes to the perception of the practice of interpretation as a matter of formalism, that by following certain steps objective meaning will be found. This creed creates an image of the practice of legal interpretation as steady and unequivocal rather than fluid and open. Such portrayal fails to grasp the complexity of the phenomenon of law making and the conflict of interpretations that takes place in the practice of international law. In this sense, it is argued here that the study of the interpretation of international law should be regarded as a process rather than an outcome.

Another problem resulting from more formalist approaches to norm interpretation is the separation of compliance from interpretation. This move takes for granted the relationship between these two very much interlinked processes, which result in an analysis that is unable to account for the indeterminacy of norms. Contrariwise, formalist approaches take the content of agreements as wholly determinate, which means "presuming [there is] one clear answer in a world of sometimes vague norms and a multiplicity of norm interpreters."[719] This section addresses the many aspects of the relationship between the interpretation and the argumentative dispute of international legal practice.

2.2.1.
Interpreting international law as a practice of contestation

In the legalist mindset, "the point of law is to lead society away from politics, understood as an effort to move from a state of contestation and conflict into one

[718] *Ibid*., p. 5.
[719] BURKE, Ciaran, Moving while standing still: law, politics and hard cases, *in*: RAJKOVIC, Nikolas M.; AALBERTS, Tanja E.; GAMMELTOFT-HANSEN, Thomas (Eds.), **The Power of Legality: Practices of International Law and their Politics**, Cambridge: Cambridge University Press, 2016, p. 136–138.

governed by rational rules, principles and institutions."[720] However, international legal practice itself is endowed with an adversarial nature. It is through disagreements that change takes place in international law. There is nothing in the practice of international law that indicates which point a certain rule would have achieved enough consensus as to not be contested any longer. Every authoritative interpretation is always open for dispute. This means that even when the 'middle-ground' has been established, the debate over the interpretation of a legal rule can always be reopened for debate.[721] Interpretation is the ordinary kind of contestation that is part of the routine engagement by practitioners with international law.[722]

The idea that interpretation can be one of the most basic forms of contesting international law was epitomized by Pierre Bourdieu in his portrayal of the field of international law. According to the author,

> The juridical field is the site of a competition for monopoly of the right to determine the law. Within this field there occurs a confrontation among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognised capacity to *interpret* a corpus of texts sanctifying a correct or legitimised vision of the social world. It is essential to recognise this in order to take account both of the relative autonomy of the law and of the properly symbolic effect of "miscognition" that results from the illusion of the law's absolute autonomy in relation to external pressures.[723]

Disagreements and disputes over the contents of the legal norm are defining aspects of international law. Contestations of this sort are a necessary process in the international legal system. It is through the contestation of normative meaning that the legal body of norms gain or lose force. This is not, however, the only kind of contestation of international law. International legal interpretation stands for the most direct kind of contestation, the one that engages directly with the application of a norm. It takes place within a heavily regulated environment that not only dictates the kinds of mobilisations that might be made, but also stipulates the rite through which they are to be performed. Other kinds of contestation might differ according to the scope and intensity of the situation, since the contestation, for

[720] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 599.
[721] *Ibid*., p. 598.
[722] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts, p. 202.
[723] BOURDIEU, Pierre, The Force of Law: Toward a Sociology of the Juridical Field, **The Hastings Law Journal**, v. 38, n. 5, p. 814–853, 1987, p. 817.

example, might aim for a simple reversal of a legal norm or aim higher and challenge an entire body of law. Interpretation of international law might take place in a variety of sites, from legal journals and professional meetings to public and political discussions.[724]

There has been a reappraisal in the study of norm interpretation (and implementation) towards a less formalist approach in the recent decades.[725] Some Constructivist International Relations scholars has also taken the task of analysing the contestedness of international norms.[726] One work that has occupied a pivotal position in the discussion of making sense of the way actors interpret norms is Ian Johnstone's *The Power of Deliberation: international law, politics, and organisations*, where he retrieves the concept of 'interpretive communities' from Stanley Fish's work and applies it to the study of the field of international law. [727] Interpretive communities can be considered as a particular kind of community of practice. [728] These communities enact practices of interpretation in a somehow structured way, having to conform to a background knowledge, which stands for the notion previously introduced in this chapter as the formality of the law.[729] There

[724] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts, p. 202–203.

[725] For example, BIANCHI, Andrea; PEAT, Daniel; WINDSOR, Matthew (Eds.), **Interpretation in International Law**, Oxford; New York: Oxford University Press, 2015; BURKE, Moving while standing still: law, politics and hard cases; JOHNSTONE, Ian, **The power of deliberation: international law, politics and organizations**, Oxford; New York: Oxford University Press, 2011; JOHNSTONE, Ian, Law-Making by International Organizations, *in*: DUNOFF, Jeffrey L.; POLLACK, Mark A. (Eds.), **Interdisciplinary Perspectives on International Law and International Relations**, Cambridge: Cambridge University Press, 2012, p. 266–292.
Constructivist IR scholarship already made such arguments in the 1980s, as Friedrich Kratochwil who posed that practical reasoning and legal reasoning are closely connected and the legal mode would be a "specialized case of practical reasoning often expounded in treatises on 'rhetoric.'" KRATOCHWIL, Friedrich V., **Rules, norms, and decisions: on the conditions of practical and legal reasoning in international relations and domestic affairs**, Cambridge: Cambridge University Press, 1999.

[726] BURKE, Moving while standing still: law, politics and hard cases, p. 138. See BRUNNÉE, Jutta; TOOPE, Stephen J., Constructivism and International Law, *in*: DUNOFF, Jeffrey L.; POLLACK, Mark A. (Eds.), **Interdisciplinary Perspectives on International Law and International Relations**, Cambridge: Cambridge University Press, 2012, p. 119–145.

[727] FISH, Stanley Eugene, **Is there a text in this class? the authority of interpretive communities**, 11. ed. Cambridge: Harvard University Press, 2000; JOHNSTONE, **The power of deliberation: international law, politics and organizations**.

[728] STAPPERT, Practice theory and change in international law, p. 2.

[729] ADLER, Emanuel; POULIOT, Vincent, International Practices, **International Theory**, v. 3, n. 1, p. 1–36, 2011, p. 16. On communities of practice, see ADLER; POULIOT, International Practices; ADLER, Emanuel, **Communitarian international relations: the epistemic foundations of international relations**, London; New York: Routledge, 2005; WENGER, Etienne, **Communities of Practice: Learning, Meaning, and Identity**, Cambridge; New York: Cambridge University Press, 1998; WENGER, Etienne, Communities of Practice and Social Learning Systems:

is room for an ample range of legal reasonings regarding a norm to emerge. These interpretations, however, are not limitless, being conditioned against an existing body of rules and other extra-legal codes in order to be taken as valid.[730] And this is a very important notion considering the decentrality of the international legal system where there is a plethora of actors engaging in the interpretation debate, most of them very much vested in the outcome of this process.[731] Incorporating the notion of interpretive communities to read the (re)production legality means denying the possibility of an objectivity in the process of norm interpretation. It also implies adopting a stance against an *a priori* interpretive authority. The interpretive authority emerges from the community of experts and interested participants disputing in the field of practice the authoritative interpretation.[732] And this idea reaffirms a point previously made, that understanding the interpretation of a legal norm requires more focus on the process rather than the outcome owing to the fact that interpretive communities are within an uninterrupted process of reconstitution motivated by the also continual "interplay between different fields of practices and, crucially, the interpretive struggles over what legality means, and how it should be studied, in specific problems over time."[733] For every matter or situation, the constitution of the interpretive community might be redefined.

However, such approach does not come without its limitations. As Nora Stappert has emphasized, the notion of communities of practice "entails two main drawbacks. First, the concept's communitarian focus implies a sense of coherence among international lawyers and a lack of contestation between the different interpretations they propose that is likely to be misleading" and, second, "it almost becomes an empty concept from a theoretical standpoint" for, besides introducing

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the Career of a Concept, *in*: BLACKMORE, Chris (Org.), **Social Learning Systems and Communities of Practice**, London: Springer London, 2010, p. 179–198; WENGER, Etienne; MCDERMOTT, Richard A; SNYDER, William, **Cultivating communities of practice: a guide to managing knowledge**, Boston: Harvard Business School Press, 2002; WENGER, Etienne, **Communities of Practice: Learning as a Social System**, The Systems Thinker. Available at: <https://thesystemsthinker.com/communities-of-practice-learning-as-a-social-system/>. Accessed: 2 nov. 2020; WENGER, Etienne; WENGER-TRAYNER, Beverly, **Introduction to Communities of Practice: A brief overview of the concept and its uses**, Wenger-Trayner. Available at: <https://wenger-trayner.com/introduction-to-communities-of-practice/>. Accessed: 2 nov. 2020.

[730] STAPPERT, Practice theory and change in international law, p. 12; JOHNSTONE, **The power of deliberation: international law, politics and organizations**, p. 36.

[731] JOHNSTONE, **The power of deliberation: international law, politics and organizations**, p. 35.

[732] *Ibid*.

[733] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 17.

the notion that there are a set of rules in place set to access the validity of argumentative practices of interpretation, it does not provide any mean to dive deeper into the community dynamics and grasp which are these criteria that make an interpretation valid in the eyes of the community.[734] The events examined on Interlude No. 2 and the characteristics of international law introduced in the first sections of this chapter clearly highlight the way international legal argumentative practices are about the meeting of contrasting interpretations under specific circumstances. Considering the indeterminate character of international law, the dynamics of (re)production of legal meaning is bound to always be marked by practices of contestation for the legal argument reliant on either concreteness or normativity is never able to provide a discourse that is not open to criticism. For a better depiction of the practice of international law, the notion of communities of practice should be able to encompass the multiplicity of legal reasonings that stem from a same group of actors, as in the case of the PTCs' arguments in response to the African States' non-compliance, and that diverging interpretations is a common feature of international law. As to the matter of assessing the rules in place within the community of practice that grant validity to argumentative practices of interpretation, the incorporation of the Bourdieusian concept of *habitus* allows the notion to gain a better sense of these structuring structures and identify them. For this thesis, such move is paramount once it allows for an understanding of the dynamics that are gatekeeping the validity of practices within the field and the actors reinforcing them. These structuring structures are more than standards that exert some sort of control over the practices in the field, they reproduce certain values that are more fundamentally entrenched in the way the system works. In that sense, an examination of the criteria that establish the validity of argumentative practices cannot be read in isolation. The analysis must encompass relationship between the different actors engaging with the norm, their interpretations and the values that are entrenched in the legal framework that is mobilised as to grasp the limits that are put in place that might prevent certain practices to be considered. In this thesis' case study, in which the practices of contestation in relation to the Chamber's reiterated defence that Al Bashir's immunities were irrelevant regarding

[734] STAPPERT, Practice theory and change in international law, p. 12.

the proceedings before the Court overflowed the argumentative dimension, a wider set of practices were mobilised and, as a consequence, other structuring structures that are constraining this process. The analysis of this array of practices of contestation and the limitations that these kinds of contestation have from the international legal system are explored, respectively, in the ensuing interlude and chapter that follows it. The choice for looking first at the non-compliance dynamics is because it is the only kind of practice of contestation that required an immediate response from the Court. In that sense, the non-compliance and argumentative practices of the African States, the issuance of decisions by the Chambers, and, in some cases, the following interactions happened in a very symbiotic fashion, while the other practices enacted by the African States were in some sense less formalistic.

There are a range of activities that fit into the label of legal interpretation and are part of the process of law making. These processes are "somewhat of a moveable feast."[735] International law is a social phenomenon and, therefore, more nuanced and made of "a complex set of practices and ideas, as well as interpretations of those practices and ideas."[736] Important elements in the making of legality are the shared and contested assumptions, doctrines and values established in relation to international law. Those are key features because of the way they impact on the manner through which these actors enact the law. As greater the contestedness of an authoritative interpretation, there is an increase in the plurality of norm interpreters and, consequently, a multiplication of legal justifications and opposing opinions proposing divergent exegesis to these legal rules. Through the events examined from interludes 2 to 5, it is possible to follow this movement of growing engagements with the Chambers position. The opposition to the issuance of warrants of arrest for the then President of Sudan mobilised many actors across the international realm and opened the space for many possible ways of reading the matter under dispute.

Even though these manifestations against the Al Bashir Case in the ICC are treated as a group mobilisation, it requires a careful scrutiny as to not make any

[735] JOHNS, **Non-Legality in International Law: Unruly law**, p. 12.
[736] KOSKENNIEMI, **The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960**, p. 7.

generalisation and consequently label all the practices of contestation in relation to the Al Bashir Case a movement of interpreting the legal matter under dispute differently from the Court. The next section dives into a discussion about the complexities in understanding the process of contestation, introducing the idea that many of these practices have diffuse motivations and consequences.

2.2.2. The multiplicity of ways of disputing legality: motivations and consequences of international actors' engagements with international law

Throughout Interlude No. 2, the practices of non-compliance by African States in relation to the ICC's arrest warrant for Omar Al Bashir demonstrated different ways of engagement that a single practice, in this case non-compliances, can generate. While most States presented their divergences in relation to the legal justifications produced by the Chambers of the Court, some non-compliances were simply a quiet dismissal of the Court's order. This means that not every practice that contradicts the Court is a contestation. Practices of contestation of international law are the ones that aim to have an impact on a legal development, whichever the result. This includes acts that resist the development of a certain legal interpretation, proposals to change or reverse how a legal doctrine regarding a specific branch of law is employed or even activities that lack any constructive character, being a mere denial of the authoritative interpretation.

Antje Wiener defines contestation as a "social practice [that] entails objection to specific issues that matter to people."[737] Contestation is both a social practice of objection to and disapproval of something which can be expressed in different manners, verbally and non-verbally. The means through which contestation is enacted depends accordingly to the context in which it takes place. Even practices of contestation regarding the disapproval of international law can be expressed differently, since it will depend on the object under dispute.[738] The concept of contestation is useful once it sees the different acts of contestation as social

[737] WIENER, **A theory of contestation**, p. 1.
[738] *Ibid*.

practices. Acts of contestation are the main drivers of social change and central pieces to the constant revision in the meaning of norms. Through practices of contestation international law is continually re-negotiated, adapted, or simply rejected.[739] This thesis identifies as acts of contestation of international law any act through which an international actor displays disagreement with a legal development. This means that the practice of non-compliance, withdrawal etc. must be performed in opposition to a certain interpretation or disposition at play in the international legal system.

Norms are themselves "moving pictures,"[740] because they are made of "thousands of frames, and micro patterns of challenge and reinforcement."[741] Therefore, the contestation towards the interpretation or enactment of a legal norm is an ordinary practice in the operation of international law and confers upon it its contingent character. Most legal norms are constantly being challenged and, consequently, redefined. In that sense, this thesis joins Wiener in defending that the social practices are important for the understanding how the practice of norm contestation takes place.[742] Contestation is both a social activity (the reactive contestations) and a way of doing critique (the proactive contestations).[743] Contestation can add to the (re)enacting of norms.[744] In other words, contestation is key to the (re)construction normative meaning. Once we understand that norms are intersubjectively constructed, it is possible to see how they are always on an ongoing process of either construction, destruction, stabilisation, or maintenance that is engendered by routine acts of contestation and redefinition. These acts are considered in this thesis as "practices of legality," once different from positivist approaches it does to seek to find the authoritative interpretation but instead to comprehend specificities of the process of contesting legalities.[745]

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[739] *Ibid*., p. viii.
[740] SANDHOLTZ, Wayne, Explaining International Norm Change, *in*: SANDHOLTZ, Wayne; STILES, Kendall (Eds.), **International Norms and Cycles of Change**, Oxford; New York: Oxford University Press, 2008, p. 1.
[741] BRUNNÉE, Jutta; TOOPE, Stephen J, Norm Robustness and Contestation in International Law: Self-Defense against Nonstate Actors, **Journal of Global Security Studies**, v. 4, n. 1, p. 73–87, 2019, p. 74.
[742] WIENER, **A theory of contestation**.
[743] *Ibid*., p. 2.
[744] *Ibid*., p. 19.
[745] BRUNNÉE; TOOPE, Norm Robustness and Contestation in International Law, p. 74.

Even though practices of international legal contestation are not out of the ordinary, in the recent years there has been an intense growth in acts of contestation that are directed to legal developments in or even in relation to cases in international courts. These acts have emphasized the diverse nature of practices of legalities and their diffuse character. This phenomenon has been portrayed in the literature as the backlash against international courts.[746] Most of the scholarship working on backlash has tried to make sense of these dynamics through the study of the different contestations against international courts. The main objective has been to categorise these practices of contestation in order to understands the drivers of these processes and the achieved outcomes. In an attempt to make contestation intelligible, Mikael Madsen, Pola Cebulak and Micha Wiebusch have developed a typology of practices of contestation against international courts.[747] In light of the different possibilities for contesting a legal rule, the authors divide the forms of contestation into two groups: the first would encompass every practice of contestation that seeks to generate any sort of influence over the path of an international court case law; the other would fit practices of contestation of a more abnormal kind, the ones that do not belong to the regular process of international law. While the former happens within the bounds of the system, the latter seeks to overturn it. For Madsen, Cebulak and Wiebusch, there is a clear difference in the position adopted with regards to the international legal system. In the first there is

[746] See, for example, GINSBURG, Tom, Political Constraints on International Courts, *in*: ROMANO, Cesare P. R.; ALTER, Karen J.; SHANY, Yuval (Eds.), **The Oxford Handbook of International Adjudication**, Oxford; New York: Oxford University Press, 2013, p. 483–502; KRISCH, Nico, **The Backlash against International Courts**, Völkerrechtsblog. Available at: <https://voelkerrechtsblog.org/articles/the-backlash-against-international-courts/>. Accessed: 19 oct. 2020; ALTER; GATHII; HELFER, Backlash against International Courts in West, East and Southern Africa: Causes and Consequences; SANDHOLTZ; BEI; CALDWELL, Contracting Human Rights; MADSEN, Mikael Rask; CEBULAK, Pola; WIEBUSCH, Micha, Special Issue – Resistance to International Courts Introduction and Conclusion, **International Journal of Law in Context**, v. 14, n. 2, p. 193–196, 2018; MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts; SOLEY; STEININGER, Parting ways or lashing back?; HILLEBRECHT, **Saving the International Justice Regime: Beyond Backlash against International Courts**.

[747] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts.

There are other ways of classifying the forms contestation against international law. Wiener identifies four modes through which contestation might happen within the field of law: (1) "arbitration as the legal mode of contestation involves addressing and weighing the pros and cons of court related processes according to formal legal codes"; (2) "deliberation as the political mode of contestation involves addressing rules and regulations with regard to transnational regimes according to semi-formal soft institutional codes"; (3) "justification as a moral mode of contestation according to moral codes involves questioning principles of justice"; and (4) "contention as the societal practice of contestation critically questions societal rules, regulations or procedures by engaging multiple codes in non-formal environments." WIENER, **A theory of contestation**, p. 2.

the goal of reversing a specific legal development, which does not imply any challenge to the authority of the court. In the second the actor has given up on the system altogether.[748]

The legal field has been described as a place that goes through constant contestation over the meaning of norms. This ordinary kind of contestation is labelled by Madsen, Cebulak and Wiebusch as pushback.[749] These are the types of contestations that are a necessary process in the international legal system. Backlash, on the contrary, is the kind of extraordinary contestation, being different specially because, besides having as target the content of the legal norm, it also seeks to undermine the institution and its authority. In this sense, it is possible to affirm that it aims for a more profound impact of transforming, suspending and even closing an international court. Actors that recur to this practice of contestation no longer accept the authority of the court and these acts are a challenge to its authority. The trigger for such action goes beyond the nuisance from a judgment or a case law, although a specific event might help such kind of contestation arise. Pushbacks are often related to broader social and political inequalities that have such a big impact for these actors that they opt for extraordinary measures.[750] Practices of pushback might be engendered as a response to a specific judgment that has these more significant issues of inequality playing in the background and motivating actions against a particular mobilisation of a norm.

Once Madsen, Cebulak and Wiebusch categorize the form through which contestation against international courts might take place, they investigate the patterns of the practices of contestation.[751] According to them, the patterns must be studied alongside the agents of contestation, because the enactment of contestation by multiple actors means different patterns of contestation. The practices of contestation might stem from many different places, but more often from the relevant audiences. Looking at processes of contestation, it is possibly to identify such practices coming from different places. The most common ones are lawyers, judges, politicians, other legal operators, NGOs and interested organisations. When looking into this list one clearly sees that there is an aspect that strikes attention: we

[748] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts, p. 202–203.
[749] *Ibid*., p. 202.
[750] *Ibid*., p. 202–203.
[751] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts.

are talking about a small elite of actors from the fields of law and politics.[752] These processes of contestation can arise from a specific group of actors or, something that frequently happens, originate from the interaction between relevant audiences. It can have States and other actors band-wagoning into the process, not necessarily for a shared belief, which turns the contestation into a broader mobilisation. And, depending on which issue is being contested, there is great chance of spill over, the most common route is coming from the legal field into civil society.[753] One actor that often is overlooked in its capacity to generate change, but that might have a big impact through contestation is academia.

> While discussions of the law and its direction are part and parcel of the operation of the legal field, academic and semi-academic discussions of [International Courts] and their practices can go beyond the boundaries of the accepted level of critical legal discourse. Many legal journals, often combining academic and practitioner perspectives, allow legal-political discussions and robust debate. In practice, in cases of pushback and even backlash, the critical discourse of legal professionals will often transition from the professional outlets into mainstream media when it reaches a certain level of opposition. This is where the critique from the legal field starts interacting directly with more ordinary politics and legal-professional disagreements become general political disagreements.[754]

All these different actors might either engage in practices of pushback by trying to reverse certain practices or legal interpretations of the court in question or perform acts of backlash, that usually revolve around the unwillingness to engage with the very court, refusing to implement or follow a decision or not even recognising the court. Madsen, Cebulak and Wiebusch associate the decision about whether to engage in practices of backlash or pushback with the perception these audiences have on the authority of the court, meaning that the recognition of an international court as an authority will lead to the implementation of its rulings and practices, while the opposite scenario might mean events of backlash.[755] In Table 1, I have summarized Madsen, Cebulak and Wiebusch's typology of the different

[752] It is possible to find examples of situations that do not follow this rule, but they are few and specific situations. "There is, for example, the case of SADC [Southern Africa Development Community] Tribunal's ruling on land rights in the context of White farmers in Zimbabwe, which was prompted by political action but supported by many groups in society." *Ibid*., p. 205.
[753] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts.
[754] *Ibid*., p. 205.
[755] *Ibid*., p. 203.

ways in which practices of contestation to international courts take place, listing the forms, actors and patterns of contestation.[756]

Table 2 – Variability of the forms and patterns of contestation to international courts

Form	Backlash: extraordinary resistance, triggering significant institutional reform or even dismantling the tribunal
	Pushback: ordinary resistance seeking to influence the future direction of an international court case-law
Pattern	Specific disagreements
	More sustained or structural critique

According to Madsen, Cebulak and Wiebusch, something that also needs to be accounted for besides the elements that revolve around the process of contestation are the results of this practices. There is an important analytical division that is being drawn: the need to study the practices of contestation and its effects separately. The first consists of the process of opposition and the practices that are put in place for it to happen. The second is about the outcomes of this interaction. The practices that are being enacted by specific actors do not happen in an empty environment. They are part of a bigger context where there is not only those in opposition to the legal norm, its implementation or something else revolving around a case in an international court. In this bigger picture, it is also important to account for those that represent the international court and its supporters and how they react to these processes of contestation. There are only four possible outcomes that could result from these acts, but to understand these results in is important to differentiate whether it was practices of pushback or backlash, because each will impact differently on the ongoing process at the international court or on the very court itself.[757] Both kinds of contestation might have an effect for the development of law or not, the difference being that practices of backlash might engender other types of change for the concerned institution. It might be able to limit the institution – especially its powers of authority – or even

[756] *Ibid*., p. 198, 202–205.
[757] *Ibid*., p. 206.

have more drastic effects such as the termination of the institution's activities. Practices of backlash might lead to small changes in the direction of specific cases or interpretations of a legal norm.[758] Therefore, the main difference between the outcomes of practices of backlash and pushback is related to where it might generate any kind of change. For the former, the effects could both create backslides in law and transform an institution, while for the latter most of the outputs have to do with countering certain developments in law.[759]

After introducing the forms and patterns of contestation, Madsen, Cebulak and Wiebusch noticed three significant aspects: (1) that "it is necessary to take a more long-term view in order to identify what events and mobilisations are consequential or not;" and (2) "that the outcomes of pushback or backlash do not necessarily match the objectives that the critics originally campaigned for."[760] As the previous paragraphs that discussed the possible outcomes of contestation have shown, there can be situations of extensive and profound critiques that could have no significant outcome neither for the court nor for the legal norm.

Although these models can be of great help to begin understanding the processes of contestation in international courts, from the classification of the practices of contestation to the possible outcomes each kind of practice might engender, the causal relationship drawn in this model paints a very generalised picture of contestation that might not prove true with a deeper look at each particular situation. The African contestation towards the Al Bashir Case, if explained through these lines, would paint a picture of like-minded States engaging in a process of contestation. Practices of international legal contestation are especially complex in terms of its expected results. Not every action will start actually knowing whether it will generate the change it seeks. At times, the desired outcome will change throughout the process. Many practices of contestation of international law generate no immediate legal consequences. It does not mean, however, that these activities have not created any effect at all. Even though we might not see, even small practices of contestation might have an impact.[761] For instance, these practices of contestation might send signals to an international court

[758] *Ibid*., p. 206–207.
[759] *Ibid*., p. 206.
[760] *Ibid*., p. 207.
[761] *Ibid*., p. 206.

where the contested matter is under appreciation influencing on a later decision or a judgment in the case which generated the contestation or in a future case. As some scholars have argued, that was precisely what transpired in the Kenyatta Case in the ICC. Many of the decisions taken by both OTP and Chambers seemed to have been influenced by the ongoing events in the Al Bashir Case and the Kenyan government explored this momentum to capitalize in its relationship with the ICC and consequently have the case dismissed.[762] Up to this point, the unpredictability of the outcomes of legal contestation is covered by the model proposed by Madsen, Cebulak and Wiebusch. However, it needs to be considered that the argumentative practice that takes place alongside the acts of contestation (or is the practice of contestation itself) might sell a narrative which does not correspond to the actual reason for that practice to take place. And here is where this thesis part ways with their typology. Practices of contestation of international law are difficult to analyse, especially collective ones, for many of these practices can be more subtle and their motivations blurry or hidden. This should not be read into their capacity of engendering legal change. Whichever the motivation, practices of legal contestation can be powerful tools to authorize or legitimize certain positions.[763] Nevertheless, the analysis should be mindful that particular motivations might be veiled behind a collective narrative or even that the State could have more than one motivation, for even though this process takes place in the international arena, domestic politics might also be concomitantly disputing the issue, as was the case of South Africa. At the time, Al Bashir's visit to South Africa was a matter of serious divergence between the executive branch and organs of the South African judiciary, in particular, the High Court and the Supreme Court of Appeal. While the former claimed that it could not fulfil the arrest warrants due to the immunity granted to Heads of State participating in the AU Summit, the latter understood that not only was arrest possible but that the government, by refusing to fulfil the warrants, violated its obligations under the reason of the Law Implementing the Rome Statute. This resulted in a series of mixed messages from South Africa from the receiving Al Bashir and sending a notification of withdrawal to a removal of said notification

[762] HELFER, Laurence R.; SHOWALTER, Anne E., Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC, **International Criminal Law Review**, v. 17, n. 1, p. 1–46, 2017, p. 42.
[763] BOURDIEU, **The logic of practice**, p. 86.

and a notice to Sudan that should Omar Al Bashir enter in South African territory he would be arrested.[764]

The practices of contestation performed by African States, which are further explored in the following interlude and chapter, were in most cases enacted under the banner of the AU decision, which was a legally devised plan to productively engage with the Court and pass on a serious message. It cannot be said that all States that used the AU justification for the non-compliance or other practices, for several reasons, actually had that as a reason for their non-cooperation and opposition to the ICC's practices, as the case of Burundi used as an example in this thesis Introduction. Especially the non-compliances, which in the catalogue of African practices of contestation towards the ICC were the only kind of a reactive nature, reunited a mixture of alleged and veiled reasons. Therefore, this thesis works under the assumption that practices of contestation of international law are filled with nuances and most of the times their motivations and consequences are very opaque. This means that even a careful study of these practices will not be able to provide an accurate answer for the triggers and outcomes of contestation, but only a tentative indication.

2.3.
Contesting international law: argumentative practices of interpretation as disputes of legality

Interpretation is the heart of the practice of international law. It is the main driver of international legal development. International norms are open, contingent, and unstable. These characteristics make the international legal system a site of constant dispute over the interpretation of a legal disposition. Albeit such description might create the idea that any kind of argument can participate in this legal exchange as to define the authoritative interpretation of an international norm, international legal practice does not take place in a vacuum. There are in the

[764] MUDUKUTI, Angela, Judicial Integrity and Independence: The South African Omar Al Bashir Matter, *in*: MEERKOTTER, Anneke *et al* (Eds.), **Goal 16 of the Sustainable Development Goals: perspectives from judges and lawyers in Southern Africa on promoting rule of law and equal access to justice**, Johannesburg: Southern Africa Litigation Centre (SALC): Judiciary of Malawi, National Association of Women Judges and Magistrates of Botswana (NAWABO), 2016, p. 17.

international legal system some structuring structures which condition the way international legal change takes place. This chapter introduced two features that constrain argumentative practices in international law. The first is the indeterminacy of legal discourse within the international realm which plays a never-ending game of back and forth between affirming law's concreteness and normativity. International law's culture of formalism is the second. This attribute reflects the way international legal practice is a dance around substance and abstraction, ending up in a position of extreme vulnerability for having to be cynical without being cynical, meaning the practitioner must be competent enough as to grasp the particularities of the situation and marshal the legal vocabulary as to make their position, having to maintain however the sanctity the mobilised rules' underlying values. The indeterminacy and the culture of formalism, in that sense, determine the practice of international law and consequently the practice of interpreting international legal norms.

Considering these two features of international legal practice, the activity of interpreting international law is mostly marked by contestation. Disputes of legality can take place in different manners. They mostly consist in the display of a disagreement in relation to a legal development. Practices of contestation are very diffuse in character. Although a dissatisfaction with a particular mobilisation of a legal rule can be identified and comprehended, their enactment can be quite dispersed. A complex feature of contestation that seem to trap most research on the topics are the elements of triggers and outcomes. Especially in cases such as the one under study in this thesis, the motivation for contestation is paramount for how it is received, which consequently creates the possibility that many States have more vested interests than the banner under which contestation takes place. Also, as these practices are very diffuse, missing some aspect of the entire contestation might create a false image or a miscalculation of its results. Therefore, studies on contestation will seldom be able to do more than create general suppositions on this phenomenon.

Considering the obstacles to understanding the motivations and results in a study of the phenomenon of contestation, this thesis dives into an investigation of the ways of contestation and the ways they are perceived. African States enacted practices of contestation in response to the Al Bashir Case in the ICC for more than

10 years. Some of the practices, as non-compliances and notifications of withdrawal, were easily associated with a resistance in relation to the Court's take on the matter under dispute. Other practices of contestation, however, for not having a direct causal effect in the Case, are not easily associated as such. The result is that most of the arguments against the African contestation only see as contestation against the Al Bashir Case the non-compliances and withdrawals, which consequently paints the picture of a very unproductive and uncooperative kind of contestation. Consequently, many commentators, scholars, and practitioners make the mistake of addressing the different practices of contestation made by African States towards the Al Bashir Case as backlashes against the system, meaning that they take every critique as an attempt to delegitimise Court, aiming towards its weakening and possible future closure. However, as the case study of this thesis shows, most of the countries that are against the case being tried by the ICC – having different sorts of reasons to justify it – are not against the Court itself.

Based on these ideas, before proceeding to the analysis of the response to the African Contestation, the next Interlude will be dedicated to an extensive examination of what practices enacted by the African States are considered as practices of contestation in relation to the Al Bashir Case in the ICC. The chapter that follows will analyse more specifically the practice dimension of the phenomenon of contestation, the mechanisms that were used in the African contestation strategy and the 'structuring structures' that come with the means of contestation that were used in a way to understand how they affect the process of contestation.

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Interlude No. 3: The African Contestation against the Al Bashir Case

In between the years of 2005 and 2008, while the situation in Darfur went through the proceedings of the Court, the AU did not issue any official position in relation with the ongoings at the ICC. During this time, there was no mention to either the referral or the beginning of investigations in its meetings, even though there were Assembly of the AU decisions regarding the peace talks in Darfur.[765] It was only with the issuance of the first ICC arrest warrant against Sudanese President Omar Al Bashir that the AU began to mobilize and formally debate the issue. The African States form the largest regional grouping within the ICC. Currently, out of the 123 countries are States Parties to the Rome Statute of the International Criminal Court, 33 are African States.[766]

In 2009, in a meeting that took place a month before the PTC I issued its decision on the Prosecution's request for a warrant of arrest for Omar Al Bashir, the Assembly of the AU expressed concern regarding this chain of events. According to the Assembly of the AU's decision, a positive response from the Chamber to this request could jeopardize the delicate peace process in Sudan. The decision also urged UNSC to defer the process under article 16 of the Rome Statute and requested the AU Commission to send a high-level delegation to establish contacts with the UNSC and convene a meeting of the African States Parties to the Rome Statute.[767]

Soon after the issuance of the first arrest warrant, Omar Al Bashir was invited by the government of South Africa to attend the inauguration of Jacob Zuma which was to take place on May 2009. The arrest warrant for Omar Al Bashir, however, was domesticated by a South African chief magistrate which made the document a

[765] ASSEMBLY OF THE AFRICAN UNION, **Fifth Ordinary Session, Decisions, Declarations and Resolutions**, Sirte: African Union, 2005.
[766] INTERNATIONAL CRIMINAL COURT, **African States | International Criminal Court**, International Criminal Court. Available at: <https://asp.icc-cpi.int/states-parties/african-states>. Accessed: 13 mar. 2022.
[767] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan, Doc.- Assembly/AU/12 (XII)**, Addis Ababa: African Union, 2009, paras. 1 et seq.

South African arrest warrant.[768] As a result, the Sudanese authorities were informed that should A Bashir land on South African Soil he would be arrested. The South African Director General for International Relations and Cooperation, Ayanda Ntsaluba, expressed that South Africa would not act outside the international legal framework to which it was bound. He clearly affirmed that "South Africa's position in this regard is that while it respects the ICC's efforts to end impunity for war crimes in Darfur, the ICC has not made enough effort to engage the AU to coordinate efforts to end the fighting in that country." In that sense, South Africa would respect its obligation in relation to the Rome Statute by executing the arrest warrant should Al Bashir arrive in South Africa, but that did not mean that it would stop to press the UNSC alongside other AU Member States to defer the Case against Al Bashir.[769] Botswana, even without any scheduled visit, publicly announced that Al Bashir would be arrested if he entered its territory.[770]

The air of uncertainty regarding whether other African States would arrest Al Bashir upon his presence in these States territories also affected his visit to Uganda. The serving Sudanese President was invited to attend a Smart Partnership conference in Kampala on July 2009. However, contradictory remarks by Ugandan officials created a cloud over whether Al Bashir would be arrested upon entry in Ugandan territory.[771] The government of Uganda had so far been in close cooperation with the Court since it referred the situation in its territory in January 2004. The OTP's investigation focused on the context of the conflict between the Lord's Resistance Army and the national government, however, arrest warrants were only issued to one party, the top members of the rebel faction.[772] The Ugandan Minister for International Relations, affirmed that Al Bashir would face arrest if he travelled to Uganda, while the Ugandan President, Yoweri Museveni, stated he was "sorry that the media made it appear that Bashir would be arrested upon arrival in

[768] MUDUKUTI, Judicial Integrity and Independence: The South African Omar Al Bashir Matter, p. 17.
[769] MBOLA, Bathandwa, **SA is obliged to arrest Al-Bashir, says Ntsaluba**, South Africa Government News Agency: SA News. Available at: <https://www.sanews.gov.za/south-africa/sa-obliged-arrest-al-bashir-says-ntsaluba>. Accessed: 12 mar. 2022.
[770] **Botswana says Sudan's Bashir will be arrested if he visits**, Sudan Tribune. Available at: <https://sudantribune.com/article31314/>. Accessed: 21 mar. 2022.
[771] **Sudanese president cancels Uganda visit over arrest threat**, Sudan Tribune. Available at: <https://sudantribune.com/article31692/>. Accessed: 20 mar. 2022.
[772] INTERNATIONAL CRIMINAL COURT, **Situation in Uganda, ICC-02/04**, International Criminal Court. Available at: <https://www.icc-cpi.int/uganda>. Accessed: 23 mar. 2022.

Kampala."[773] Besides, Museveni affirmed that Al Bashir could travel to Uganda without fear of being arrested to attend the ICC Review Conference in Kampala.[774]

On 3 July 2009, during the Thirteenth Ordinary Session of the Assembly of the AU, the African States adopted a decision based on the deliberations that took place in the meeting of the African States Parties to the Rome Statute. In said decision, these States expressed grave concern at the PTC I's decision on the issuance of an arrest warrant for Omar Al Bashir. The decision reiterated the commitment of the AU Member States towards the end of impunity, but noted that this indictment was already having an impact on the peace process underway in Sudan and in the efforts for facilitating a process of conflict resolution in Darfur.[775] The meeting also made reference to a request made in the previous ordinary session, in the context of a debate on universal jurisdiction, that sought to extend the jurisdiction of the African Court on Human and Peoples' Rights to encompass crimes of international concern such as genocide, crimes against humanity and war crimes.[776] The July 2009 decision also requested a preparatory meeting of the African States Parties at expert and ministerial levels in preparation for the Review Conference of States Parties, that was scheduled to take place in Kampala in May 2010. The goal was to discuss specific topics of concern to African States in order to present a common position at the meeting. Among the matters of concern were: articles 13 and 16 of the Rome Statute, more specifically the powers conferred by them to the UNSC to begin and halt trials or investigations in the Court; an analysis of the practical application of articles 27 and 98 of the Rome Statute; and a clarification on the immunities of officials whose States are not party to the

[773] CHECKLEY, Andy, **Sudanese president cancels trip to Uganda**, The Guardian. Available at: <https://www.theguardian.com/katine/2009/jul/20/omar-bashir-ugandan-trip>. Accessed: 21 mar. 2022.
[774] ASSEMBLY OF STATES PARTIES, **Press Conference to Mark Eleventh Anniversary since Adoption of International Criminal Court Statute**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2009.
[775] ASSEMBLY OF THE AFRICAN UNION, **Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII)**, Sirte: African Union, 2009, paras. 2 et seq.
[776] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/3(XII)**, Addis Ababa: African Union, 2009, para. 9; ASSEMBLY OF THE AFRICAN UNION, **Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII)**, para. 5.

Statute.[777] The decision also emphasized the African States Parties to the Rome Statute's regret that their request to the UNSC to defer the proceedings in the Court against Omar Al Bashir under article 16 of the Statute was neither heard nor acted upon. In light of the lack of engagement by the UNSC with the AU's requests, the African States Parties to the Rome Statute decided that AU Member States would no longer cooperate with the ICC in matters related to the arrest and surrender of Omar Al Bashir to the Court pursuant to the provisions under article 98 of the Rome Statute. The Republic of Chad, however, presented a reservation to this last item of the decision.[778]

Dapo Akande, professor of international law and former consultant to the Commission of the African Union on the question of the relationship between African States and the ICC, pointed that this position adopted by the Assembly of the AU was a middle ground between the range of views that had been taken by African States. He posits that part of the African States "have taken a hardline position and would have liked to push for African States to the ICC Statute to withdraw or at least consider withdrawing from the Rome Statute," while another group "would have preferred a reiteration of the request for deferral."[779] Even though there is a divergence in terms of the means through which they would voice their opposition in relation to the Al Bashir Case, most of the African States were in accordance as to their dissatisfaction with the way the Court was handling the Case.

Before States convened in the 2009 meeting of the ASP, South Africa made a proposal for an amendment. Pursuant to Article 121(1) of the Statute, which establishes that such proposals shall be submitted to the UN Secretary General who would oversee the circulation of the document to all States Parties, the Permanent Mission of the Republic of South Africa proposed an amendment to Article 16 of the Statute. The proposal resulted from a decision made at the November 2009

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[777] ASSEMBLY OF THE AFRICAN UNION, **Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII)**, para. 8.
[778] *Ibid*., paras. 9-10.
[779] AKANDE, Dapo, **Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case**, EJIL: Talk!. Available at: <https://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/>. Accessed: 19 oct. 2020.

meeting of the Assembly of the AU. The proposed amendment first sought to grant the chance for a State with jurisdiction over a situation before the Court to make a deferral request to the UNSC. And second and most importantly, it attempted to extend the power to defer cases for one year to the UNGA. As of the current text of Article 16, only the UNSC holds such power. The UNGA would only have such powers, though, in cases where the State made a request and the UNSC failed to decide within six months. The current text of Article 16 of the Statute would become paragraph 1 and paragraphs 2 and 3 would be added. In the proposal, the new format of Article 16 would read:

> Article 1
> Deferral of Investigation or Prosecution
> 1) No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under the Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.
> 2) A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided for in (1) above.
> 3) Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377(V) of the UN General Assembly.[780]

This amendment proposal was made in the lead up to the 2010 Kampala Review Conference of States Parties that was precisely deciding on amendments to the Rome Statute. However, the proposal was submitted too late to be on the Conference. Since the eighth session of the ASP was to happen shortly after the proposal was submitted, it was decided that it was to be considered in the ASP's ninth session in December 2010.[781]

In its Fourteenth Session, for the most part, the Assembly of the AU reiterated the requests made in its previous decision. The new addition was the expression of support for the proposed amendment to Article 16 of the Statute made by the Republic of South Africa on behalf of the African States Parties to the Rome

[780] SOUTH AFRICA, **Proposal of Amendment**, New York: Assembly of States Parties to the Rome Statute, 2009.
[781] AKANDE, Dapo, **Addressing the African Union's Proposal to Allow the UN General Assembly to Defer ICC Prosecutions**, EJIL: Talk!. Available at: <https://www.ejiltalk.org/addressing-the-african-unions-proposal-to-allow-the-un-general-assembly-to-defer-icc-prosecutions/>. Accessed: 18 oct. 2020.

Statute.[782] In light of the Review Conference that was about to take place in Kampala, the Assembly of the AU also encouraged the African States Parties to raise the matter of the immunities of officials whose States are not parties to the Rome Statute under the discussion on cooperation with the Court.[783]

In the following meeting, on July 2010, the position of the Assembly of the AU remained the same. Mainly, it reaffirmed the decision not to cooperate with the ICC in the matters of the Al Bashir Case, protested the lack of engagement by the UNSC with its referral request and incited the African States Parties to the Statute to voice their support for the amendment proposal submitted by South Africa.[784] The Assembly also expressed in the decision its annoyance with the conduct of ICC Prosecutor Luis Moreno Ocampo of "making egregiously unacceptable, rude and condescending statements" not only on the Al Bashir Case but other situations in Africa.[785]

Upon the reiteration from a number of African States that they would abide by the AU's commitment to not cooperate with the ICC, Omar Al Bashir started to travel to the territory of ICC States Parties. His first visit was to Chad, which also came to be in the following years the country he visited most often. Al Bashir went to Chad to attend a summit of the Sahel-Saharan States between 21 and 23 July 2010 without any threat of arrest and surrender to the ICC.[786] Soon after, in August 2010, Al Bashir travelled to Kenya to attend the celebration of the State's new constitution. Kenya justified the lack of measures to comply with the ICC arrest warrant as a matter of not risking the already "adversely affected peace in Sudan."[787] Opinions inside the government of Kenya, however, were divided on the

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[782] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC) - Doc. Assembly/AU/8(XIV)**, Addis Ababa: African Union, 2010, para. 5.
[783] *Ibid*., para. 8.
[784] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)**, Kampala: African Union, 2010, paras. 4 et seq.
[785] *Ibid*., para. 9.
[786] PRE-TRIAL CHAMBER I, **Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad**, p. 3.
[787] ASSOCIATED PRESS IN NAIROBI, **Kenya defends failure to arrest Sudan's president Omar al-Bashir in Nairobi**, The Guardian. Available at: <https://www.theguardian.com/world/2010/aug/29/kenya-omar-al-bashir-arrest-failure>. Accessed: 21 mar. 2022.

matter of receiving Al Bashir, which impacted on a second trip to Kenya by the then leader of Sudan.[788] The venue for the AU summit was changed to a non-State Party to the Rome Statute and receiving Al Bashir was no longer an issue for Kenya.

Al Bashir was invited by the government of the CAR to attend the Golden Jubilee Independence Day celebrations. The Sudanese government, however, decided last minute to cancel Al Bashir's presence in the event after supposedly the French government intervened and counselled the CAR authorities that his presence could mean future problems for the receiving country.[789] On 11 December 2010, the government of Zambia announced that Al Bashir was free to attend a Special Summit of the International Conference on the Great Lakes Region on its territory for he would not be arrested.[790] However, like in other situations, the lack of a clarity regarding the official position of the government of Zambia and the pressure exerted on the State by the ICC made Al Bashir cancel his attendance in the Summit.[791]

The decision resulting from the Assembly of the AU meeting, on 31 January 2011, went beyond the usual restatement of its request for the UNSC to defer the proceedings against Omar Al Bashir pursuant to Article 16 of the Statute. It also signalled to Kenya's request to the UNSC for a deferral of the ICC investigations regarding the situation in Kenya opened at the ICC on March 2010. The requisition asked the Court to allow for a National Mechanism to deal with these events. In said decision, the Assembly further noted the non-compliance decisions issued by the PTC I for Chad and Kenya in relation to the Al Bashir Case. The decision took the position that both States, by receiving Al Bashir in their territories, were implementing the decisions of the Assembly of the AU to not arrest the sitting Head of State of Sudan, besides working towards the pursuit of the Organization's primary goal of ensuring peace and security in Africa. Lastly, the Assembly underscored the need for a common African voice behind the amendment proposed

[788] **Kenyan PM says Bashir must stand before ICC, wants apology made to int'l community**, Sudan Tribune. Available at: <https://sudantribune.com/article35856/>. Accessed: 22 mar. 2022.
[789] **Sudan's Bashir heading to Central African Republic on Wednesday: report**; **Central African Republic convinces Sudanese president to stay away**, Sudan Tribune. Available at: <https://sudantribune.com/article36826/>. Accessed: 22 mar. 2022.
[790] **Zambia says Sudanese president should not fear arrest on its territory**, Sudan Tribune. Available at: <https://sudantribune.com/article36933/>. Accessed: 24 mar. 2022.
[791] **Sudanese president will not attend regional summit in Zambia**, Sudan Tribune. Available at: <https://sudantribune.com/article36947/>. Accessed: 23 mar. 2022.

by South Africa, so that during the informal consultations of the ASP Working Group on Amendments the ASP would be able to notice that there was support for the proposition.[792]

In May that year, Omar Al Bashir was received in Djibouti for the inauguration of President Ismael Omar Guelleh, marking the third time a State Party to the Rome Statute received the Sudanese President since the ICC issued the arrest warrants against him. In the following month, Al Bashir was scheduled to attend an AU Peace and Security Council meeting in Nigeria. However, due to public pressure the Sudanese authorities opted to cancel the visit.[793]

On July 2011, the Assembly of the AU addressed the PTC I's decisions regarding the non-compliances by Chad, Kenya, and Djibouti. The AU States defended that these States did not arrest and surrender Al Bashir upon his visit to their respective territories due to their obligation pursuant Article 23 of the Constitutive Act of the AU, as well as due to their commitment to peace and stability of the region. The Assembly's decision even brought up the case opened by the ICC against Muammar Gaddafi, which, according to them, complicated the efforts for negotiating a political solution to the crisis in Libya. The decision extended the non-cooperation with the ICC beyond the Al Bashir Case comprising also the request for a non-compliance with the warrant of arrest issued for Gaddafi.[794]

Once again, Al Bashir travelled to Chad, this time to the inauguration of President Idriss Déby Itno, in August 2011. Considering that it was the second time the State Party received Al Bashir since the issuance of the arrest warrants, the PTC I invited the Chadian authorities to provide their justification as to the reason why the visit had taken place and the State did not comply with its obligation to arrest and surrender Al Bashir to the Court. For the first time, the Chamber would receive the answer that the State was not able to cooperate for there was an AU decision to

[792] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Implementation of the Decisions on the International Criminal Court (ICC) – Doc. EX.CL/639(XVIII)**, Addis Ababa: African Union, 2011, paras. 3 et seq.
[793] BOEHME, **State Behavior and The International Criminal Court: between cooperation and resistance**, n.p.
[794] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc. EX.CL/670(XIX)**, Malabo: African Union, 2011, paras. 3 et seq.

not comply with the arrest warrants for Al Bashir.[795] Later that year, Al Bashir was in the territory of Malawi for a regional summit and the PTC I mirrored the proceedings put in place for Chad. Upon replying to the Chamber's request, the Malawi authorities affirmed that article 27 of the Rome Statute was not applicable for Sudan was not a party to the document.[796]

In its January 2012 decision, the Assembly of the AU saw fit to assert its understanding on Article 98(1) of the Rome Statute. According to the Assembly, this provision was included "out of the recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute" and the UNSC by referring the situation in Darfur to the Court "intended that the Rome Statute would be applicable, including Article 98."[797] At this moment, the PTC I had just issued its decision regarding the non-compliance by Malawi. The Assembly addressed said decision and responded that, by not complying, Malawi was implementing the decisions of the AU Assembly. In this decision, the Assembly also made a request for the Commission of the AU to consider seeking an advisory opinion from the ICJ regarding the immunities of State Officials under international law.[798] After the pressure of the ICC upon Malawi, the State decided not to host the following AU summit, especially because AU members insisted on having Omar Al Bashir attend the meeting.[799]

In the decision resulting from its nineteenth session, the Assembly of the AU returned to the matter of the request to the ICJ. According to the Assembly, the Meeting of Ministers of Justice/Attorneys General also made a recommendation for the AU Commission to approach the ICJ, through the UNGA, seeking an advisory opinion on the question of immunities of Heads of State and senior state officials from States that are not Parties to the Rome Statute under international law. The

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[795] REGISTRAR, **Rapport du Greffe relatif aux observations de la République du Tchad, Al-Bashir, Annex 1**, p. 3.
[796] REGISTRAR, **Transmission of the observations from the Republic of Malawi, Annex 2**, p. 2.
[797] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX)**, Addis Ababa: African Union, 2012, para. 6.
[798] *Ibid*., paras. 7 et seq.
[799] **Malawi cancels AU summit over Sudan's Bashir**, Aljazeera. Available at: <https://www.aljazeera.com/news/2012/6/9/malawi-cancels-au-summit-over-sudans-bashir>. Accessed: 22 mar. 2022.

decision encouraged both African States Parties and non-Parties to the Rome Statute to consider concluding bilateral agreements on the immunities of their Senior State officials. The Assembly of the AU moreover prompted its Member States to "balance, where applicable, their obligations to the African Union (AU) with their obligations to the ICC."[800]

Throughout 2013, the Assembly did not vocalize with as much strength its frustrations in regards to the Court's activities in relation to the Al Bashir Case.[801] Before the progression of the situation in Kenya in the ICC, in an extraordinary session, the Assembly requested that the African States Parties to the Rome Statute inserted in the next session of the ASP's agenda the issue of the indictment of African sitting Heads of State and Government by the ICC.[802]

Even though the discussions on the Al Bashir Case at the Assembly of the AU lay relatively dormant, Al Bashir travelled three times during this year to States Parties to the Rome Statute. Two visits were to Chadian territory, in February and May 2013.[803] The first visit was to attend the Community of Sahel-Saharan summit, the second for participating at the Great Green Wall summit.[804] Upon demand of the Chamber that the State present its reasons for receiving Omar Al Bashir without arresting and surrendering him to the Court, the authorities of Chad emphasized that they were following the instructions of the Assembly of the AU not to cooperate with the ICC in matters of the Al Bashir Case. The third visit of the year was to the territory of Nigeria to a special summit of the AU. The visit took place amidst a national debate over whether the State should arrest him. Their discussion

[800] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/731(XXI)**, Addis Ababa: African Union, 2012, paras. 3 et seq.
[801] ASSEMBLY OF THE AFRICAN UNION, **Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) Doc. Assembly/AU/13(XXI)**, Addis Ababa: African Union, 2013.
[802] ASSEMBLY OF THE AFRICAN UNION, **Decision on Africa's Relationship with the International Criminal Court (ICC)**, para. 10.
[803] ASSEMBLY OF STATES PARTIES, **Report of the Bureau on non-cooperation**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, para. 4.
[804] **Sudan's Bashir to visit Chad, Libya despite ICC warrant**, Sudan Tribune. Available at: <https://sudantribune.com/article44690/>. Accessed: 26 mar. 2022; **Sudanese president travels to Chad for regional summit**, Sudan Tribune. Available at: <https://sudantribune.com/article45666/>. Accessed: 26 mar. 2022.

was moot for by the time he was made aware that governmental agencies were pushing for his arrest the government of Sudan cancelled his visit.[805]

On 22 November 2013, the Government of Kenya submitted a proposal for amendments to the Rome Statute in accordance with Article 121(1) of the Statute. The proposal suggested amendments to Article 63 (Trial in the Presence of the accused), Article 27 (Irrelevance of official capacity), Article 70 (Offences against Administration of Justice), Article 112 (Implementation of Independent Oversight Mechanism), and to the Preamble of the Rome Statute. The Kenyan proposals mostly sought to address issues related to the Kenyatta Case. The situation in Kenya at the ICC brought the indictment of Kenyan President Uhuru Kenyatta and Deputy President William Ruto for crimes against humanity for inciting widespread violence after the presidential election held on 27 December 2007.[806] Kenyatta became the first sitting Head of State to appear before the ICC. However, both cases failed to proceed. The Kenyatta Case was dismissed in December 2014 and the Ruto Case on 5 April 2016.[807] While both cases were opened at the ICC, the government of Kenya launched a series of challenges to the Court, which some consider is what undermined both prosecutions.[808]

The Kenyan proposals to amend the Preamble of the Rome Statute and Article 27, however, had a broader scope and would impact cases in both situation in Kenya and situation in Darfur. The suggested amendment to the Preamble would change the provision that reads "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." The proposed change was the addition of the word 'regional,' so that it would read "…complementary to national and regional criminal jurisdictions."[809]

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[805] REGISTRAR, **Report of the Registry on the "Decision regarding Omar Al-Bashir's Visit to the Federal Republic of Nigeria", Annex 4**, p. 4.
[806] INTERNATIONAL CRIMINAL COURT, **Situation in the Republic of Kenya, ICC-01/09**, International Criminal Court. Available at: <https://www.icc-cpi.int/kenya>. Accessed: 16 apr. 2022.
[807] TRIAL CHAMBER V(B), **Decision on the withdrawal of charges against Mr Kenyatta**, The Hague: International Criminal Court (ICC), 2015; TRIAL CHAMBER V(A), **Public redacted version of Decision on Defence Applications for Judgments of Acquittal**, The Hague: International Criminal Court (ICC), 2016.
[808] HELFER; SHOWALTER, Opposing International Justice, p. 2.
[809] KENYA, **Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute, 2013, annex.

The suggested change to Article 27 would be the addition of a third paragraph, which would read:

> Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.[810]

Considering that the Kenyan proposal was made less than a month before the 2013 ASP meeting, it was to be debated on the following meeting a year later.

Non-compliances with the ICC's arrest warrants were still an issue in 2014. Two visits were made by the sitting President of Sudan. On February 2014, Al Bashir went on a summit of the Common Marked for Eastern and Southern Africa in the DRC and soon after to Chad.[811] However, Al Bashir's 25 March 2014 visit to Chad, per the Chadian authorities, "should not be read as a refusal to comply with the obligations of Chad towards the Court," since it "had taken place in the context of border security imperatives and of the role of mediator that Chad is playing in favor of peace agreements among various ethnic groups."[812]

On 2014, the African Union Member States met in order to put together a treaty that sought to expand the jurisdiction of the AU's courts in the African Court of Justice and Human Rights.[813] The Malabo Protocol approved in the capital of the Equatorial Guinea on June 2014 would amend the Statute of the African Court.[814] The implementation of the Protocol would mean a merger of the African Court on Human and Peoples' Rights with the Court of Justice of the African Union.[815] The amendments to the Statute of the African Court of Justice and Human Rights expanded the jurisdiction that the African Courts so far had. Under these new

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[810] *Ibid*., annex.
[811] **Sudan's Bashir in DRC amid calls for his arrest**, Sudan Tribune. Available at: <https://sudantribune.com/article48968/>. Accessed: 22 mar. 2022.
[812] ASSEMBLY OF STATES PARTIES, **Report of the Bureau on non-cooperation**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2014, para. 24.
[813] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Draft Legal Instruments Doc. Assembly/AU/8(XXIII)**, Malabo: African Union, 2014, para. 2(e).
[814] Until the finalization of this dissertation, the Malabo Protocol had yet to enter into force for it did not have any ratifications. AFRICAN UNION, **List of Countries which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights**, Addis Ababa: African Union, 2019.
[815] AFRICAN UNION, **Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights**, Malabo: African Union, 2014, p. 3.

provisions, it would be added to the Court a Section that would have the competence to try cases under international criminal law.[816] This section would have jurisdiction over 14 crimes, including genocide, crimes against humanity and war crimes.[817] The actions listed to account for crimes against humanity were the same as in the Rome Statute definition. As to genocide and war crimes, those two crimes had a broader range of actions than the Statute of the ICC.[818] The document does not make any mention or reference to the ICC. Another relevant provision of the Statute of the proposed Court is Article 46A *bis*, which asserts that "[n]o charges shall be commenced or continued before the Court against any serving AU Head of State or Government […] during their tenure of office."[819]

In its first meeting in 2015, the Assembly of the AU incorporated to its decision the reaffirmation of the customary international law that grants sitting Heads of State and other senior officials with immunity during their tenure in office. In the decision, it also welcomed the decision of the OTP to withdraw the charges against Kenyan President Uhuru Kenyatta. It was further noted that the ASP had failed to consider the concerns expressed and the amendments proposed to the Rome Statute by the African Member States during the ASP meeting held in December 2014. In its 2015 decision, the Assembly also addressed the DRC's non-cooperation with the ICC arrest warrant against Al Bashir.[820]

South Africa was the next State to not comply with the arrest warrant issued by the ICC. Omar Al Bashir visited the South African territory on 13 and 14 June to attend an AU Summit. While the judicial authorities debated whether the State was under the obligation to arrest and surrender him to the ICC, Al Bashir fled the country.[821] While the matter of Al Bashir's arrest was debated domestically, on 5 October 2015, South Africa requested the inclusion of a supplementary item in the agenda of the Fourteenth Session of the ASP, which was the "Application and

[816] AFRICAN UNION, **Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights**, art. 16(1).
[817] *Ibid*., art. 28A.
[818] *Ibid*., arts. 28B, 28C and 28D.
[819] *Ibid*., art. 46A bis.
[820] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court (ICC) Doc. Assembly/AU/18(XXIV)**, Addis Ababa: African Union, 2015, paras. 7 et seq.
[821] ONISHI, **Omar al-Bashir, Leaving South Africa, Eludes Arrest Again**.

Implementation of Article 97 and Article 98 of the Rome Statute."[822] South Africa explained its request as the need to discuss how Article 98 should be interpreted for "there appear to be fundamental differences on the issue of immunities [...] between the Pre-Trial Chambers of the Court with equal status," which requires the development of "a full understanding of the nature and scope of Article 98 and its relationship with Article 27."[823]

On the first AU meeting of 2016, the Assembly spoke about Al Bashir's visit to South Africa and the consequent non-compliance with the ICC's arrest warrant by said State. The decision affirmed that "by receiving President Bashir, the Republic of South Africa was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC" and was acting consistently with its obligations under international law.[824] The Assembly further pointed to the posture of the "Principals of the Court" (OTP, Registrar and Presidency of the ICC) of disregard in relation to the positions of African Member States parties to the Rome Statute.[825] The decision, besides calling specialized AU offices for support in pursuing political, legal, and strategic avenues in addressing AU's concerns before the UN, ICC and ICJ, included in the Ministerial Committee's mandate the development of a strategy of collective withdrawal from the ICC.[826]

On May 2016, again States Parties received Al Bashir without arresting and surrendering him to the ICC. Al Bashir visited Djibouti to celebrate the inauguration of President Ismail Omar Guilleh.[827] A few days later, Al Bashir attended the swearing in ceremony of President Yoweri Museveni of Uganda. During this las event, "a group of American, Canadian, and European diplomats walked out […]

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[822] ASSEMBLY OF STATES PARTIES, **List of supplementary items requested for inclusion in the agenda of the fourteenth session of the Assembly, Annex I: Request by South Africa for the inclusion of a supplementary item in the agenda of the fourteenth session of the Assembly titled 'Application and Implementation of Article 97 and Article 98 of the Rome Statute'.**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2015.
[823] *Ibid*.
[824] ASSEMBLY OF THE AFRICAN UNION, **Decision on the International Criminal Court Doc. EX.CL/952(XXVIII)**, Addis Ababa: African Union, 2016, para. 3.
[825] *Ibid*., para. 9.
[826] *Ibid*., para. 10.
[827] **Sudan's Bashir invited to attend Djiboutian president inauguration**, Sudan Tribune. Available at: <https://sudantribune.com/article57075/>. Accessed: 21 mar. 2022.

in part because Bashir was in attendance."[828] The retreat of the foreign officials had also to do with Museveni's blatant remarks about the ICC.[829]

At their second meeting in 2016, the States of the AU prepared their strategy for the upcoming fifteenth ASP, which would take place later in the year. Amidst the proposals for the meeting was a vote on a draft ICC Action Plan on Arrest Strategies which would demand the UNSC to mandate UN Peacekeeping missions to enforce ICC warrants of arrest.[830] The Assembly of the AU instructed the African States Members of the Statute to reject such proposal.[831]

For the 2016 ASP meeting, South Africa requested the establishment of a working group on the application and implementation or articles 97 and 98 of the Rome Statute. Before this meeting of the ASP took place, the resistance against the ICC that had so far been mostly effective in the form of ignoring the ICC, especially through the non-compliances, gained a bigger proportion. On 21 October 2016, South African authorities filed an official notification informing the withdrawal of their country from the jurisdiction of the ICC. The wide repercussion of the news generated shock in much of the international community. Although the country had previously threatened to withdraw from the Court, it was not known that the South African representatives had a real plan for their exit. The South African government made clear its dissatisfaction with the ICC.[832] The letter submitted to the UN Secretary General indicated the reason for its request to be the situation it found itself of having conflicting international law obligations. It raised the fact that, considering that there was no clarity regarding the relationship of the provisions under Article 98 and Article 27 of the Statute, which is indicated by the inconsistencies in the findings of the PTCs, it had requested the Court for

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[828] MCLEARY, Paul, **Exclusive: The International Criminal Court Really Wishes Djibouti Had Arrested an Accused War Criminal**, Foreign Policy.
[829] *Ibid*.
[830] The Action Plan on Arrest Strategies was developed by the ASP Bureau (the ASP executive committee that consists of a president, two vice-presidents and 18 States Parties) as a roadmap for achieving an operation tool to enhance the prospect that requests by the ICC for arrest and surrender are executed. ASSEMBLY OF STATES PARTIES, **Report of the Bureau on cooperation, Annex IV: Arrest strategies: roadmap and concept paper**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013.
[831] ASSEMBLY OF THE AFRICAN UNION, **Decision on the International Criminal Court Doc. EX.CL/987(XXIX)**, Kigali: African Union, 2016, para. 5.
[832] **South Africa to quit international criminal court**, The Guardian. Available at: <http://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows>. Accessed: 13 dec. 2020.

consultations, but to no avail. Under these circumstances, South Africa considered that to continue to be a State Party to the Rome Statute would compromise its efforts to promote peace and security on the African Continent.[833] The letter also listed amongst its reasons "perceptions of inequality and unfairness in the practice of the ICC that do not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others."[834] The South African request for withdrawal from the ICC, however, was not an isolated phenomenon. In the beginning of the same month, Burundi had already drawn attention after 94 of its 110 parliamentarians voted in favour of withdrawing from the jurisdiction of the Court. The government of Burundi had started proceedings following the April 2016 opening of preliminary investigations in the situation in Burundi by the OTP.[835] Subsequently, on 26 October 2016, the Gambia also announced that it would denounce the Rome Statute.[836] Reports also indicated that Namibia, Kenya, and Uganda contemplated withdrawing from the ICC at that moment.[837]

Until today, only Burundi followed through with the denunciation of the Rome Statute. The Gambia withdrew its request after a change in administration, while, in the case of South Africa, the process was more complex.[838] South Africa's communication regarding its withdrawal from the Rome Statute had been sent on 19 October 2016 by the South African Minister of Foreign Affairs. However, this measure generated a debate within the country over the correct proceedings to be

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[833] SOUTH AFRICA, **Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court**, New York: United Nations, 2016, p. 2–3.
[834] *Ibid*., p. 1–2.
[835] **Burundi politicians back international criminal court withdrawal**, The Guardian. Available at: <http://www.theguardian.com/world/2016/oct/12/burundi-politicians-back-international-criminal-court-icc-withdrawal>. Accessed: 13 dec. 2020; INTERNATIONAL CRIMINAL COURT, **ICC judges authorise opening of an investigation regarding Burundi situation**.
[836] **Gambia is latest African nation to quit international criminal court**, The Guardian. Available at: <http://www.theguardian.com/world/2016/oct/26/gambia-becomes-latest-african-nation-to-quit-international-criminal-court>. Accessed: 13 dec. 2020.
[837] MIYANDAZI, Luckystar; APIKO, Philomena; AGGAD-CLERX, Faten, **Why an African Mass Withdrawal From the ICC Is Possible**, Newsweek. Available at: <https://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-burundi-515870>. Accessed: 20 oct. 2020. This is not including those States that threatened to leave the Court in other moments.
[838] SAINE, Pap; JAHATEH, Lamin, **Gambia announces plans to stay in International Criminal Court**, Reuters. Available at: <https://www.reuters.com/article/us-gambia-justice-icc-idUSKBN15S2HF>. Accessed: 18 oct. 2020.

adopted in this case, since there is no express provision regarding procedure for denouncing treaties in the South African Constitution. As parliamentary approval is a requirement for ratifying and, therefore, acceding into treaties, those who were against the measure of withdrawing from the ICC, mainly the Democratic Alliance, the opposition party, took the matter to the High Court of South Africa to decide whether the approval of parliament was needed for leaving the international court. On 22 February 2017, the High Court invalidated the denunciation on the grounds that the government did not have the authority to make the arrangements for withdrawing the ICC without the consent of parliament.[839] In the following month, South Africa, then, revoked its letter of resignation of the Rome Statute, though the President maintained that the country had the intention of submitting a bill for proceeding with their withdrawal from the ICC according to the steps established by the High Court.

Against this backdrop, at the Twenty-Eighth Session of the AU Assembly, on 30 and 31 January 2017, the AU Member States addressed a meeting held between its Ministerial Committee and the UNSC, which was ended because the AU team considered that the delegation representing the UNSC affronted its attempt of constructive engagement. The UNSC officials had no decision-making powers. It was decided that the Committee would cease its efforts of dialogue with the UNSC. The Assembly also signalled its welcome to the decisions taken by Burundi, South Africa, and the Gambia, indicating them as pioneer implementers of the Withdrawal Strategy. Lastly, the Assembly decided to adopt said strategy. However, some States presented reservations.[840] Nigeria, Senegal, and Cape Verde presented formal reservations to the decision adopted in the meeting. Liberia entered a reservation only regarding the dispositions of the strategy, and Malawi, Tanzania, Tunisia, and Zambia asked more time to consider the proposal.[841]

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[839] HIGH COURT OF SOUTH AFRICA, **Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening) (83145/2016)**, Pretoria: High Court of South Africa, 2017; SOUTH AFRICA, **Withdrawal of Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court**, New York: United Nations, 2017.

[840] ASSEMBLY OF THE AFRICAN UNION, **Decision on the International Criminal Court Doc. EX.CL/1006(XXX)**, Addis Ababa: African Union, 2017, paras. 3 et seq.

[841] KEPPLER, Elise, **AU'S 'ICC Withdrawal Strategy' Less than Meets the Eye**, Justice in Conflict. Available at: <https://www.justiceinfo.net/en/31899-au-s-icc-withdrawal-strategy-less-than-meets-the-eye.html>. Accessed: 20 oct. 2020.

On 1 February 2017, a day after the AU meeting, non-governmental organizations had access to a draft of the Withdrawal Strategy. The document, despite the given name, was not exactly an action plan, but a recommendation to African States for withdrawal that, however, affirms that this is a "sovereign exercise" to be carried according to each State's domestic legislation. The document listed the objective of such action being giving "member states a holistic approach, analysis and implications of initiating the withdrawal provision under the Rome Statute."[842] Per the provisions of the VCLT, it was recognized that the proposed withdrawal would have to be implemented on a state by state basis invoking Article 127(1) of the Rome Statute.[843] According to the stipulations of Article 127(2) of the treaty, the ongoing cases against the withdrawing parties would still require them to fulfil their obligations under the Statute in relation to those cases or investigations.[844]

The document then moves of to analyse the elements that are beyond the statutory dispositions, looking at the nature and effects of what is being proposed. They ponder on the meaning of the action being proposed.

> Collective withdrawal 'by a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences.' States can sometimes band together to challenge international legal rules they perceive as unfair and objurgate international institutions that enforce those rules. The collectiveness of the action has the potential to 'radically reconfigure existing forms of international cooperation.' Withdrawal from a treaty 'can give a denouncing state additional voice, either by increasing its leverage to reshape the treaty to more accurately reflect its interests or those of its domestic constituencies, or by establishing a rival legal norm or institution together with other like-minded states.'[845]

The document recognizes that, even being a collective strategy, it is a process that requires unilateral acts that holds individual political and legal

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[842] ASSEMBLY OF THE AFRICAN UNION, **Withdrawal Strategy Document (Draft 2)**, Addis Ababa: African Union, 2017, para. 9.
[843] Article 127(1) reads:
1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date." **Rome Statute of the International Criminal Court**.
[844] ASSEMBLY OF THE AFRICAN UNION, **Withdrawal Strategy Document (Draft 2)**, paras. 10 et seq.
[845] *Ibid*., para. 19.

consequences.[846] Considering the delicacy of the issue, the proposal raises attention to the fact that collective withdrawal "has not yet been recognized by international law," and demanding further studies on "the potential emergence of a new norm of customary international law."[847] The document is careful to point that there had been various reasons for the decisions to withdraw that had taken place in the previous year, noting that Burundi's actions had taken place soon after the Court opened a case to investigate episodes of violence in its territory, while South Africa declared that its ICC treaty obligations were inconsistent with customary international law and the Gambia justified its withdrawal on the ICC's selectivity practices. The document also points that there were African countries that in face of the notifications of withdrawal pledged their continued support to the ICC.[848] Lastly, the document goes on to delineate the strategy, which is divided into two main fields: first, the legal and institutional and, second, the political. The legal and institutional strategies would comprise: the proposal of amendments to the Rome Statute; the fight for a more representative UNSC, which would happen through a reform of said organ; an enhancement of African representation in the ICC so that the continent is able to contribute effectively to the evolution of the Court's jurisprudence; the strengthening of national legal and judicial mechanisms; and the ratification of the Malabo Protocol, which would mean being able to address the crimes regionally. As to the political approach, it would mainly revolve around engaging in a constant dialogue with stakeholders relevant to the ICC proceedings, such as: the UNSC, more specifically the five permanent members; the ASP; African Groups in New York and the Hague, which as a group precisely to be able to have a more impactful voice in international organizations; and the OTP.[849]

In the meeting held in January 2018, the Assembly of the AU took a new step in the predicament around the Al Bashir Case and made some decisions regarding the AU-ICC impasse regarding the issue of immunities. The Assembly noted that the decision adopted by the PTC II on the non-compliance by South Africa was at variance with customary international law and instructed its members to oppose the line of interpretation adopted by the Chamber. Also, it requested the ASP to

[846] *Ibid*., para. 20.
[847] *Ibid*., para. 21.
[848] *Ibid*., paras. 22 et seq.
[849] *Ibid*., paras. 28 et seq.

convene "a working group of experts from its member states to propose a declaratory/interpretative clarification of the relationship between Article 27 […] and Article 98."[850] The decision reiterated its plea for the African States to insist that the UNGA places on its agenda a request an advisory opinion from the International Court of Justice on the question of immunities of a Head of State and Government and other Senior Officials."[851]

On 9 July 2018, the Permanent Representative of Kenya to the UN submitted a letter requesting the inclusion of an item in the provisional agenda of the UNGA 2018 session. The request was for an advisory opinion of ICJ on "the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials."[852] The importance of said advisory opinion was justified in the following manner:

> 10. Members of the United Nations will benefit from a General Assembly request for an advisory opinion of the International Court of Justice that will provide clarity to the evident ambiguity and to competing obligations under international law and will assist States in carrying out their obligations without undermining either the call for ending impunity or the legal regime governing the immunities of Heads of State and Government and other senior officials.
> [...]
> 12. The divergence of States' practices and relying on their own interpretation rather than recourse to available international justice mechanisms thereby undermine the international justice system and the legal regime governing relations between States in its entirety.
> 13. By seeking the advisory opinion in the exercise of its powers under Article 96 (1) of the Charter, the General Assembly will be able to bring a lasting resolution to the long-disputed issue of immunities and the conflicting obligations of States under international law.[853]

Even after Omar Al Bashir was no longer in office (see Interlude No.6), the Assembly of the AU kept their project to have an advisory opinion of the ICJ. On

[850] ASSEMBLY OF THE AFRICAN UNION, **Decision on the International Criminal Court Doc. EX.CL/1068(XXXII)**, Addis Ababa: African Union, 2018, para. 5.
[851] *Ibid*., para. 5.
[852] UNITED NATIONS GENERAL ASSEMBLY, **Request for the inclusion of an item in the provisional agenda of the 73rd session: request for an advisory opinion of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials: letter dated 9 July 2018 from the Permanent Representative of Kenya to the United Nations addressed to the Secretary-General**, New York: United Nations, 2018.
[853] *Ibid*., annex.

its February 2020 decision, the Assembly requested that their previous request was removed and reported to be finalizing with the AU Commission a draft for a new request.[854]

Table 3 – Mapping the African Contestation practices in relation to the Al Bashir Case

Year	Actor	Contestation activity	Details
2009	AU	Request for non-compliance	Decision to no longer cooperate with ICC in matters of the Al Bashir Case
		Alternative regional mechanism	Debate on the extension of the jurisdiction of the African Court on Human and Peoples' Rights to incorporate genocide, crimes against humanity and war crimes
		Request for deferral of proceedings	Request for the UNSC to use its powers under Article 16 to defer the proceedings against Al Bashir
		Other	Request for clarification on non-parties immunities
	South Africa	Proposal of amendment to the Rome Statute	Article 16: Creation of ability for States to make a deferral request to UNSC and extension of Article 16 powers to UNGA (for special circumstances)
2010	Chad	Non-compliance	Regional summit
	Kenya	Non-compliance	New constitution celebrations
2011	Chad	Non-compliance	President inauguration
	Djibouti	Non-compliance	President inauguration
	Malawi	Non-compliance	Regional summit
2012	AU	Position on interpretation of Article 98	Provision included in Statute out of the recognition that said document is not capable of removing an immunity which international law grants to the officials of States that are not parties and the UNSC by referring the situation in Darfur to the Court intended that the Rome Statute would be applicable, including Article 98
		Request for ICJ advisory opinion	Request for the Commission of the AU to consider seeking an advisory opinion

[854] ASSEMBLY OF THE AFRICAN UNION, **Decision on the International Criminal Court Doc. EX.CL/1218(XXXVI)**, Addis Ababa: African Union, 2020, para. 5.

			from the ICJ regarding the immunities of State Officials under international law
2013	AU	Other	Request for discussion on ASP meeting about the indictment of African sitting Heads of State and Government by the ICC
	Chad	Non-compliance	Regional summit
		Non-compliance	Regional summit
	Kenya	Proposal of amendment to the Rome Statute	Preamble: Extend complementarity to regional mechanisms Article 27: addition of provision that would create the possibility for the Court to exempt the State official from prosecution during their current term of office
	Nigeria	Non-compliance	Regional summit
2014	AU	Alternative regional mechanism	Adoption of the Malabo Protocol 55 States 15 Signatures No ratifications[855]
	Chad	Non-compliance	Ongoing peace process
	DRC	Non-compliance	Regional summit
2015	AU	Other	Requested development of a strategy for collective withdrawal from the ICC
	South Africa	Non-compliance	Regional summit Requested consultations with the Court before visit took place
		Other	Request for supplementary item in ASP agenda 'Application and Implementation of Article 97 and Article 98 of the Rome Statute'
2016	AU	Other	Withdrawal Strategy Document Nigeria, Senegal, and Cape Verde: formal reservations to the decision Liberia: reservation to the dispositions regarding the strategy Malawi, Tanzania, Tunisia, and Zambia: more time to consider strategy
	Burundi	Notification of withdrawal	Notification: 27 October 2016 Withdrawal effective: 27 October 2017
	Djibouti	Non-compliance	President inauguration

[855] AFRICAN UNION, **List of Countries which Have Signed, Ratified/Acceded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights**.

	South Africa	Other	Request of a working group on the application and implementation or articles 97 and 98 of the Rome Statute
		Notification of withdrawal	Notification: 19 October 2016 Rescission: 07 March 2017
	The Gambia	Notification of withdrawal	Notification: 10 November 2016 Rescission: 10 February 2017
	Uganda	Non-compliance	President inauguration
2018	AU	Other	Request to ASP to convene working group of experts from its member states to propose a declaratory/interpretative clarification of the relationship between Article 27 and Article 98
	Kenya	Request for ICJ advisory opinion	Advisory opinion of ICJ on 'the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials'

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3.
Practicing contestation: the bias of international legal knowledge

The relationship between African States and the ICC throughout the decade between 2009 to 2019 is portrayed as turbulent, with the point of highest dissension between the end of 2016 and the beginning of 2017, when three States handed their notifications of withdrawal and the Assembly of the AU decided on a 'withdrawal strategy.' However, as the previous Interlude examines, there is more to the African practices of contestation towards the Al Bashir Case in the ICC than most depictions present. The complexity of motivations for these practices makes them more blurred and filled with contextuality than simply an affront to the Court. Non-compliances have been enacted for the purposes of particular State's interest, regional summits, and peace processes. These different motivations imply different grounds upon which each non-compliance takes place. The Chadian authorities' argument emphasizes this point by claiming that their allowance of Al Bashir's entry in their territory in 2014 should not be read as an affront to the ICC. The meeting with the Sudanese Head of State was held due to the negotiation of a peace agreement. Some acts such as the Chadian 2014 non-compliance are not always linked to an opposition to a legal development. Nevertheless, for happening in the midst of a larger wave of actions directed towards the case and because the act indeed speaks directly against a legal directive, the practice comes to be understood as contestation and might even be consequential for legal developments. A more in-depth scrutiny also reveals that sensationalist renderings of the African contestation paints a picture of a politically suffused process that could care less about the law when reality shows something else. Most States bother justifying their non-compliances presenting an interpretation of the legal development to which their practice speaks to. All the other categories of practices which comprise the African contestation are performed within the standards already in place for international legal practice. The AU's 'withdrawal strategy' serves as a good example for this point. This strategy for withdrawal can be considered as

"purposefully weak," specially taking into consideration the adopted vocabulary.[856] It does not even make a call for a mass withdrawal of States from the ICC and, in this sense, should be read more as a "reasonable list of possible reforms to the Rome Statute and to the Court […] [that] should be taken seriously and continue to be debated," than a pledge for denouncing the Rome Statute.[857] In general, it is a roadmap for the African States to dive into an engagement with the Court in all possible fronts.

The African contestation reveals the more dynamic relationship between law and politics. The mobilisation of the legal mechanisms available to make their positions reflected in legal standards "demonstrate a simultaneous upgrading and downgrading of legal expertise." [858] The substantive practices that reject the position presented by the Court "downgrades legal knowledge as a specific kind of expertise," while the concomitant engagement with proposals that are precisely speaking the legal grammar upgrades legal knowledge.[859] There is a (re)production of international law in these legal exchanges, one that not only moves the boundaries of law but "also raises questions as to […] who can participate in producing that specific 'expert' kind of legal knowledge."[860]

This chapter explores a crucial element of international legal practice that shapes the practices of contestation of African States seen in Interlude No. 3, the formalisation of international law. Fleur Johns argues that "the formal versus anti-formal distinction does not seem […] to be very telling for those who would seek to chart the dynamics and grasp the stakes of contemporary legal work."[861] It has been recognized the presence of "extra-legal normative codes […] 'as ... fully "inside" the practice of legal interpretation, rather than as external" to the international legal field.[862] However, considering the wider purpose of this research to analyse the practice of the organs of the ICC in response to the African

[856] KERSTEN, Mark, **Not All it's Cracked Up to Be – The African Union's "ICC Withdrawal Strategy"**, Justice in Conflict. Available at: <https://justiceinconflict.org/2017/02/06/not-all-its-cracked-up-to-be-the-african-unions-icc-withdrawal-strategy/>.
[857] *Ibid*.
[858] AALBERTS, Tanja E.; BOER, Lianne J M, Entering the Invisible College: Defeating Lawyers on Their Own Turf, **British Yearbook of International Law**, v. 87, n. 1, p. 1–19, 2017, p. 2.
[859] *Ibid*.
[860] *Ibid*., p. 16.
[861] JOHNS, **Non-Legality in International Law: Unruly law**, p. 21.
[862] *Ibid*.

contestation towards the Al Bashir Case as to understand the participation of these States in the (re)production of expert knowledge in the field of international criminal law, the formalisms of international legal practice are a necessary stop.

As to work through the particular elements of the African practices of contestation in relation to the Al Bashir Case, this chapter is divided into three main sections. The first part of the chapter begins by considering the dimension of practicing international law as to understand the way political actors come to occupy a place in international legal debates. Then, it builds the frame upon which the African practices of contestation are analysed. It draws on the International Relations and International Law scholarship that pore over the Bourdiesian approach to practices as to establish the link between the performance of the African practices of contestation and the notions of *habitus*, the features introduced in Chapter 2, and field. It seeks to highlight the idea that the performativity of these practices of contestation is in a relation of co-constitution with the structuring structures of international legal practice and with the social space in (relation to) which these practices are taking place. The second part of the chapter is devoted to an analysis of the practices of contestation that were explored in Interlude No. 3. It looks to the elements of these practices and which of the international legal formalisms each mobilises. The final part of the chapter moves to an examination of the more in-depth elements that condition these structuring structures or formalisms of the practice international law. In this sense, it focuses on the underlying aspect of legal norms as practice, debating the capacity of international law of authorizing and limiting certain international legal practices of contestation. It, then, moves to a brief analysis of customary international law, the formalism of international law which its practice determines the way of international legal practices. In other words, as the source of international law that draws obligations from practice, it investigates the commonly overlooked dimension which is the practice of delimiting practices in customary international law.

3.1.
Practicing international law as performance in an institutionalized environment

The practices examined throughout Interlude No. 3, regardless of whether their performance was intended to provoke change or make a stance in relationship to the Al Bashir Case in the ICC, represent a phenomenon that comes along with the legalisation of international politics: the States' need to justify their practices in legal terms. The most noticeable examples that have been extensively explored in the literature are situations of invasion, such as the ones in Iraq, Kosovo, and, more recently, Ukraine.[863] Alongside this movement towards a larger presence of law (and legal vocabulary) in the daily life of international politics comes an array of actors mobilising these legal terms and making claims about legality. Arguments that were more often associated with events and disputes that take place in domestic and international judicial and quasi-judicial bodies, begin to increasingly occupy diplomatic interactions among States, discussions in the many international organisations, interventions from NGOs and other actors from civil society and academia.[864] This phenomenon emphasizes the fact that international "lawyers are but one of the parties sitting around the table, and need to defend legal reasoning against other types of relevant expertise, with different vocabularies and logics for international decision-making." [865] The dynamics of States responding to international legal developments and jurisprudence was termed by Tanja Aalberts and Thomas Gammeltoft-Hansen the "sovereignty game."[866]

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[863] KOSKENNIEMI, 'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law; GRASTEN, Maj, Whose legality? Rule of law missions and the case of Kosovo, *in*: RAJKOVIC, Nikolas M.; AALBERTS, Tanja E.; GAMMELTOFT-HANSEN, Thomas (Eds.), **The Power of Legality: Practices of International Law and their Politics**, Cambridge: Cambridge University Press, 2016, p. 320–342; AALBERTS; BOER, Entering the Invisible College: Defeating Lawyers on Their Own Turf, p. 1; BELLINGER III, John B., **How Russia's Invasion of Ukraine Violates International Law**, Council on Foreign Relations. Available at: <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law>. Accessed: 4 mar. 2022; DWORKIN, Anthony, **International law and the invasion of Ukraine**, European Council on Foreign Relations. Available at: <https://ecfr.eu/article/international-law-and-the-invasion-of-ukraine/>. Accessed: 4 mar. 2022.

[864] JOHNSTONE, **The power of deliberation: international law, politics and organizations**, p. 3.

[865] AALBERTS; BOER, Entering the Invisible College: Defeating Lawyers on Their Own Turf, p. 15.

[866] The authors did not create the game metaphor but drew it from different analytical studies of world politics. AALBERTS, Tanja; GAMMELTOFT-HANSEN, Thomas, Sovereignty Games,

3.1.1.
The agents of contestation: the States' 'sovereignty game'

Across the international law scholarship and practice, the engagement with issues of legality by non-legal actors is often deemed as problematic and potentially damaging towards the law. This notion comes from the idea that the interference of political actors in legal matters as norm interpreters infuse the process of interpretation with bias. This can be a position adopted even by those who recognise that there is no way of detaching law from politics. The legalisation of international politics means that a large part of the international legal debate is more frequently taking place in sites without a 'proper' judicial forum where there is "no authoritative judge or jury with the jurisdiction to decide upon the legality" of the matter.[867] In the legalist mindset, this phenomenon is translated as a situation with a "plurality of norm interpreters left to pose divergent interpretation[s] of the legal framework peppering their positions with extra-legal reasoning mudding the waters and potentially rendering a deficient legal system still worse."[868] The participation of political actors suffuses the debate over legality with "extra-legal reasoning."[869] In other words, considering political actors as norm interpreters would create a scenario where there is a multitude of answers to a legal dispute, multiplying among them interpretations which are not substantiated by juridical arguments. Such contention already sets *a priori* the notion that interpretations given by political actors are not grounded in juridical arguments but political ones, being in this sense extra-legal or outside of the realm of law. Another problem is the argument that political actors "will necessarily approach specific international disputes and crises with a particular bias, according to their distinct philosophy and political beliefs."[870] As chapters 1 and 2 have discussed, the same can be argued in relation to judges and every other individual working in an international judicial institution. Legal operators differ, for example, in terms of their criteria for evidence (as Interlude

International Law and Politics, *in*: AALBERTS, Tanja; GAMMELTOFT-HANSEN, Thomas (Eds.), **The Changing Practices of International Law**, Cambridge: Cambridge University Press, 2018, p. 29.

[867] BURKE, Moving while standing still: law, politics and hard cases, p. 127.

[868] *Ibid*.

[869] *Ibid*.

[870] *Ibid*.

No. 1 explores in the matter of the issuance of the arrest warrant for Omar Al Bashir) and what is enough to constitute an international custom (discussed further in this chapter) and these different positions result from philosophical and ideological preferences and beliefs. This means that every engagement with legality is in relation to a certain politics regardless of the field within which the actor comes from.

Practices of international legal contestation can be performed by any actor, not only legal operators, but anyone considered to be within the key audiences of the debate. In order to create a category where all these actors could fit together, Wiener has chosen to classify them as stakeholders.[871] Political actors, however, frequently engage in discussions that often fall into the realm of the extra-legal. It is important to make a differentiation of the kinds of arguments that are legal and those that are not. But this is not to say that politics is not present in the legal reasoning of the international lawyer. In the debate regarding Al Bashir's immunity, there has been a multitude of answers and raised possibilities that comes from legal *and* political actors. The engagement with legal issues by political actors in international court's cases places them as norm interpreters and their engagement through practices of norm interpretation will also generate an impact in the very understanding and future interpretations of this legal norm.

Legality is influenced by what political and legal actors do, and seek to do, in different settings, not only in the spaces traditionally associated as where international law happens. This means that what is considered a legal obligation is the result of a process involving more than the work of legal operators, who adopt specific notions about what is legality, but also from actors that have a stake in the process taking place.[872] The "sovereignty game" implies a disaggregation of sovereignty amongst the entities that act in the name of the State.[873] This occurrence has made a brief appearance in Interludes No. 2 and 3 in the events of non-compliance and notifications of withdrawal. These situations displayed the way the position taken by the States in international affairs is influenced (or even decided)

[871] WIENER, **A theory of contestation**, p. 3.
[872] BRUNNEE, Jutta; TOOPE, Stephen J., **Legitimacy and Legality in International Law: An Interactional Account**, Cambridge: Cambridge University Press, 2010, p. 106.
[873] AALBERTS; GAMMELTOFT-HANSEN, Sovereignty Games, International Law and Politics, p. 30.

in the interplay between the government and other entities inside the State. Where the object of study of this thesis is concerned, however, the practices under analysis are performed by the State as an actor. Their participation through argumentative practices in international legal developments constitutes them as players in the game.[874] These States are constantly defending and justifying their positions "as part of everyday political practice, both within national parliaments and international diplomatic fora."[875] States positions and strategies to make the case for such stances are conditioned by rules that establish the way international law should be practiced (and contested) and will change accordingly to the dynamics at play. The possibilities that are open by the mobilisation of the legal vocabulary by international actors make it "entirely possible to affect both the legal interpretation and framing of a particular issue as well as to organize political practices so as to avoid liability."[876] The capacity of the actor to mobilise the legal vocabulary as to perform such acts is the competent practice of international law. In the South African art. 97 consultations with the Court (see Interlude No. 2), for example, the Ambassador recognized his lack of competence to mobilize the juridical vocabulary necessary to argue the South African position in relation to the (ir)relevance of Al Bashir's immunity in relation to the proceedings before the ICC. The Ambassador affirmed before the Single Judge: "I am definitely not an authority or an expert on judicial matters. I'm just the ambassador of the Republic. […] experts back at the capital would deal with this issue."[877] "The politics of international law is what competent international lawyers do. And *competence is the ability to use grammar in order to generate meaning by doing things in argument*."[878] In order to capture the phenomenon of political actors mobilising the legal language, however, international law needs to be conceived as a practice rather than a tool, a doing instead of a being. The ontological premises that comes with the understanding of international law as practice are presented in the next section.

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[874] *Ibid*., p. 38.
[875] *Ibid*., p. 40.
[876] *Ibid*.
[877] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 2**, p. 11.
[878] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 571.

3.1.2.
Investigating the micro practices of international law:

The investigation of the practices of international legal contestation implies the zooming in to the level of micro analysis of politics and institutions. As considered by Iver Neumann, the study of practices can provide a very valuable contribution because it allows changes in the social level to be perceived. In addition, it also provides a better insight into the role of actors in the structure of the system.[879] Adler and Pouliot point out that the use of 'Practice Theory' together with theories of International Relations opens a research agenda that allows one to make considerations about issues that are valuable to the discipline, such as the politics of power, history etc. They point that "as soon as one looks into practices it becomes difficult, and even impossible, to ignore structures (or agency), ideas (or matter), rationality (or practicality), stability (or change): one becomes ontologically compelled to reach beyond traditional levels and units of analysis."[880] The reason for being such a fruitful approach is that it allows one to make sense of subtle or even diffuse manifestations of power. 'Practice Theory' while looking into significant actions is able of grasping big questions related to the social order. In this sense, it sees social worldly events as both structural and structuring.[881]

Adler and Pouliot see the study of practices as an epistemological umbrella which would encompass different ontologies and epistemologies.[882] In that matter, this thesis joins Bueger and Gadinger in arguing that there are some ontological and epistemological assumptions required for an analysis of practices. The authors point to six assumptions required for a study of practices: (1) the adoption of a relational ontology, meaning that its object of investigation has a contingent character, instead of static; (2) the understanding that knowledge is acquired through practices, instead of being prior to them; (3) take practices as "inherently collective

[879] NEUMANN, Iver B., Returning Practice to the Linguistic Turn: The Case of Diplomacy, **Millennium: Journal of International Studies**, v. 31, n. 3, p. 627–651, 2002.
[880] ADLER, Emanuel; POULIOT, Vincent, International practices, *in*: ADLER, Emanuel; POULIOT, Vincent (Eds.), **International Practices**, Cambridge: Cambridge University Press, 2011, p. 5.
[881] ROCHA DE SIQUEIRA, Isabel, Contribuições da Teoria da Prática de Pierre Bourdieu, *in*: ROCHA DE SIQUEIRA, Isabel *et al* (Eds.), **Metodologia e relações internacionais: debates contemporâneos: vol. II**, Rio de Janeiro: Ed. PUC-Rio, 2019, p. 96.
[882] ADLER; POULIOT, International Practices, p. 5.

processes," in which the interaction results in the assimilation of the practices by the actors; (4) the notion that practices are not only the result of individual action, but there is also a social impact generated by objects and technologies; (5) comprehend that practices change and create new orders, which can overlap with each other; and, (6) assume a "performative understanding of the world," understanding that everything that exists is actually constantly becoming through the practices in progress that are constantly (re)establishing and (re)ordering the world.[883]

To understand practices, they ought to be read as patterned activities endowed with social meaning. This attribution of meaning takes place in contexts that are socially organized. That is "where relevant fields of practices construct the authority to interpret whether specific performances are competent and actually conform to – sometimes competing – background assumptions and governing standards."[884] In order to enact the micro analysis of practices of legality, according to Rajkovic, Aalberts and Gammeltoft-Hansen, the investigation need to cover "an appreciation that legality is attributed in and through social interaction between conventional legal institutions" and a heuristic mapping of an ordered arrangement of overlapping fields of practices and actors that accounts for their own views, stakes and approaches on how legality gets defined or ought to be defined in each time and place.[885]

Adopting a relational ontology means presupposing that everything that exists is in a constant process of becoming through the ordering practices taking place. In the analysis of the practices of legal contestation in relation to the Al Bashir Case and the argumentative practices that portray the way the Court makes sense of these acts of contestation, this ontological premise implies looking to the social (re)construction of normative frontiers as these practices are performed throughout time and space. This thesis sets into motion a sociological investigation into the way the meanings ascribed by the Court to the African practices of contestation are (re)defining the limits of contestation. 'Making' the practice turn allows the development of a heuristic approach which "focuses on the interrelated processes

[883] BUEGER, Christian; GADINGER, Frank, The Play of International Practice, **International Studies Quarterly**, v. 59, n. 3, p. 449–460, 2015, p. 5.
[884] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 16.
[885] *Ibid*.

of social and interpretive contestation" in relation to the "prime engines of knowledge construction" in the field of international (criminal) law.[886]

The analysis of the forces that influence the meaning of norms should look into the parallel legal constructions being continued articulated by legal operators, working through the meanings that these international legal practitioners "ascribe to their doing, under ordinary and particular circumstances."[887] Such approach sheds light on the disputes that are taking place surrounding the norm and make its meaning a contested one. This making of the meaning also shapes international law, understood "as *responsive* to actions and agendas established elsewhere." [888] Practices are able of assigning meanings into things and, therefore, of affecting the way international law is interpreted.

'Practice Theory' is heavily influenced by social theory and mostly associated with the work of Pierre Bourdieu and, as a consequence, most of the works under this label have mobilised the concepts developed by the author. Practices seems to be Bourdieu's path of avoiding the determinisms that "plague sociology."[889] One of the great developments of the theory of practice developed by Bourdieu is in its "methodological relationalism," the primacy given to relations and processes, developing what could be called a relational ontology.[890] Through this approach, Bourdieu manages to avoid the "methodological monism" of most approaches that give a fundamental role in their analysis to either structure or agents, system or actors etc. This means that an analysis of practices inspired by Bourdieu's approach should always give precedence to understanding the social as a set of ongoing relations.

Bourdieu creates two conceptual categories that provide the framework to the development of a practice approach. The first, *habitus*, stands for

> [S]ystems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organise practices and representations that can be objectively adapted to their outcomes

[886] *Ibid*., p. 4.
[887] JOHNS, **Non-Legality in International Law: Unruly law**, p. 21–22.
[888] *Ibid*., p. 24.
[889] BOURDIEU, Pierre; WACQUANT, Loïc J. D., **An invitation to reflexive sociology**, Chicago: University of Chicago Press, 1992, p. 15.
[890] *Ibid*.

> without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them.[891]

The *habitus* is constantly being perpetuated through its presence in the very practices that are structured around its principles.[892] It is the dispositions that create the basis of perception and appreciation of every subsequent experiences. And we can only make sense of practices through the establishment of the relation between two social conditions: the one in which the *habitus* that generated these practices was constituted and the one in which the *habitus* was actually implemented, "that is, through the scientific work of performing the interrelationship of these two states of the social world that the *habitus* performs, while concealing it, in and through practice."[893]

The second category important for Bourdieu's development of his "practical sense" is the concept of *field*. The field is the place for social interaction, conflict, and competition. In society, there are many fields that coexist. They are arenas that can be social or institutional – in some cases the institution can be within a specific field – where actors reproduce the *habitus* through practices. The *field* could be compared to a game, but "unlike the latter […] it is not the product of a deliberate act of creation." It follows regularities which are not explicit nor codified.[894] It is structured base on how the relations between the actors are set up, where some that have more force are able to exert more power over the delineation of the field.[895]

3.1.3.
Performing legality: structuring structures of international law

The focus on practice opens the way to an understanding of international law – and its dynamics – as structured and structuring practices, because it is an organised environment constantly (re)articulated by a specific number of actions. An investigation of practices, therefore, has as its central point of analysis the

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[891] BOURDIEU, **The logic of practice**, p. 53.
[892] BOURDIEU, Pierre, **Outline of a theory of practice**, Cambridge: Cambridge University Press, 2010, p. 82.
[893] BOURDIEU, **The logic of practice**, p. 54.
[894] BOURDIEU; WACQUANT, **An invitation to reflexive sociology**, p. 98.
[895] *Ibid*., p. 99.

significant, material, or social activities that are performed with a certain regularity and are endowed with significance that take place within somewhat organised contexts.[896] This means that practice is a performance. Performativity, as explained by Judith Butler, does not come from a singular act, but from its repetition through certain rituals.[897] In Butler's definition of performativity, practices are also patterned, because they display a certain regularity in time and space, resembling somehow a routine. International practices, then, are "socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world."[898] Thus, as pointed out by Neumann, 'Practice Theory' is considered as the approach that analyse the patterns of action and the material organisation performed from the implicit understandings of the actors.[899] It is through the analysis of practices that the 'principled approach' to legal contestation, as proposed in the Introduction of this thesis, is accomplished.

Practices only exist in the process. They are, in that sense, a similar behaviour with regular meanings.[900] The performance has to be repeated in order to become understandable to more people. Its intelligibility, in other words, cannot be reduced to a single practice. "It is the result of actions and utterances repeated over time and, quite often, prior to legal recognition that both draw on and transform the normative context in which they are made."[901] As a result, the practice of making legality is in itself also a political and social practice, since it requires those dimensions to be generative of subjectivities and signifiers. The practices of contestation enacted by the African States only manage to be read as such because they have been taking place throughout time. A single act of non-compliance might be understood as a violation of international law instead of as legal contestation if happens isolated. The reiteration of practices of legal contestation creates around these very practices a series of meanings related to them and confers upon them the

[896] MEIERHENRICH, Jens, Foreword: The Practices of the International Criminal Court, **Law and Contemporary Problems**, v. 76, n. 3/4, p. i–x, 2013, p. i.
[897] BUTLER, Judith, **Gender trouble: feminism and the subversion of identity**, London; New York: Routledge, 2011, p. xv.
[898] ADLER; POULIOT, International practices, p. 6.
[899] NEUMANN, Returning Practice to the Linguistic Turn, p. 629.
[900] ADLER; POULIOT, International practices, p. 7.
[901] ZIVI, Karen, Performing the Nation: Contesting Same-Sex Marriage Rights in the United States, **Journal of Human Rights**, v. 13, n. 3, p. 290–306, 2014, p. 293.

quality of contestation. In the practices explored in Interlude No. 3, the opposition of African States towards the Al Bashir Case in the ICC become so socially meaningful in the context in which it is taking place that even practices that are not intended to represent a contestation of the legal developments of the Case, for having any link whatsoever with the situation, ends up being understood as themselves practices of legal contestation in relation to the Al Bashir Case.

The notion of the *habitus* brings the dimension that these "rituals of everydayness" are performed within a given culture which produces its own ways of making sense of these enacted practices.[902] The field whether these performances are socially produced "is a site for the reproduction of […] *dispositions* which 'incline' the social subject to act in relative conformity with the ostensibly objective demands of the field."[903] When putting forward a definition of legality, actors are ordering the social world through the creation of representations and the ascribing of meaning to actions. These meanings are not necessarily intended. Enactments of legality might not play out in the expected ways. These acts might exceed their intended consequences or might even reach a result that was not aimed.[904] Practices have a logic of their own and "not that of the logician."[905] However, these performances are conditioned by the "*hexis*" (the way they carry their social interactions) that gives these practices the efficacious force of authority.[906]

For extra-legal actors to become competent practitioners they have "to become keen connoisseurs of these subtleties" that are the structuring structures of the field.[907] From the practices examined in Interlude No. 3, the African States performing the practices of legal contestation, especially the ones beyond the non-compliances, demonstrate an awareness towards the subtleties of the international legal dynamics and, consequently, developed a strategy that sought to exploit the many available mechanisms provided for the Rome Statute, general international practice and 'loopholes' that derive from the fragmentation of international law.

[902] BUTLER, Judith, **Excitable Speech: A Politics of the Performative**, London; New York: Routledge, 2013, p. 152.
[903] *Ibid*., p. 155.
[904] FELMAN, Shoshana, **The scandal of the speaking body: Don Juan with J.L. Austin, or seduction in two languages**, Palo Alto: Stanford University Press, 2003, p. ix.
[905] BOURDIEU, **The logic of practice**, p. 86.
[906] BOURDIEU, Pierre, **Manet: A Symbolic Revolution**, Cambridge: Polity Press, 2018, n.p.
[907] LATOUR, Bruno, **The Making of Law: an Ethnography of the Conseil d'Etat**, Hoboken: Wiley, 2014, p. 28.

Seemingly unrelated practices enacted in multiples sites, such as AU Assemblies, ASP meetings, ASP working groups and through diffuse channels, like documents and bodily performances are connected through the social meaning that is bestowed upon them. In that sense, even the most circumspect activities, which would be incomprehensible otherwise, gain a certain inclination and becomes part of a wider movement.

These practices, however, do not gain meaning simply by being performed but through the competent performance which has to do with practicing the contestation accordingly to a specific knowledge. By developing their own strategies and making their positions through the engagement with the legal vocabulary, States are not "being parasitic on the work of law, or diverting it from its true path" for these articulations of legal justifiability with the actor's interest is the competent practice of international law and "what actually enables the law to move forward."[908]

> By entering into the juridical field, governments have to accept 'the specific requirements of the juridical construction of the issue'. This requires not only knowledge of the rules (know-what) but also the skills for engaging in legal argumentation (know-how). Yet within this framework it is entirely possibly [sic] to impact both the legal interpretation and framing of a particular issue as well as to organise political practices so as to avoid liability.[909]

States' mobilisation of the formalisms of international legal practice can either reflect a commitment with the dynamics of the field or a cynical engagement with the technicalities of international law. Regardless of the motivations, the dedication "to international law and the technicalities of legal discourse in order for law to deliver its seal of legitimacy"[910] means that these States have grasped that for most international lawyers the power in the practice of international law is connected to its formalism.[911]

The entrance by these African States in the game is manifested through "a mimetic identification, that acquires the habitus precisely through a practical

[908] *Ibid*.
[909] AALBERTS; BOER, Entering the Invisible College: Defeating Lawyers on Their Own Turf, p. 17.
[910] *Ibid*., p. 19.
[911] DEZALAY, Yves; MADSEN, Mikael Rask, The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law, **Annual Review of Law and Social Science**, v. 8, n. 1, p. 433–452, 2012, p. 438.

conformity to its convention."[912] Nevertheless, their very competent participation in the game moves the barriers put in place by the habitus, for the rules of the game are not "carved in stone."[913] This makes habitus not purely subjective nor completely constituted, but in a "situation of constrained contingency."[914]

> One does not need to be an international lawyer to know what international law says or to understand how it is made and argued. Anyone who knows the rules of the game can provide an 'honest and reasonable' legal argument, ie be an expert ('an authority') on international law. On the other hand, not everyone gets to say definitively (authoritatively) 'what the law is.'[915]

As Bourdieu has hinted, it is within the social-legal universe "that juridical authority is produced and exercised."[916] This affirmation implies a dance between habitus and the dynamics and context of the social field, which includes the acceptance of the field's authorities. Even though in some cases the interpretation of a State might become general practice of international law, there is a need for a judicial instance to endorse said position.

The African contestation towards the Al Bashir Case through the legal downgrading and upgrading movements have mobilised a series of legal practices that aimed at producing a comprehensive strategy that was in conversation with the structuring structures that condition the field and managed to incorporate into the hall of acts of legal contestation practices that would normally not be read as such. As to have a better grasp at the kinds of practices were marshalled into the African contestation strategy and the ones that unintentionally (or, for all we can tell, intentionally) gained meaning and made into the collective movement, the next section is dedicated to the analysis of these practices individually and the meanings ascribed to them.

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[912] BUTLER, **Excitable Speech: A Politics of the Performative**, p. 155.
[913] AALBERTS; GAMMELTOFT-HANSEN, Sovereignty Games, International Law and Politics, p. 39.
[914] BUTLER, **Excitable Speech: A Politics of the Performative**, p. 156.
[915] AALBERTS; BOER, Entering the Invisible College: Defeating Lawyers on Their Own Turf, p. 17–18.
[916] BOURDIEU, The Force of Law: Toward a Sociology of the Juridical Field, p. 816.

3.2.
Performing contestation: the meaning behind African practices

There has been a multiplicity of practices articulating and ascribing their interpretations regarding the relevance of Al Bashir's immunities in relation to the proceedings before the ICC. These practices of contestation are not necessarily explicit acts actively engaging in actions to clearly demonstrate their dissatisfaction. Through the social meaning endowed to them, practices such as the neglecting, negating, or disregarding of an international legal norm or decision or even acts that are not commonly understood as contestation come to be regarded in a different light.[917] The practices of contesting legality come to acquire such meaning in context, otherwise they remain blurred and indistinct. The means of legal contestation to which the African States resorted to have been mostly mobilising the possibilities that are already comprised by the international legal mechanisms available. The following pages are dedicated to exploring the meanings behind these means of contestation enacted in relation to the Al Bashir Case in the ICC that were examined throughout Interlude No. 3.

3.2.1.
Non-compliances with the ICC's warrants of arrest for Omar Al Bashir

The practice of non-compliance might be the most diffuse of all the engagements of African States with the Al Bashir Case. The act of non-complying with the ICC's warrants of arrest and request for cooperation is dissipated mostly due its character of being a passive performance. States perform a non-compliance by negating to arrest and surrender the individual that has been indicted and, therefore, is wanted by the Court. A myriad of reasons might give rise to a situation of non-compliance. In the non-compliances examined in both Interludes No. 2 and 3, even though in the observations submitted to the PTCs most of the non-compliant States have introduced in general lines their adhesion to the AU common position

[917] WIENER, **A theory of contestation**, p. 2.

regarding the non-cooperation with the ICC in matters related to the Al Bashir Case, different contexts were at play. Situations of non-compliance happened in circumstances like celebratory events, regional summits, and negotiations of peace. This set of conditions in themselves already confer upon the practice of contestation a different character. Al Bashir's invitation and presence in events such as presidential inaugurations or commemoration of a State's symbolic dates denotes a certain disregard towards the Court's decisions. Non-compliances of this kind reflect that either the State does not care whether its practices are in violation of international law or that the State might respect the Court's legal reasoning but 'begs to differ.' In the latter situation the State does have a different legal justification for not agreeing with the Court and intends the act of non-compliance as a practice of contestation. The former just does not bother with the matter. Although not possible to pinpoint which non-compliances with Al Bashir's arrest warrants fit into each situation, understanding the contextualities can provide a general indication of where each State stands, especially in cases where a second visit came with the warning that the ICC's warrant would be enacted. This kind of non-compliance was performed by Kenya (2010), Chad (2011), Djibouti (2011, 2016), and Uganda (2016).

A second scenario of non-compliances are the situations that result from an indicted individual presence in a Member State's territory because of a meeting from a regional organization or in the circumstance of a peace process. Those were the cases of Chad (2010), Malawi (2011), Chad (2013x2), Nigeria (2013), Chad (2014), DRC (2014), South Africa (2015). Regional meetings and peace negotiations have the capacity of establishing or maintaining the stability of the region. In the case of the former, as many African States have argued, the host State abide by the rules already in place by the regional organization (also rules of international law – based on treaties etc.), which involves the invitation of every State Party. Twice the non-compliances in events of regional summits were accompanied by national judicial proceedings that inquired whether the State was under the obligation of arresting and surrendering Al Bashir to the ICC, followed by an immediate departure of the President of Sudan from the territory of the receiving State before a decision could be reached. In both cases, South African and Nigerian, discussions of a second visit came along with the threat of arrest. Such

circumstances are filled with contradictions which turns the attempt to make sense of them a herculean task that might not provide much accuracy. Its consideration as a separate scenario from the first group of non-compliances is significant, however, because it adds the mobilisation of a different set of structuring structure into the picture. As South Africa (and in Interlude No. 5, Jordan) has argued, the hosting of an AU Assembly involves following the treaty dispositions that the State has subscribed to upon joining the organisation.

Throughout the practices of non-compliance, when given the opportunity, the States presented before the Court the reason for their rejection of the Court's order. In the ten-year span of non-compliances, the justifications for not arresting and surrendering Omar Al Bashir to the ICC comprised: the need for regional stability; the AU common position; the inapplicability of the Rome Statute for Sudan is not a Party; the fact that these was a situation for the application of art. 98(1) of the Statute since Al Bashir was entitled to immunity under customary international law; regional agreements prevented the State from arresting Al Bashir during his attendance of a regional summit; and lack of time to deliberate over obligation and arrest. Most of these reasonings evoke an interpretation over the legal matter under dispute between these States and the Court. Even though the precise reasoning might have varied, the common interpretation was that the request for arrest and surrender by the ICC placed them in a legal conundrum in relation to their obligations towards general international law.

These non-compliance events are able to demonstrate that compliances with international law and legal interpretation are notions that are closely interrelated and should not be treated as two separate phenomena. In the legalist view, which makes us come back to the domestic analogy, non-compliances are explained by the lack of legislative, judicial, or executive processes that would create for the international legal system the capacity to self-enforce. In other words, the question of non-compliance has to do with the fragmentation of authority in international law. [918] Most approaches that presuppose that the content of international agreements is fully determinate and provide one clear answer, by not seeing an

[918] COGAN, Jacob Katz, Noncompliance and the International Rule of Law, **Yale Journal of International Law**, v. 31, n. 1, p. 189–210, 2006, p. 190.

opening for diverging interpretations to arise and gain authority, fail to comprehend all the links between these two elements.[919]

The practice of non-compliance is the one that gains more attention in the entire set of practices of contestation being enacted by African States in relation to the Al Bashir Case in the ICC. Two features convey the reason for the appeal that make such practices for outsiders the main banner of the African Contestation. The first is the fact that non-compliances are the most emphatic way of rejecting the Court's position in relation to Al Bashir's immunities. Every time it was reported that Al Bashir was travelling to the territory of a State Party, human rights organizations, newsfeeds, and even the ICC's organs made raucous pleas for the receiving State to arrest and surrender him to the Court. After the non-compliances, the noise surrounding the matter only became more strident. The second reason is that non-compliances are the sole practices that triggers proceedings before the Chambers of the Court. The unrelentless back and forth between States and Chambers stomping their feet on the ground to defend their position created the amount of theatrics that other practices were not able to. The portrayal of the African contestation towards the Al Bashir Case as being mostly about the non-compliance with the ICC's arrest warrants makes most analysis create an incorrect image about this contestation and miss the complexity of practices put in place in the African strategy.

Another element that makes the emphasis on non-compliances a sensationalist rendering of the African contestation is the fact that these practices are in stark contrast with most of the other activities that compose the African strategy of contestation towards the Al Bashir Case in the ICC. Non-compliances lack a constructive dimension. While many of the practices to be analysed in the following pages are trying to work through the system in a way to engender change and become more reflective of their views of how international law ought to be, non-compliances are practiced by a negative performance that not only has a deficiency in terms of proposals but also violates the rules of the existing system. However, non-compliances, even though seen as illegal, are still within realm of law. These practices are activities that albeit undesired are comprised by the

[919] BURKE, Moving while standing still: law, politics and hard cases, p. 138.

international legal system. The Rome Statute assigns to the ASP any matter that is related to non-cooperation with the Court, which includes non-compliances. Dealing with these situations of non-cooperation, art. 87(7) disposes that

> Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.[920]

The weight put by the Court in these practices of non-compliance have to do, as the text of the Statute indicates, the fact that without States' cooperation especially in matters related to arresting and surrendering indicted individuals is vital for the capacity of the Court to function. The reliance that the Court has on States complying with its arrest warrants makes this issue a trouble for the organs of the Court.

3.2.2.
Requests for UNSC deferral of the Al Bashir Case

The practices of requesting a deferral are merely referring to the use of a statutorily mechanism for having an investigation or a case be stopped at the ICC. Although such possibility is provided in the Rome Statute, the request represents a bypassing of the Court, making a direct appeal to the UNSC. Statutory provision under art. 16 provides the Council the power to interrupt through a resolution the beginning or the continuation of an investigation or prosecution in the ICC for a period of 12 months, which can be continuously renewed by the UNSC.[921]

Considering that there are no regulations that establish the way the Council should weight such matters, the reasons that could trigger such deferral (although the decision has to be within the scope of the Charter's Chapter VII authority), or even whether any entity can request such evaluation from the UNSC (and if the Council has to consider it), there is not much ground to evaluate this strategy.

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[920] **Rome Statute of the International Criminal Court**.
[921] *Ibid*.

Alongside the non-compliances, the requests for a deferral of the Al Bashir Case were the first practices to be put in place. Upon analysis of the Assembly of the AU's bi-annual decisions it is possible to see that it was not the absence of an UNSC resolution determining a temporary deferral of the Al Bashir Case that turned many African States feel affronted by the Council. Rather, the exasperation of these States towards the UNSC had to do with the fact that the Council never gave their requests the time of day. On the height of the African contestation, after States begun to deliver their notifications of withdrawal and the 'withdrawal strategy' document was disclosed, the UNSC accepted to meet with an AU ministerial delegation as to debate the matter of the request for a deferral. However, once the AU officials noticed that the Council representatives had no power to make any decision, the AU delegation interrupted the meeting and aborted the dialogue. This move sent the message to the African States that the Council did not have any intention of making a move in relation to the Al Bashir Case in the ICC. After that, the African States seemly gave up on having the UNSC decide to temporarily defer the Case against Omar Al Bashir.

Differently from the situations of non-compliance, the requests for a UNSC deferral were discursively presented as a question of letting the African regional instances find a negotiated solution, tying the resolution of this matter to a question of peace. The wordings used to present the motivations for the request for a deferral already emphasizes the nature of this practice of contestation. The idea that a solution must be negotiated, regardless of whether it stands against the normative standards of international law, already characterizes this practice as a diplomatic tool. The request for the UNSC to defer the Case against Al Bashir through the narrative that justice should not prevail over peace is not only a bypassing of the Court, but of what the Court stands for: the upholding of international law. In this sense, this practice is a call for what most legalist deem the most pervasive disposition of the Rome Statute: the capacity conferred by said document to the UNSC to initiate and terminate investigations and proceedings in the ICC.

3.2.3.
Proposal of amendments to the Rome Statute of the ICC

In terms of the proposal of amendments, as seen in Interlude No. 3, there were two initiatives, one by Kenya and other by South Africa. The South African proposal suggests modifications to the text of art. 16 of the Rome Statute. This practice of contestation tries to make its act of requesting a deferral as a mechanism comprehended by the Statute. Through this proposal, South Africa seems to balance well the distribution of prerogatives and instead of proposing a boulder and more direct mechanism, which would assure it that the AU's requests would move forward, it suggested a solution to a common situation in the UNSC dynamics which is the political deadlock. This amendment would confer upon the UNGA the responsibility to assess requests for deferral of cases or investigations in the ICC in circumstances in which the Council has failed to deliberate. This proposal does not bring anything new to the practice of international law, considering that it somehow mirrors the Cold War arrangement of "Uniting for Peace." This mechanism transferred the responsibility for the maintenance of international peace and security to the UNGA in cases of lack of unanimity between permanent members of the Council.[922] The idea of the South African amendment proposal was not to transfer the powers of the UNSC under the Rome Statute to the UNGA. Its approval would not have any impact in the Council's referral powers. The amendment would create the possibility for the Assembly to decide upon requests of deferral in situations which the Council fails to do so. The response of the UNGA could even come to be a denial of the request. The amendment would be a mechanism to assure that the request would be appreciated by competent bodies. More than that, the proposal sough for an institutionalization of the practice of contestation that would come to be an act repeatedly performed by the AU. In that way, there would be a proper procedure in place for States to make requests of deferral to the UNSC. A diplomatic mechanism would gain another facet and become a statutory practice, regulated and foreseen in international law. This matter talks directly to the African frustrations with the UNSC, derived from its contestation through a request for

[922] UNITED NATIONS GENERAL ASSEMBLY, **Resolution 377 (V) of 3 November 1950 (Uniting for Peace)**, New York: United Nations General Assembly, 1950.

deferral. However, as if it anticipated that nothing would come from its requests, the amendment was proposed in the year 2009, when the ICC issued its first arrest warrant for Omar Al Bashir.

The Kenyan proposal, in turn, suggested four different amendments. The Kenyan contestation, differently from the South African, was enacted in direct response to the situation in Kenya at the ICC, which opened cases against President Kenyatta and his deputy. However, two of the Kenyan proposals were in direct conversation with the practices of contestation directed at the Al Bashir Case. The amendment for article 27 would create an exemption for government officials to sit in trials during their terms of office. This meant that the Kenyan proposal sought a postponement of the trial, which is a similar situation to the temporary deferral. In this case, however, such deferment would be determined by the ICC. Likewise the proposal for an institutionalisation of the deferral request, this amendment would establish an institutional mechanism for a measure that already can be found in the Court's practice. The Trial Chamber I in the Case against Thomas Lubanga decided that, in light of the situation that the right to fair trial of the accused was violated, the best remedy would be a stay of proceedings.[923] However, neither the Statute nor the Rules of Procedure and Evidence mention such possibility. The decision was made based on the practice of human rights courts and jurisprudence from the ICC's AC.[924] The Kenyan amendment proposal to art. 27 would create the scenario of a possibility of staying the proceeding connected to the fact that the accused individual is a government official in office.

The second Kenyan proposal of interest is the amendment to the Preamble of the Rome Statute. This initiative sought to address a practice which will be explored in this chapter under item 3.2.5., the proposal of an alternative mechanism. The Statute's Preamble states that the jurisdiction of the ICC should be exercise in a complementary nature, for national jurisdictions should take precedence over the ICC in trying individuals accused of perpetrating an international crime. The condition to the State to exercise its sovereign prerogatives is that the individual

[923] TRIAL CHAMBER I, **Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008**, The Hague: International Criminal Court (ICC), 2008.
[924] TURNER, Jenia Iontcheva, Policing International Prosecutors, **NYU Journal of International Law & Politics**, v. 45, p. 175–258, 2012, p. 178.

and conducts on trial should be the same as the situation at the ICC. Otherwise, the latter should take over the criminal jurisdiction over the case. The idea behind the Kenyan proposal was to create the same relationship between the ICC and regional courts trying individuals for international crimes. More on the implications of this provision will be addressed in the section on the practice of proposing an alternative regional criminal court (3.2.5.).

All these amendment proposals under scrutiny address a central issue for the African States: the indictment of a sitting Head of State. As much of the literature on the African relationship with the ICC has brough up, African individuals have been sitting trial at the Court from beginning of its activities. It was only after the indictment of heads of state such as Omar Al Bashir and Uhuru Kenyatta that the AU began to forcefully contest the practices of the ICC and put in place a series of activities as to make their cases and provoke the desired changes. The analysis of the proposed amendments serves to corroborate the position that African States were not criticising the Court *per se* not trying to undermine its existence. The problematic issue for these States was the instauration of proceedings against leaders in office.

These practices of amendment proposal do not put forward an interpretation regarding the legal developments in the Al Bashir Case at the ICC, although they clearly indicate their dissatisfaction regarding the unfolding of events. These acts are practices of contestation, even though for their different nature, they might not be considered as such. The proposal of amendments is most often associated with a certain 'progress' in international legal practice, like the Kampala amendments to the Rome Statute, which established the definition and jurisdiction over the crime of aggression, or the more recent proposal by an International Commission of Jurists to have the ASP vote on an amendment that would include the crime of ecocide in the Rome Statute.

Even though practices of amendment proposal do not constitute a practice of actively engaging in the debate over the interpretation of whether Al Bashir's immunities serve as an impediment for the proceedings before the ICC, these practices of contestation are very much immersed into the legal realm. Both Kenyan and South African proposals strictly followed the proceedings set forth in the ICC's statutory framework. Though it can be argued that their proposals are a politization

of the Court's proceedings, it does not make the Court any more vulnerable to being a representation of States' interests than it already is.

3.2.4.
Notifications of withdrawal from the Rome Statute of the ICC

Once part of an international institution, practices of contestation in relation to the institution do not only comprise the non-compliance with the Court's decisions. Most statutory frameworks include the option of exiting this institution. Activating withdrawal dispositions can also be a form of contestation. During the last months of the year 2016, three African States sent to the competent authority their notifications of withdrawal from the Rome Statute. Burundi, the Gambia, and South Africa's decisions for withdrawal happened in such temporal proximity that appeared to be a concerted strategy. Even though it is not known the length of the influence that the decision of one State had on the other, what mattered was the perception that was created. As this thesis has already explored, Burundi's withdrawal stood out from the other two as it coincided with the opening of Prosecutorial investigations regarding international crimes perpetrated in its territory. And, after all, after South Africa's and the Gambia's rescission, Burundi was the only one that went through the process of withdrawal. Whichever Burundi's motivation was, as it went along a broader movement, the practice of handing in a notification of withdrawal was grouped within the movement of protest against the Al Bashir Case. A few months after these events, the notorious AU 'withdrawal strategy' was debated and voted by the Assembly of the AU, which reinforced the perception that the withdrawals were a concerted movement.

Even though the practice of institutional withdrawal offers little in terms of contesting the interpretation of international law, the South African notification was submitted under the justification that the State could no longer remain on the Court due to the conflicting obligations that had risen once the ICC issued an arrest warrant for Omar Al Bashir. The affirmation of conflicting obligations presupposes that its obligations in relation to the Court did not prevail in light of other underlying international law obligations, which in turn displays that South Africa did not accept

the idea that Al Bashir's immunities had been removed. The Gambia, in turn, took another route. The State associated its intention of withdrawing the ICC with an already over explored critique of the Court's practices, the issue of selectivity.[925] This means that the motivation for the Gambia's withdrawal was not a contestation over a legal development but a dissatisfaction with the conduct and policies adopted by the Court.

The discussion on withdrawals brought one interesting element to the debate over the African contestation in relation to the Al Bashir Case. The 'withdrawal strategy' document, which comprised of a list of ways of engaging in contestation and a study of the withdrawal process within the ICC system, ponders the effects of a collective withdrawal. The document recognizes that current international legal practice only contemplates the possibility of individual State withdrawal. In that sense, for each State to take such measure, it has to individually follow the steps provided for in the treaty in question. The document, however, opens a door. It proposes the realization of further studies on the possibility that collective withdrawal might create changes in customary international law.

3.2.5.
Creation of an alternative regional mechanism: the Malabo Protocol

The practice of creating an alternative regional mechanism to the ICC is one of the activities that takes place outside the framework of the Rome Statute. The idea of extending the jurisdiction of the existing African Court of Human Rights began to be seriously discussed in 2009 and intended to add to its jurisdiction the

[925] See, for example, SCHABAS, William A., Victor's Justice: Selecting "Situations" at the International Criminal Court, **John Marshall Law Review**, v. 43, n. 3, p. 535–552, 2010; SCHABAS, William A., "Complementarity in practice": some uncomplimentary thoughts, **Criminal Law Forum**, v. 19, n. 1, p. 5–33, 2008; HELLER, Kevin Jon, **OTP Formally Requests First Non-African Investigation**, Opinio Juris. Available at: <http://opiniojuris.org/2015/10/13/otp-formally-requests-first-non-african-investigation/>. Accessed: 25 may 2022; KIYANI, Asad, Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity, **Journal of International Criminal Justice**, p. mqw052, 2016; VAN DER WILT, Harmen, Selectivity in International Criminal Law: Asymmetrical Enforcement as a Problem for Theories of Punishment, *in*: JESSBERGER, Florian; GENEUSS, Julia (Eds.), **Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law**, Cambridge; New York: Cambridge University Press, 2020, p. 305–322.

three international crimes over which the ICC had authority to adjudicate: genocide, crimes against humanity and war crimes. With the expansion of jurisdiction of the African Court, the States sought to create a mechanism that would rival in terms of competence with the ICC. The idea became a more concrete proposal in 2014 with the negotiations and adoption of the Malabo Protocol, which until this moment has yet to see its first ratification.

The creation of an alternative mechanism also speaks directly with the African position in regard to the Al Bashir Case at the ICC. The Protocol includes a disposition that prevents sitting Heads of State to stand trial during their terms of office. One more time, the African States enact practices of contestation that, although they do not engage in a direct debate with the ICC, they try to mark their position in relation to the disputed matter and proposes the mechanisms to engender change in international legal practice. This movement reinforces the idea that was raised in the requests for a UNSC deferral that the regional mechanism can deal more appropriately with the issue because it is more equipped to take into consideration which moves might affect the stability of the region.

This practice raised an already overly debated issue in international law, which was mentioned under the discussion of fragmentation in Chapter 1: the problem of forum shopping. This phenomenon is treated by international legalists as a nuisance for it is another reflex of States attempting the politization of international law. However, such critique might be countered with the reading the two practices of contestation in combination, the proposal of an expansion of the jurisdiction of the African Court alongside the proposed amendment by Kenya to the preamble of the Rome Statute. If we understand the African contestation as a mostly concerted strategy, these two proposals would be read in conjunction and the problem of forum shopping would be resolved since the precedence for trying cases for the three international crimes would lie with the Regional Court. Adopting this perspective also allows us to see the mobilisation of legal mechanisms by the African States in a way that the proposal does not constitute of a mere politization of the issue, but a use of the legal mechanisms available for the proposal of an alternative practice.

3.2.6.
Requests for an ICJ advisory opinion on the issue of Heads of State immunity before international criminal courts

Since 2012, the Assembly of the AU requests the AU Commission to take the necessary steps to request the ICJ for an advisory opinion on the matter of immunities. However, throughout the past ten years the exact phrasing of the requests has changed from a more general to a more specific question. Consider the number of instances that this process has to go through (the Assembly asks the Commission, which in turn asks the UNGA, which in turn asks the ICJ to put the item on its agenda), this is a complicated chain of communications to follow. This difficulty was made even worse by the requests of the Assembly to withdraw the last question in order to frame it in a new light. In this sense, little is known about the request to the ICJ. This practice of contestation aimed at a broader impact than the Al Bashir Case in the ICC. Nonetheless, it was influenced by the initiation of this case, alongside the trials against Kenyatta, that mobilised the African States to pursue an opinion from the ICJ.

The fact that the African States have periodically reiterated the need for a position from the ICJ regarding the matter of Heads of State immunities before proceedings in international criminal courts alongside their continuous firm positioning that they are against having sitting Heads of State and Government stand trial in international courts infers that there is a general belief on the part of these States that the advisory opinion issued by the ICJ is going to strengthen their position. Such optimism is possibly related to the position adopted by the Court in the *Arrest Warrant* Case (which was controversially used by the SCSL and ICC's PTC in the events examined in Interlude No. 2).

Even though the Arrest Warrant Case was held in an international court, it concerned a matter of a domestic proceeding – claiming universal jurisdiction – trying an individual over international crimes. It was about the issuance of an international arrest warrant by a Belgian Judge,[926] on 11 April 2000, for crimes

[926] Belgium approved in the 1990s a legislation usually referred as "law of universal jurisdiction" or "Belgium's Genocide Law," through which it deemed itself competent to judge foreign nationals accused of genocide, crimes against humanity or violating the Geneva conventions and international

committed in the DRC by a Congolese national.[927] The DRC, whose request triggered the case before the ICJ, asked for an annulment of the arrest warrant for a couple of reasons: (1) the subject of the warrant, Mr. Absulaye Yerodia Ndombasi, was a Minister of Foreign Relations in the DRC, which means a bearer of immunity *ratione personae* from the jurisdiction of another State; and (2) the Belgium self-proclaimed universal jurisdiction over acts perpetrated in another State violates sovereignty, a norm of customary international law.[928] In sum, the question put before the ICJ was whether, according to customary international law, State officials enjoyed immunities from foreign criminal jurisdiction.[929]

The decision affirmed that the ICJ was unable to identify from the practice of national legislations and decisions of national high courts, nor from the legal instruments of the international criminal tribunals, such as the IMT, IMTFE, ICTY, ICTR and ICC, any exception in customary international law to the rule of immunity *ratione personae* for high-ranking State officials that would allow them to be tried in a national court.[930] The ICJ made some further considerations that sought to relativize its finding, "in order to avoid a ruling that would reinforce impunity."[931] In its judgment, the ICJ raised four situations in which immunities do not bar international criminal responsibility, one of them in relation to international criminal jurisdictions. The decision affirmed that "an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain

humanitarian law. As a result of this legislation, in 2001, Belgium tried and convicted four Rwandan nationals for participation in the genocide. In the same years, Palestinian victims of a massacre by a Lebanese militia filed a criminal complaint against Ariel Sharon, who, until that moment, served as Defence Minister of Israel and was just beginning his term as Prime Minister. RATNER, Steven R., Belgium's War Crimes Statute: A Postmortem, **American Journal of International Law**, v. 97, n. 4, p. 888–897, 2003.

[927] PEDRETTI, Ramona, **Immunity of heads of state and state officials for international crimes**, Leiden; Boston: Brill Nijhoff, 2015, p. 130; YAMATO, Roberto Vilchez, Mandado de Prisão de 11 de Abril de 2000 (República Democrática do Congo vs. Bélgica) (14 de Fevereiro de 2002), *in*: RORIZ, João Henrique Ribeiro; AMARAL JÚNIOR, Alberto do (Eds.), **O direito internacional em movimento: jurisprudência internacional comentada: Corte Internacional de Justiça e Supremo Tribunal Federal**, Brasília: IBDC, 2016, p. 118.

[928] INTERNATIONAL COURT OF JUSTICE, **Summary of the Judgment of 14 February 2002, Summary 2002/1**, The Hague: International Court of Justice (ICJ), 2000, p. 209.

[929] FOX, Hazel; WEBB, Philippa, **The law of state immunity**, 3. ed. Oxford; New York: Oxford University Press, 2015, p. 558; YAMATO, Mandado de Prisão de 11 de Abril de 2000 (República Democrática do Congo vs. Bélgica) (14 de Fevereiro de 2002), p. 122.

[930] INTERNATIONAL COURT OF JUSTICE, **Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)**, The Hague: International Court of Justice (ICJ), 2002, para. 58.

[931] PEDRETTI, **Immunity of heads of state and state officials for international crimes**, p. 130.

international criminal courts, where they have jurisdiction," which means tribunals created by the UNSC, like the ICTY and ICTR, can exercise jurisdiction over any UN Member State, and the ICC – which at that point was on the verge of starting its activities – over countries that ratified the Rome Statute.[932] The Arrest Warrant Case judgement made it clear that immunity *ratione personae* shields high-ranking State officials from the exercise of foreign criminal jurisdiction. However, the list of situations in which immunities do not stand leave some questions open to interpretation, as more precise definitions were unnecessary for the case *sub judice*. It is worth noting that the decision was taken by a majority of ten votes against six, which decided in favour of Belgium annulling the arrest warrant.[933] Highlighting the controversial nature of the issues debated in the *Arrest Warrant* Case and the vast range of views regarding these matters, the judgement had appended to itself: four Separate Opinions; one Joint Separate Opinion; three Dissenting Opinions; and one Declaration. But, differently from the judgement, these Opinions in general focused on the issue of universal jurisdiction rather than on immunities.

Although what most African States want to hear from the ICJ is an extensive explanation of the position assumed in the *Arrest Warrant* Case, such result is not guaranteed. As this thesis has already explored, legality is under constant movement. Actors are uninterruptedly articulating and ascribing for and through international law meanings to norms, which ends up blurring or even displacing the authoritative interpretation. This means that the degree of openness of a legal rule might vary because different ways of interpreting a legal rule might already exist or arise. It should be considered that "all positions [regarding legality] remain open and contrasting arguments may be reproduced at will."[934] This means that the "international legal argument can never secure its own foundations and remains open to diametrically opposed conclusions."[935] Even if the bench of ICJ Judges had

[932] INTERNATIONAL COURT OF JUSTICE, **Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)**, para. 61.
Through its assessment, the SCSL was included in this list of exceptions, "even though its basis was a treaty between the UN and Sierra Leone, to which Liberia was not a party." CRYER, Prosecuting the Leaders, p. 64.
[933] INTERNATIONAL COURT OF JUSTICE, **Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)**, para. 29-32.
[934] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 607.
[935] LEANDER; WERNER, Tainted love: the struggle over legality in international relations and international law, p. 92.

remained the same, there is nothing that could guarantee an alignment with its previous position. It should also come to the consideration that we are 20 years away from the *Arrest Warrant* Judgment but also there has been 20 years of ICC practice to be taken into consideration.

This move by African States has seem to be only of the African practices that has gain a level of respect from international legalists. Even though the intentions, as discussed, might have been to have its position legitimised, the practice in itself represents a deference for the 'authorities' of international law. While in many of the other practices of contestation performed by the African States in relation to the Al Bashir Case at the ICC the States are advancing an interpretation over the relevance of Al Bashir's immunities in relation to the proceedings before the ICC, some practices such as the request for an advisory opinion by the ICJ display an awareness that their part in the 'sovereignty game' is limited because as far as their capacity to enter the dance of legal justifiability, there will always be a need for a legal institution to validate these States' position.

3.3. Practical knowledge of the structuring structures: the bias of international (criminal) law

The African contestation towards the Al Bashir Case in the ICC mobilised a series of different means that sought to present their position in relation to the issue under dispute and change the practice of international (criminal) law. Through the analysis of the six main mechanisms that composed the African strategy, it is possible to see that international legal practice does not respect the boundary between law and politics. Instead, it emphasized that such frontier is fluid and cloudy. None of these mechanisms was able to guarantee the results for they all are part of the structure of international legal argumentative practices.

> Each of [instrumentalism and formalism] is, again, indeterminate. None of them explain why *this* argument was held relevant, why *that* interpretation was chosen.

> The decision always comes about, as the political theorist Ernesto Laclau has put it, as a kind of 'regulated madness', never reducible to any structure outside it.[936]

'Regulated madness' seem to describe well the dynamics of these practices of contestation. Even though all mobilise the available means already present in the practice of international law, most even in the very Rome Statute, these practices seem to be all over the place but still respecting the rules of the international legal game.

The motivations attached to the enacted practices seems to oscillate slightly between an interpretation that the alleged obligation towards the Court in relation to the Al Bashir Case does not exist and a position that holds that Heads of State should not be tried by international criminal courts while in office. These practices emphasized the States' capacity to mobilize and speak the language of international law. The African States were able to develop and perform an integrated strategy that regardless of its results demonstrated an in-depth perspective of the workings of international legal practice.

In spite of the indeterminate character of international law, the formalisms that inform legal decision-making are deeply embedded in structural biases. Even though there is an appearance of objectivity, the international legal formalisms "not only favor certain actors and outcomes, but also entrench existing imbalances and inequalities" to the practice of international law.[937] In that sense, the success of a contestation practice, a justification, or any position "depends on how it fits with the structural bias in the relevant institutional context."[938] Fitting the practice into the formalisms of the field completes only one part of the process. For the practice of contestation to actually be able to generate change, and therefore have a substantive outcome, it has to "satisfy the structural bias."[939] This final section of the chapter explores the biases that are entrenched within the strcutures that are mobilised in the practices of contestation enacted by the African States in relation to the Al Bashir Case at the ICC. It approaches first the rationality behind the social

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[936] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 301.
[937] DUNOFF, From Interdisciplinarity to Counterdisciplinarity, p. 334.
[938] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 570.
[939] *Ibid*.

dimension of international law and then moves to an analysis to the structural source of international law that can be the main driver of legal change and has been brough up many times in the discussions about the African practices of contestaion: customary international law.

3.3.1.
Normalizing contestation: the structural bias

In light of the elements presented in the previous sections, we are left with the question of which actors – or even which States – within international society that have influence over the process of change in international legal practice. In order to inquiry this question, it is important to understand the conditions under which social relations in the international environment take place that help to shape and is reinforced by it. In this section, the goal is to look into what are the circumstances that the normalizing norms are trying to sustain.

Antje Wiener suggest that an analysis of international law should be three dimensional. This means that, besides looking at the actors of contestation and the structure that conditions their practice, we should give attention to another one feature: cultural validation. Practices of contestation acquire validation from the 'protocol' through which international law already works. In turn, the social dynamics represent the dimension that looks into society and the way it structures itself around certain positions. While the first dimension finds its strongest production in the legal scholarship, the second one finds resonance in the IR literature, which points to the effects of learning and socialization within international institutions.[940]

A better understanding of the process of legal contestation would require a look into this third dimension, which is the reconstruction and mapping of the "cultural validation of norms as an interactive process."[941] This means that, according to Wiener, the sociocultural context from which the contestation is

[940] WIENER, Antje, **The Invisible Constitution of Politics: Contested Norms and International Encounters**, Cambridge: Cambridge University Press, 2008, p. 4.
[941] *Ibid*., p. 5.

situated participates in shaping this individual's behaviour.[942] This thesis joins Wiener in arguing that this third dimension – alongside the other two – is an important component to understanding the meanings behind practices. There is an exclusionary feature in international legal formalisms which impacts the very act of contestation. The access to these three dimensions is different for each actor. Understanding the process of validation means not only asking which formalisms but investigating the background knowledge vested in them, which is the structural bias.

In order to develop further the way the structural bias works, we have to go back to the writings (and teachings) of Michel Foucault.[943] The author makes an important connection between the practices that maintain a certain order of things and the epistemological categories that sustain them. Foucault argues that these definitions that happen in the order of practices are being "regulated by epistemological orders, which in turn are also suffused with power."[944] For this mutual constitutive relationship between the practices and the normative orders that together work to reinforce power in social relations, Foucault adopted the term "power-knowledge."[945]

Foucault emphasizes the way knowledge is dependent on power (and vice-versa) and how power has a productive character in social relations. This is shown by the author through the notion of *normalization*, a social process through which things are taken as normal. Normalization is the construction of an ideal norm of conduct that shapes actions and ideas.[946] The capacity in norms of normalization gives them the ability to create in subjects the perception of an efficiency in the performance of a certain range of practices. Normalization is put in place to get people, movements, and actions to conform with a certain model. The normal is

[942] *Ibid*., p. 6; WIENER, **A theory of contestation**, p. 5.
[943] FOUCAULT, Michel, **Power/knowledge: selected interviews and other writings, 1972-1977**, New York: Pantheon Books, 1980; FOUCAULT, Michel, **Discipline and punish: the birth of the prison**, 2. ed. New York: Vintage Books, 1995; FOUCAULT, Michel, **Society must be defended: lectures at the Collège de France, 1975-76**, New York: Picador, 2003; FOUCAULT, Michel, **Abnormal: lectures at the Collège de France 1974 - 1975**, London: Verso, 2003; FOUCAULT, Michel, **Psychiatric power: lectures at the Collège de France: 1973-74**, Houdmills; Basingstoke; Hampshire: Palgrave Macmillan, 2008; FOUCAULT, Michel, **Security, territory, population: lectures at the Collège de France, 1977-78**, London: Palgrave Macmillan, 2009.
[944] EPSTEIN, The postcolonial perspective: why we need to decolonize norms, p. 4.
[945] FOUCAULT, **Discipline and punish: the birth of the prison**, p. 184.
[946] *Ibid*., p. 26.

that which conforms to the norm.[947] These practices in turn are not taken as norms precisely but as something that is repeatedly performed for being normal and essential. In other words, these practices are repeated for simply being seen as natural and necessary.

Alongside the process of normalization, Foucault identifies a phenomenon that he calls *normation*, which would be the disciplinary techniques that are used to establish the process of normalization.[948] Normation is what "helps to locate precisely where the prescriptive power of norms lies" and "constitutes the battery of means […] deployed to obtain" conformity with legal norms.[949] By engaging with these two concepts we can understand the power of international law and, since they are part of a process of co-constitution alongside agents and structures, how this power gets diffused through relations that take place in the realm of international politics.

Besides that, those two Foucauldian concepts help to go beyond in the study of norms so that we can conceive how some actors might be better adjusted to act in this environment than others. This happens because the power relations highlighted by Foucault are so entrenched in those norms that they have the capacity of defining elements such as who are the recognized actors of international law and politics and they also "regulate the possibilities for acting appropriately."[950] And, here, we can use Wiener's proposal of a three dimensional approach to discuss how resistance to norms take place and how normalizing norms shape the way this process takes place.

The first element to be analysed, so that we can understand how practices of contestation are received within this field, is whether the arguments in this critique are taken as legal. States' representatives, international courts' judges etc. define whether such a claim has legal validity – and, therefore, determine if it should be taken seriously – based on its reliance on a source of international law and on whether this legal norm being evoked is appropriately read or interpreted. If arguments are perceived, for example, as 'political' or based on a legal norm that

[947] FOUCAULT, **Security, territory, population: lectures at the Collège de France, 1977-78**, p. 57.
[948] *Ibid*., p. 56–57.
[949] EPSTEIN, The postcolonial perspective: why we need to decolonize norms, p. 4–5.
[950] *Ibid*., p. 5.

is considered to no longer stand, they seldom go forward. But, as the explanation itself points out, there is an appropriate, and therefore authoritative, interpretation of the sources of international law.

Secondly, there is the social aspect. In this dimension, we see how contestation gets defined by certain 'authorities of international law,' that retain the almost exclusive right over defining legality – through the means presented in the former dimension. Here, we have a specific group that have the capacity to create authoritative meaning to or the right way to interpret a legal norm. As the discussion on the African request for an ICJ advisory opinion has indicated, there are specific actors that would be able to have significant contestation, meaning that only the performances of certain actors would have the ability of engendering a reaction that impacts the meaning or interpretation of international law. And these are, generically, groups associated with policy – mainly governments, international organizations, and NGOs – those that work in international courts and academics. But even within these groups there is a division of those that can and those who cannot define legality.

Besides defining which legal norms and interpretations can be evoked and which are the actors that might do so, there is a final dimension that also spills over the former two and therefore cannot be left aside: "cultural validation."[951] This means that we should not only look to the 'where' of the contestation in terms of which actor, but to the bigger picture. Defining how international law should be thought about and which are the specific practice communities that can influence it, limits the possibilities for contesting to those that already share and think within the terms of this culture. This means that in order to contest international law any actor should conform with the values of international society. In other words, there is a barrier created that make it almost impossible for actors, mainly States, deemed as 'outsiders,' to breach. And the division of those who belong within this 'Family of Nations' usually have developed nations on one side and the developing and underdeveloped on the other.

Normalizing norms, then, play an essential role of assuring that practices are performed according to what is deemed as appropriate and, as a consequence, is

[951] WIENER, Antje, **Contestation and Constitution of Norms in Global International Relations**, Cambridge; New York: Cambridge University Press, 2018, p. 43.

constantly shaping the components of these three dimensions. Considering this, then, this thesis investigates this specific international legal order that is being put in place by these normalizing norms in order to understand the way it shapes the process of interpretation/contestation of international law.

In one of the most famous essays on postcolonial theory, Gayatri Chakravorty Spivak questions the structures of what Foucault termed knowledge-power by highlighting the oppression present in the epistemologies that govern social relations.[952] This study was undertaken within a larger movement that sought to understand – and advocate for – non-Western knowledge. By adopting the Gramscian term of *subaltern* to refer to groups of people that occupy an underprivileged position due to oppression, subordination or even for just being considered as inferior in any manner, Spivak and the Subaltern Studies Group wanted to propose another way of analysing social relations by adopting a bottom-up approach instead of the most common and often resorted to top-bottom approach.[953]

The driving question of Spivak's work was whether the subaltern could speak. By posing such question, the author wanted to problematize the issue of the participation of non-Western subjects – the subalterns – in situations that develop within a Western framework and that require a knowledge of such structure in order to navigate it. According to the author, these subalterns when interacting within the social field would only reinforce their condition of subalternity through their practices, because they would be forced to engage with and within an epistemological structure that is completely dictated by European knowledge, which you place these subjects in a clear situation of disadvantage.[954] This means that normalizing norms would be developing the same role of preserving the position occupied by Western/European subjects in this environment through a narrative that differentiates, as pointed out in the previous section, the appropriate from what is "inadequate to their task or insufficiently elaborated: naive

[952] SPIVAK, Gayatri Chakravorty, Can the Subaltern Speak?, *in*: NELSON, Cary; GROSSBERG, Lawrence (Eds.), **Marxism and the Interpretation of Culture**, London: Macmillan Education, 1988, p. 271–313.
[953] SYLVESTER, Christine, Post-colonialism, *in*: BAYLIS, John; SMITH, Steve (Eds.), **The globalization of world politics: an introduction to international relations**, 6th. ed. Oxford; New York: Oxford University Press, 2014, p. 188.
[954] SPIVAK, Can the Subaltern Speak?, p. 271.

knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity."[955] These norms can also deceive States. For example, the international political-legal system is often described as a structure marked by sovereign equality, that promises that every 'other' that belong to the non-Western world by simply being sovereign is entitled to equality.[956] However, as many studies on international law and its implementation show, the international society would be better described as a place of sovereign inequality.[957]

In face of such situation, Spivak does not see a way for these subjugated knowledges to be accessible outside their own epistemological space. There is a geo-political division in the production of knowledge that affects the ability of some actors to enact its practices in equal footing.[958] And this situation is constantly reproduced by the normalization norms that are policing and constructing the epistemological categories over which subjects work. While for Spivak the Subaltern cannot truly be heard in a Western context,[959] the approach followed in this thesis is more in line with Robbie Shilliam, where he argues that, even though is very difficult for subaltern subjects to have their voices heard in an environment dominated by Western/European subjects and knowledges, they can still exist and make themselves heard.[960]

These considerations help us understand the context where the practices of contestation in relation to the Al Bashir Case are taking place. This Case points towards questions that are more deeply enshrined in international legal formalisms, as the unbalanced relations that affect how international relations are structured, which, in turn, have an impact on who has access to contestation. Once the dimension that gains emphasis throughout this process is the practice, it is important to make a close examination into customary international law because it can help

[955] FOUCAULT, **Power/knowledge: selected interviews and other writings, 1972-1977**, p. 82.
[956] PAHUJA, Sundhya, **Decolonising International Law: Development, Economic Growth and the Politics of Universality**, Cambridge: Cambridge University Press, 2011, p. 23–24.
[957] GIANNINI, Luisa; YAMATO, Roberto Vilchez; MARCONI, Claudia Alvarenga, Ruling through the International Criminal Court's rules: legalized hegemony, sovereign (in)equality, and the Al Bashir Case, **Carta Internacional**, v. 14, n. 1, p. 177–201, 2019.
[958] SHILLIAM, Robbie, The perilous but unavoidable terrain of the non-West, *in*: SHILLIAM, Robbie (Ed.), **International Relations and Non-Western Thought: Imperialism, Colonialism and Investigations of Global Modernity**, New York: Routledge, 2010, p. 13.
[959] SPIVAK, Can the Subaltern Speak?
[960] SHILLIAM, The perilous but unavoidable terrain of the non-West, p. 13.

us understand how these more profound issues appear when we analyse norms alongside the conditions under which they are being formed.

3.3.2.
Formalising practices in international law: customary international law

As Dunoff and Pollack have there is in the International Relations and International Law scholarship a "persistent neglect, until very recently, of customary law-making."[961] It was the New Haven School that galvanized attention to the theorizing on the political nature of customary international law in the works of Myres McDougal and Michael Reisman.[962] More recent approaches have dropped the formalism of political scientists that take international law as what is in international treaties to encompass a broader range of phenomena, as the creation and modification of customary international law.[963]

Customary international law is the source that reflects well the two impulses of international legal practice: the need for concreteness and normativity. This source is composed by two elements: international practice, the objective element, and *opinio juris*, the subjective element. Custom, then, is not only the recurrent practice of a legal norm but also the acceptance that such an act is performed due to its necessity. Customary international law seems to be the source that clearly encapsulates the need for an assessment of legality that extrapolate the traditional tools of international lawyers in order to encompass the way actors interpret and enact the law, once it is those very acts that are constructing legality.[964]

[961] DUNOFF, Jeffrey L.; POLLACK, Mark A., Reviewing Two Decades of IL/IR Scholarship, *in*: DUNOFF, Jeffrey L.; POLLACK, Mark A. (Eds.), **Interdisciplinary Perspectives on International Law and International Relations**, Cambridge: Cambridge University Press, 2012, p. 631.

[962] MCDOUGAL, Myres S., The Hydrogen Bomb Tests and the International Law of the Sea, **American Journal of International Law**, v. 49, n. 3, p. 356–361, 1955; REISMAN, W. Michael, Assessing Claims to Revise the Laws of War, **American Journal of International Law**, v. 97, n. 1, p. 82–90, 2003.

[963] DUNOFF; POLLACK, Reviewing Two Decades of IL/IR Scholarship, p. 631. See, for example, MEYER, T., Codifying custom, **University of Pennsylvania Law Review**, v. 160, n. 4, p. 995–1070, 2012.

[964] TZEVELEKOS, Vassilis P., Juris dicere: custom as a matrix, custom as a norm, and the role of judges and (their) ideology in custom making, *in*: RAJKOVIC, Nikolas M.; AALBERTS, Tanja E.; GAMMELTOFT-HANSEN, Thomas (Eds.), **The Power of Legality: Practices of International Law and their Politics**, Cambridge: Cambridge University Press, 2016, p. 190–191.

International customary law is able to capture the idea of legality being constantly reproduced by the actors through the way they perceive and enact the legal norm. International custom seizes this dual character of legality since it is both "reality and law, fact and norm."[965] There is entrenched in this notion the fact that the law needs to transform according to the social reality, which inevitably points out that there is no way of avoiding international politics. It is present not only in its enactment but in its making, due to the fact that it is this very enactment – that derives from how actors interpret the norm – that makes the law. "Custom is a legal obligation because it is practiced in society; likewise, it is social reality because the members of the society conceive it and implement it as law. As such, custom remains to be unceasingly re-confirmed and re-constructed."[966]

According to the Statute of the ICJ, customary international law is a "general practice accepted as law."[967] There have been recent efforts by the International Law Association (ILA) and the International Law Commission (ILC) to clarify what can be considered as customary international law and how can we identify it.[968] The ILA hosted a conference in London, in 2000, that produced a final report which contained 33 principles regarding the formation of customary international law.[969] After that, it was the ILC that devoted time to study the identification of customary international law after the subject was added to its work programme in 2012.[970] By 2016, the ILC had released a draft with 16 draft conclusions on the identification of customary international law,[971] which was transmitted through the

[965] *Ibid*., p. 189.
[966] *Ibid*., p. 190.
[967] **Statute of the International Court of Justice**, San Francisco: United Nations, 1945, art. 38(1)(b).
[968] CHIMNI, B. S., Customary International Law: A Third World Perspective, **American Journal of International Law**, v. 112, n. 1, p. 1–46, 2018, p. 1.
[969] INTERNATIONAL COURT OF JUSTICE, **Summary of the Judgment of 14 February 2002, Summary 2002/1**.
[970] For detailed information regarding the work of the ILC on the identification of customary international law, see INTERNATIONAL LAW COMMISSION, **Summaries of the Work of the International Law Commission — Identification of customary international law**, International Law Commission. Available at: <https://legal.un.org/ilc/summaries/1_13.shtml>. Accessed: 11 dec. 2020.
[971] INTERNATIONAL LAW COMMISSION, **Identification of customary international law: Text of the draft conclusions provisionally adopted by the Drafting Committee**, Geneva: United Nations General Assembly, 2016.

UN Secretary General to national governments for commentaries and observations that were supposed to be submitted until 1 January 2018.[972]

Even though there seems to be a consensus around the two elements that must be present in order to a norm of customary international law to emerge, which would be state practice and *opinion juris sive necessitas*, or the objective and subjective elements, the meanings and weights attributed to each of these two vary.[973] While the ILC focuses on the importance of the two elements working together, position shared by the ICJ in the *Continental Shelf Case (Libya v. Malta)*,[974] the ILA adopts the standing that state practice is the most important dimension, to a point that, in cases where there's a good deal of State practice, the subjective element – *opinio juris* – can be dispensed.[975]

In the First Report on formation and evidence of customary international law, the Special Rapporteur, Michael Wood, highlighted the importance of separating the two formal sources of customary international law, state practice and *opinio juris*, from the material ones. For the purpose of analysing the ways of identifying international law, as sources, he meant the formal, "that which gives to the context of rules of international law their character as law."[976] The material sources, in turn, are the historical origins of a rule.

However, most analysis on customary international law, like those above, focus solely on formal aspects of these processes, being completely "divorced from a serious examination of linkages of CIL norms to regional and global social structures."[977] Those analysis freeze the sources of international law and fail to grasp that those customs are performing certain functions in the international order because they are looking only to formalistic matters and, therefore, missing

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[972] INTERNATIONAL LAW COMMISSION, **Summaries of the Work of the International Law Commission — Identification of customary international law**.
[973] CHIMNI, Customary International Law, p. 2.
[974] INTERNATIONAL COURT OF JUSTICE, **Continental Shelf (Libyan Arab Jarnahiriya v. Malta)**, The Hague: International Court of Justice (ICJ), 1985, para. 27.
[975] CHIMNI, Customary International Law, p. 2–3.
There are other approaches to customary international law, some that establish more inclusive notions in order to expand the scope of what's considered customary international law and others that reject this division and have a more rigorous reading of what can constitute an international custom.
[976] INTERNATIONAL LAW COMMISSION, **First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur**, Geneva: United Nations General Assembly, 2013, p. 28.
[977] CHIMNI, Customary International Law, p. 4.

significant practices that help make sense of modern international law.[978] In the case of the elements that constitute the formal sources of customary international law, these investigations attribute to them a limited meaning, once they do not take into account the material source, which would highlight how it emerges in the context of a supposedly shared culture between European nations.[979]

However, this attempt of dealing separately with the material and formal sources of customary international law, according to Chimni, has not always been the case.[980] At first, the two were dealt with together, because the laws being created at that moment intended to perpetuate the European social, cultural and political order, as we can see in article 38(1) of the ICJ Statute with the reference to civilized nations, which facilitated the project of colonization. Customary international law gained strength during the nineteenth century, when the positivist method took the place of natural law as the main approach to international law. At that time, the project of the Law of Nations was being advanced based on the idea that there was a shared legal consciousness and common history among them. This "meant that the standard of conduct which counted as practice had to spring from organic [hegemonic] European culture"[981] and the notion of a civilizing mission was in the centre of this culture. Positivists, then, would strengthen a demarcation between civilized and uncivilized nations, which would give rise to a new momentum for imperialism.[982] And customary international law was informed according to this criterion of civilization and, as a consequence "excluded reference to the practice of non-European states which were classified as "uncivilized."[983]

Another reason for making sense of the formal and material sources together has to do with the fact that state practice and *opinio juris* gained meaning in a European environment. Once third world States began to go through the process of decolonization, the criteria to differentiate between the countries that could be a part of the Family of Nations and those that could no longer be applied. These new

[978] ANGHIE, A.; CHIMNI, B.S., Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, **Chinese Journal of International Law**, v. 2, n. 1, p. 77–103, 2003, p. 98.
[979] CHIMNI, Customary International Law, p. 14.
[980] *Ibid*., p. 18.
[981] *Ibid*., p. 17.
[982] ANGHIE, **Imperialism, Sovereignty and the Making of International Law**, p. 85.
[983] CHIMNI, Customary International Law, p. 17.

States also sought to change the meaning of the formal sources of customary international law. As a response, the development of the customs under international law began to reinforce more vigorously the notion of *opinio juris*, which was seen as a way to secure that the values of the international legal order were maintained, since by solely focusing on the practices of States in this new expanded community was a problem. "It is therefore no accident that what has been common since the nineteenth century is that subaltern actors either do not speak or are not assigned adequate weight."[984] Therefore, customary international law, which in theory has been democratized with the end of colonialism, can be in practice a useful tool to legitimize a certain international order.[985]

Due to this situation, a historical analysis of the practices of third world countries can be a difficult task and Chimni associates this problem not only to matter of access but to the very way of how knowledge is structured within the discipline that impact on the assessment regarding its pertinence.[986] For example, State practice of these third world nations are not assembled and published in a systematic way, which influences in its availability for consultation. Besides that, the assessments on State practice usually undervalue the significance of practices of non-western states. And, regarding the production of knowledge, the views of publicists normally taken into consideration used and continues to reflect the positions of western writers, whose work follows a certain preferential approach as, for example, the separation between formal and material sources when discussing customary international law.

In this sense, context is an important aspect to the analysis into the African practices of contestation in relation to the Al Bashir Case, since they allow us to grasp the linkages between norms – alongside their sources – and the ordering practices that are establishing not only which States are producing these norms, but whose contestation is valid. Customary international law's selection of which practices count and where does the perception come from already sets the tone for the biases that are present in this structure, which will be further explores in the ensuing Interlude and Chapter that follows.

[984] *Ibid*., p. 19.
[985] *Ibid*., p. 20.
[986] *Ibid*., p. 20–24.

3.4.
The African contestation and the formalisms of international legal practice

The notion that "legality derives from and ultimately amounts to international practice" has been a constant throughout this Chapter.[987] There is a multiplicity of international actors engaging in the (re)production of international legal norms through these practices, which includes States. With the process of legalization international law has become a central part of international political dynamics. As international law begins to be mobilised in very dispersed sites, the same happens to norm interpreters, which start to appear from fields outside the law. These international actors come to perceive the importance of engaging with the language of international law is in order to participate in the game. Once such grammar is mastered, extra-legal international actors also become competent norm interpreters and join the play of international law.

This phenomenon properly portrays the African engagement with the Al Bashir Case in the ICC. Through its vast range of practices, African States were able to devise a strategy that mastered an integrated look at the international legal system as to explore the many possibilities of contestation through the system. Even though these practices of contestation were very different in nature from one another, for having different ways of engaging with the matter under dispute, their integration is able to encapsulate the social character of contestation. Because it is a social phenomenon, the practice of contestation gains meaning alongside its larger context, not only (re)producing particular disputes over rulings and interpretations, but also displaying deep social divisions and conflicts that arise because of it. In light of that, a study on contestation needs to be able to grasp that international law's formalisms are suffused with certain preferences which conditions the success of a contestation practice.

In this sense, the movement that has been made by this thesis so far now begs the question about the way the bias that is entrenched in the structuring structures of international legal practice influences the "argumentative strategies and

[987] TZEVELEKOS, Juris dicere: custom as a matrix, custom as a norm, and the role of judges and (their) ideology in custom making, p. 188.

epistemic struggles" in relation to the Al Bashir Case in the ICC.[988] The next interlude and chapter explore this question through the examination of the ways through which the organs of the ICC make sense of the contestation practices of the African States through the professional biases of the field. It engages in an endeavour of mapping the parallel creations and the influence that they exert in the acceptability of contestation.

[988] RAJKOVIC; AALBERTS; GAMMELTOFT-HANSEN, Introduction, p. 3.

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Interlude No. 4: The Court respond to the African contestation

Before the Al Bashir Case, the ICC began talks with the AU as to establish an office for the ICC at the AU Headquarters in Addis Ababa upon request of the ASP. After some African States openly positioned themselves in relation to the Al Bashir Case, the Court started to put more emphasis on the necessity of this project. Once discussions on the need for a field office were bolstered with the beginning of the contestation in relation to the Al Bashir Case, the ASP asked the Registrar to submit a report on the matter. The report concluded that it was desirable for to the Court to have such office. One of the points the Registrar for justifying the necessity of the field office in Africa was that

> Africa played a leading role in the establishment of the Court, and it constitutes the largest regional block of States Parties to the Rome Statute. The role Africa played in the negotiations on the Rome Statute, the number of ratifications by Africa, the cooperation offered by African States Parties, the self-referral of situations by African States and the complementary nature of the Court as a court of last resort needs to be a regular part of the dialogue in the AU.[989]

However, the Registrar considered that the geographical distance between Addis Ababa and The Hague represent a challenge for the Court to "bring this information to the AU debates."[990] In the report, it is firmly stated that there was a crucial need for enhancing the "understanding that the Constitutive Act of the AU […] is consistent with the Rome Statute," that would come with a closer dialogue between the Court and the AU.[991] The proposal, when taken to the Assembly of the AU, was rejected.[992]

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[989] ASSEMBLY OF STATES PARTIES, **Report of the Court on the establishment of an office for the International Criminal Court at the African Union Headquarters in Addis Ababa**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2009, para. 3.
[990] *Ibid*., para. 3.
[991] *Ibid*., para. 4.
[992] ASSEMBLY OF THE AFRICAN UNION, **Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV)**, para. 8.

In light of the soaring movement expressing its dissatisfaction to the Al Bashir Case, the different instances of the ICC felt the need to address the phenomenon and have its narrative in relation to these events voiced. In a press conference to mark the anniversary of the adoption of the Rome Statute, on 17 July 2009, the President of the ASP was asked whether the AU's request was taken to mean a challenge to the ICC, which was answered that such a request falls within the framework of the Statute and as such was not meant as an act of defiance.[993] At the first ASP meeting after the issuance of the first arrest warrant against Omar Al Bashir, Luis Moreno-Ocampo framed the African response as one of reassurance of its commitment to their legal obligations in relation to the Court. He posited that:

> African States Parties to the Rome Statute have been requesting that the UN Security Council consider a deferral of the Darfur investigation, but they remain firm in their legal obligation to execute arrest warrants should indictees be present on their territory. In the general debate of the UN General Assembly, on 29 October [2009], Kenya on behalf of the African States Parties to the Statute reaffirmed their commitment to their legal obligations.[994]

The former Prosecutor, however, proceeded in his remarks to emphasize the challenge of having arrest warrants enacted by States. For him, Al Bashir was "enjoying the protection of […] members of governments eager to shield them from justice."[995]

For the tenth session of the ASP held in 2011 the Working Group on Amendments prepared a report commenting on the received amendment proposals until that point.[996] The Report, however, did not elaborate in any way on the South African proposal despite doing so for all the other submissions. The South African (on behalf of the AU) proposed amendment was not considered by the Assembly

[993] ASSEMBLY OF STATES PARTIES, **Press Conference to Mark Eleventh Anniversary since Adoption of International Criminal Court Statute**.
[994] MORENO-OCAMPO, Luis, **Address to the Assembly of States Parties**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2009, p. 6.
[995] *Ibid*., p. 7.
[996] The issue of amendments began to arise in mid-2009 because, pursuant to art. 121(1) of the Rome Statute, amendments could only be proposed by States Parties seven years after the Statute's entry into force. In that sense, in 2011, there had been relatively little practices of amendment proposals. **Rome Statute of the International Criminal Court**.

neither on that year nor on the following years, it was only listed once by the Working Group amongst the annexes of their report.[997]

In his last address to the ASP, on December 2011, outgoing Prosecutor Moreno-Ocampo reflected on the risks that lay ahead for the ICC. One of them was the ICC becoming a "Court that produces legal debates, but is ignored in the management of massive violence," in a clear reference to the non-compliances and the requests for the deferral of the case against Al Bashir.[998] In his depiction of this situation "some leaders sought by the Court threatened to commit more crimes to retain power, blackmailing the international community with a false option: peace or justice."[999] The narrative that purported that peace and security are in opposition to justice lures political leaders and conflict managers. According to the former Prosecutor, situations of conflict can only achieve peace and security through the sustenance of the legal limits. This threat to the livelihood of the ICC, however, was being managed by the growing support for ending impunity.[1000] In the same ASP meeting, Judge Sang-Hyun Song, then President of the ICC, said that the Court, because it deals with highly political contexts, cannot avoid the accusations of selectivity, bias, or political interferences. However, the Court's officials do not and cannot do such things, for their guiding principle is the rule of law.[1001]

At the Twelfth Session of the ASP, in November 2013, Judge Sang-Hyun Song, praised the many initiatives by States Parties to the Rome Statute to circulate drafts of their proposed amendments. However, his remarks focused on the need for caution. The Judge reflected a concern regarding the initiatives proposed, position that

> Any amendment of the legal framework of the Rome Statute system needs to be well thought through and should not be undertaken with undue haste.
> […]
> It will be particularly important, therefore, for States Parties to reflect carefully on the proposals before them and to ensure that any amendments adopted are consistent with the wider legal framework of the Statute, without prejudice of course to the

[997] ASSEMBLY OF STATES PARTIES, **Report on the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2011.
[998] MORENO-OCAMPO, Luis, **Address to the Assembly of States Parties**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2011, p. 7.
[999] *Ibid*.
[1000] *Ibid*.
[1001] SONG, Sang-Hyun, **Remarks to the Assembly of States Parties**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2011, p. 4.

> possibility of any future amendments to the Statute itself. Any advice from the Court on the matter will necessarily be of a purely legal nature, as appropriate for a judicial institution.[1002]

Prosecutor Fatou Bensouda's opening remarks at the 2013 ASP meeting steered clear of addressing the non-compliances or other practices of contestation. When addressing the issue of cooperation by States Parties, she emphasized her resoluteness that politics had no place and would not play any part in her decisions, for the mandate entrusted to her by the States Parties required her to act "solely upon the evidence and the applicable principles, within the framework of the Rome Statute."[1003] Bensouda added that States were also entrusted to "serve as robust custodians of the treaty's object and purpose," upholding "the fundamental values enshrined in the Statute."[1004]

In that year, the ASP, upon the recommendation of the Bureau, decided to include an additional item on the agenda that had been requested by the AU, a Special Segment on the "Indictment of Sitting Heads of State and Government and its Consequences on Peace and Stability and Reconciliation."[1005] Judge Song, President of the ICC, complimented the AU initiative commenting that that the ASP was "clearly the most appropriate forum" for States Parties of the Rome Statute and other stakeholders to come together and consider the challenges facing the system of international criminal justice.[1006] Bensouda's remarks, however, did not address the special session that was to take place on the following day.

The segment was conducted in the format of a panel discussion, followed by informal interactive debates, moderated by the representative of Jordan.[1007] The Panel was composed by Professor Cherif Bassiouni, Chair of the Drafting

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[1002] SONG, Sang-Hyun, **Statement at the opening of the 12th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, p. 1.
[1003] BENSOUDA, Fatou, **Address to the Assembly of States Parties**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, para. 14.
[1004] *Ibid*., para. 15.
[1005] ASSEMBLY OF STATES PARTIES, **Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records, Volume I**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, para. 12.
[1006] SONG, **Statement at the opening of the 12th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court**, p. 1.
[1007] ASSEMBLY OF STATES PARTIES, **Recommendation by the Bureau for the inclusion of an additional item in the agenda of the twelfth session of the Assembly of States Parties of the International Criminal Court**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, annex.

Committee at the 1998 Rome Conference, Professor Charles Jalloh, who had been suggested by African States Parties members of the Bureau, and Ms. Djenaba Diarra, the acting Legal Counsel of the African Union, also suggested by African States Parties. The coordinator of the 1998 Rome Conference, Ambassador Rolf Einar Fife, Director General of the Department of Legal Affairs of Norway, participated through a pre-recorded video contribution. The African States Parties also informed the Bureau of their wish to include Professor Githu Muigai, Attorney-General of Kenya, as a panellist. A number of NGOs also participated in the interactive discussion. [1008] The moderator summarized the five-hour special segment as demonstrating a

> [B]road agreement that the Assembly should consider looking into practical solutions consistent with the existing legal framework that would address concerns expressed by the African Union. One such avenue was the possibility of amending the Rules of Procedure and Evidence in order to ensure the necessary degree of flexibility when dealing with specific circumstances which could not have been foreseen when the Statute was adopted.[1009]

Throughout the debate, States Parties reinforced their commitment to ending impunity but stressed their uneasiness with situations unforeseen by the drafting of the Statute. The debate steered in the direction of the precise situation proposed in the title of the session, the indictment of Heads of State and Government and its impact in situations of peace and reconciliation. The States and specialists pondered

> [T]he delicate balancing act required to achieve the objectives of the fight against impunity on the one hand, and peace and stability on the other. It was recognized that this constituted a challenge in the exercise of prosecutorial discretion.[1010]

The President of the ASP, Ambassador Tiina Intelmann, commented that States engaged in earnest with the matter.[1011] The comments throughout the spheres of discussion at the twelfth session of the ASP recognized that

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[1008] ASSEMBLY OF STATES PARTIES, **Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal Summary by the Moderator**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, para. 4.
[1009] *Ibid*., para. 8.
[1010] *Ibid*., para. 9.
[1011] INTELMANN, Tiina, **Closing remarks of the President of the Assembly of States Parties**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2013, p. 1.

> There was broad satisfaction that an open process of dialogue had been started in order to address the concerns of African States and with the manner in which the special segment had been organized and conducted. It was agreed that this dialogue should continue and develop further, focusing also on possible practical measures to deal with the issues that had been raised.[1012]

Throughout the year of 2014, the ASP Working Group on Amendments met with the States that had proposed amendments to the Statute to further discuss their proposals. Both South African and Kenyan suggestions for amendments were presented and commented by the delegations. In both cases, it was agreed that further discussions would be necessary after the thirteenth session of the ASP, which would take place in December 2014.[1013] In the reports for the following years, the Working Group on Amendments stated that, in both cases, the respective State did not provide any further updates concerning their proposals during the intersessional period. The discussion on the African proposals was never taken by the Working Group to the general debate of the ASP meetings.[1014]

During the 2014 ASP meetings, Bensouda came to the defence of the Court's operations in light of the growing criticism of the Court mostly stemming from African States.

> Operating in a highly politicised international environment, in which the role and function of the Court as a key player and judicial pillar in the international arena is often misunderstood, continues to be a major challenge. This has led to unfair and unjustified criticism of the Court. Such criticisms have served to strengthen our resolve and commitment to independently and impartially discharge the mandate entrusted to us by the Rome Statute, guided by nothing but the law and evidence,

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[1012] ASSEMBLY OF STATES PARTIES, **Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal Summary by the Moderator**, para. 11.

[1013] ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2014, paras. 7 and 9.

[1014] ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2015, paras. 17 et seq; ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, paras. 19 and 20; ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2017, paras. 25 and 26; ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2018, paras. 15 and 16; ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2019, paras. 18 and 19; ASSEMBLY OF STATES PARTIES, **Report of the Working Group on Amendments**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2020, paras. 11 and 12.

> devoid of any political considerations. Just as the oversight function of the ASP under Article 112 of the Rome Statute is an important factor for the institution's success, so too is *respect for judicial independence* and *safeguarding the integrity of the judicial process* from political interference. It is the duty and indeed the responsibility of this eminent body to *protect* the institution and *safeguard* its judicial independence, much as you are duty bound to provide management oversight over its administration. We *must always* honour the sanctity of the Rome Statute and act as its unwavering custodians.
> It is particularly disturbing that a number of suspects indicted by the Court remain at large after States invested so much in the investigations that culminated in the Chambers' decisions that these suspects have to answer charges. It is in our collective interest to see a return on this investment. I can only reiterate that States are the enforcement arm without which the Court cannot properly function.[1015]

Besides the remarks from Bensouda, the discussions at the thirteenth session of the ASP did not address the practices of the African States in contestation to the Al Bashir Case. The Assembly took place a few days after the OTP announced the dropping of the charges against President Kenyatta of Kenya, the other African case besides the one against Al Bashir under heavy contestation at the ICC.[1016]

On the verge of Al Bashir's visit to South Africa, after the Court request the State that Al Bashir was arrested and surrendered to the Court, the South African authorities requested a consultation under art. 97 of the Rome Statute (see Interlude No. 2). During the consultation, the Single Judge Cuno Tarfusser began by demonstrating the Court's appreciation that South Africa had activated the consultation mechanism, which demonstrated its earnest demeanour towards the issue and set the dynamic of the proceedings. The Judge further affirmed:

> We had this morning -- I had consultations among -- inside the Court in order to understand which way we should do this consultations, what consultations with the Court means because the Court is the judiciary, is the Prosecution, is the Registry, is altogether, and we didn't really know what the merit of the consultations you wanted to have with the Court was, if it was merely -- well, if it was, say, executive, or if it was political, or if it was judicial, so I thought that the Chamber, the judiciary should take over and then to decide how to proceed as soon as we know what the merit of these requested consultations are, what you bring in front of the Court.[1017]

[1015] BENSOUDA, Fatou, **Address to the Assembly of States Parties**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2014, p. 3–4.
[1016] OFFICE OF THE PROSECUTOR, **Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the withdrawal of charges against Mr. Uhuru Muigai Kenyatta**, The Hague: International Criminal Court (ICC), 2014.
[1017] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 2**, p. 1.

The position of the OTP was that there was no legal issue raised by South Africa that would warrant a legal consultation and added that "there is no balancing to be performed" in relation to the matter of the South African obligations.[1018] "[O]nce an issue has been decided, it's only decided once. So it cannot be raised again and again once it has been decided because it's a question of law."[1019] On top of the OTP's statement, the Single Judge affirmed that there was not "much space [for South Africa] to make any other consideration" that would not mean a reaffirmation that South Africa was under the obligation to arrest and surrender Al Bashir to the ICC.[1020] In light of the South African Ambassador's remarks that unless the State and Court "find institutional mechanisms of dealing with these issues through a process by experts on both parties […] [they] would not be doing justice to the issue,"[1021] the Judge responded:

> This is the problem, because we have already decided what prevails, what legally from our point of view prevails. That doesn't mean that I do not understand that from your point of view the thing is a little bit more tricky and different of course, but that's why we are doing this 97 consultation.[1022]

At the 2015 ASP meeting, South Africa requested the inclusion of a supplementary agenda item titled 'Application and Implementation of Article 97 and Article 98 of the Rome Statute.'[1023] On 20 November 2015, the two articles were discussed in a high-level debate. During the discussions on the matter of article 98, "it was noted that interested States Parties could refer the matter to the Bureau for further consideration and attention."[1024]

Still at the 2015 ASP meeting, the President of the ASP, the Senegalese Sidiki Kaba, in his closing remarks, addressed the "negative perception" of the ICC in Africa, referring to the criticisms of "selective justice, discriminatory justice, 'pick

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[1018] *Ibid*., p. 8.
[1019] *Ibid*., p. 21.
[1020] *Ibid*., p. 8.
[1021] *Ibid*., p. 11.
[1022] *Ibid*., p. 17–18.
[1023] ASSEMBLY OF STATES PARTIES, **Annotated list of items included in the provisional agenda**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2015, p. 2.
[1024] ASSEMBLY OF STATES PARTIES, **Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records, Volume I: Closing remarks of the President of the Assembly at its 12th plenary meeting, on 26 November 2015**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2015, para. 59.

and choose' justice, two-speed justice, white man's justice against the others."[1025] In light of this scenario, Kaba proposed a four-courses plan of action: (1) keep working towards universality, and this means not only working towards having more countries join the Rome Statute but also not letting African States leave the Court. Some African States had been threatening to leave the ICC; (2) improve cooperation with the Court; (3) work on complementarity, strengthening national judicial systems for it is in the interests of justice; and (4) have faith in the decisions of the judges.[1026] The President of the ASP ended his closing statement by advocating for the ICC as the beacon for universal justice. His words were:

> I do not hold with theories based on race when it comes to justice. I do not believe that justice has a colour. I simply refer to justice. And this feeling is deeply rooted in all human beings. And when people are living in a place where there is no justice, what could be more normal than to go and search for it where it exists? In that sense, the International Criminal Court can be a vector for peace: peace through justice.[1027]

For the 2016 ASP meeting, South Africa requested the establishment of a working group on the application and implementation or articles 97 and 98 of the Rome Statute. The Bureau considered the request and created a working group of the Bureau to examine the application of article 97.[1028] Nevertheless, the Bureau affirmed that there was no consensus on establishing a working group to clarify the relationship between articles 27 and 98 of the Statute.[1029]

During the fifteenth session of the ASP, in light of the notifications of withdrawal to the Rome Statute submitted in the previous months, many remarks were directed at the relationship between Africa and the ICC. The President of the ASP, Sidiki Kaba, proposed to include a segment to provide an opportunity to engage in a constructive dialogue on the relationship between Africa and the International Criminal Court, emphasizing that "the Assembly was the proper

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[1025] *Ibid*., para. 12.
[1026] *Ibid*., paras. 12 et seq.
[1027] *Ibid*., para. 22.
[1028] ASSEMBLY OF STATES PARTIES, **Report of the Chair of the working group of the Bureau on the implementation of article 97 of the Rome Statute of the International Criminal Court**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, paras. 1 et seq.
[1029] ASSEMBLY OF STATES PARTIES, **Bureau of the Assembly of States Parties, Third meeting: Agenda and decisions**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, p. 2.

forum to address the challenges in this relationship and to seek dynamic solutions."[1030] The Bureau of the ASP agreed to hold an open Bureau meeting on 18 November 2016, to be moderated by ASP President Kaba. Two panellists, the Ambassador of Ghana to the Netherlands and an expert on transitional justice and member of Kenyans for Peace with Truth and Justice, were to make interventions while the representative of the African Union Commission, presented some perspectives on behalf of the Open-Ended Ministerial Committee on the ICC of the African Union. States Parties were satisfied with the open dialogue and agreed to continue further discussions on the more practical measures that needed to be adopted. Still, they voiced their worries in relation to the notifications of withdrawal and the message such actions could send.[1031]

ASP President Kaba's statement at the fifteenth ASP session also focused on the matter of the withdrawals, appealing for the States to reconsider their decision, and sending the following message:

> I wish to tell them that they have been heard, as have those other States which have remained within the fold and which also demand equal justice for all without any discrimination on the basis of whether a State may be weak or strong, rich or poor.[1032]

The ASP President indicated five areas that needed attention to address the African complaints in relation to the work of the Court: (1) the pursuit of universality, "so that this principle […] is transformed from myth to reality;" (2) a focus on strengthening complementarity, "so that justice can be rendered *in situ* through effective and efficient legal systems;" (3) the support of States Parties on reinforcing the resources of the Court, so that "we would no longer see only African nationals before the Court" and, in this sense, "delegitimize the criticism levelled at the ICC that it is against Africa;" (4) the reformulation of the communication strategy of the Court; and (5) a "[r]eform [of] the current system of world governance […], which grants the right of veto to five major powers, allowing them

[1030] ASSEMBLY OF STATES PARTIES, **Informal summary by the President on the "Relationship between Africa and the International Criminal Court"**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, para. 1.
[1031] *Ibid*., paras. 2 et seq.
[1032] KABA, Sidiki, **Speech of the President of the Assembly of States Parties, Mr. Sidiki Kaba, fifteenth session of the Assembly of States Parties, 16 November 2016**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, para. 6.

to exercise this right according to their own geostrategic interests, thereby creating a two-tier justice system."[1033] On this last point, the ASP President added that "[t]his reinforces the impression that international justice applies double standards," a conception that, according to the ASP President, could be corrected before it became assimilated as "a historical injustice," with the ICC being the "victim of this situation."[1034]

Meanwhile, the speech by the ICC President, Judge Silvia Fernández de Gurmendi responded to the notifications of withdrawal in a different note. The Judge remarks focused on presenting the openness of the Court to dialogue with the States as to strengthen the ICC's work. Speaking on the African decisions to withdraw from the Court, the Judge stated that:

> I would like to take this opportunity to reiterate the Court's commitment to listen to concerns, facilitate dialogue by providing information and technical support as may be required, and to participate itself in this dialogue within the confines of its mandate as an impartial and independent judicial institution.
> Since the last session of this Assembly, the Court has indeed continued to listen and act upon constructive criticism or suggestions.[1035]

In her speech, the Court's President Gurmendi also demonstrated the Court's wish to deepen the lines of communication with its African Member States through the attempt of creating a field office at the AU's Headquarters, which was opposed by the African States Parties through an AU decision. The view of President Gurmendi regarding the AU decision was made clear in her speech:

> As you are aware, in 2009 this Assembly decided to establish a Liaison Office for the Court at the Headquarters of the African Union and the Court indeed conducted negotiations to that effect. Unfortunately, these efforts were not fruitful and at its Fifteenth Ordinary Session in July 2010, the African Union decided to reject for the time being the opening of the ICC Liaison Office.
> I hope that the African Union will revisit this decision and allow for the finalization of this process. I have no doubt that a closer relationship facilitated by an ICC Liaison Office would make an important contribution to maintain a constructive dialogue and to strengthen international, regional as well as national efforts against impunity.[1036]

[1033] *Ibid*., para. 6.
[1034] *Ibid*., para. 6.
[1035] GURMENDI, Silvia Fernández de, **Presentation of the Court's annual report to the Assembly of States Parties**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, p. 1.
[1036] *Ibid*., p. 5.

Also addressing the inescapable matter of the notifications of withdrawal, the ICC Prosecutor, Fatou Bensouda, presented her position that the fight against impunity should be strived for "only in a forward trajectory."[1037] Bensouda affirmed that "the real crisis for the global community" was the unchecked reign of the world's gravest crimes during the decades before the establishments of the ICTR and ICTY.[1038] In a direct reference to the notifications of withdrawal, the Prosecutor said

> I must register my disappointment that three States Parties have decided to withdraw from the statute. While acceding or withdrawing from any treaty is a sovereign act that duly deserves respect, any act that may undermine the global movement towards greater accountability for atrocity crimes and a ruled-based [sic] international order in this new century is surely – when objectively viewed – regrettable.
> What is required is greater dialogue and cooperation to jointly strengthen the international criminal justice system.
> Despite the sensational headlines, this is not a crisis for the Rome Statute system, but a set-back in our joint efforts towards achieving a more peaceful and just world.[1039]

Contrary to what these actions demonstrate, the Prosecutor concluded, "ours is in fact the age of rights consciousness where humanity no longer accepts that […] perpetrators escape justice."[1040] This means that:

> The attainment of justice for atrocity crimes and the international rule of law is the cherished hope of all of humanity.
> We must *not* and will *not* allow that the law falls silent during war and conflict; *not* under our watch, not in our times.
> The ICC will continue to forge ahead to deliver on its important mandate to deliver justice.
> It will do so because it stands for powerful ideas; because it meets vital needs for humanity's progress in the modern era; because without the ICC, we will regress into an even more turbulent world where chaos, volatility and violence take the upper hand as inevitable norms.
> We must do all we can to ensure that security, stability and the protective *embrace of the law* become a reality to be relished *by all, in all corners of the world*.
> We owe it to ourselves, our children and to future generations to nurture the ICC so that it carries on with its crucial work to fight against impunity and to foster the Rome Statute system of international criminal justice.

[1037] BENSOUDA, Fatou, **Address at the First Plenary**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2016, p. 2.
[1038] *Ibid*., p. 3.
[1039] *Ibid*., p. 3–4.
[1040] *Ibid*., p. 8.

> To be sure, the quest to end impunity may be long and fraught with challenges, but it is one that *must* be travelled – collectively.[1041]

On a different tone from the two previous remarks, the Prosecutor's attitude presented a more condemnatory position, while the ASP and ICC Presidents sought to find possible channels through which have these States reappraise their decisions to withdraw.

At the following year ASP meeting, in light of the withdrawal notifications' rescission from South Africa and the Gambia, despite the continuous non-compliances by States Parties, the statements barely touched upon the issue of contestation towards the Al Bashir Case. The ICC President and Prosecutor dedicated their remarks to other topics, nonetheless, addressed the matter. ICC President Gurmendi, posited that "[a]t a time when serious pushback appears to challenge the achievements already made to enhance accountability, the firm and sustained commitment of the international community is crucial for the Court to effectively fulfil its mandate."[1042] Her remarks linked the criticism with drawbacks to the quality of the justice that can be provided.[1043] The Prosecutor, in turn, maintained a more stern posture in regards to the contestation practices. Bensouda's remarks addressed these manifestations as a diversion of the Court's mission, as the following passage demonstrates:

> The challenges before us are many, in particular when adding to the equation persistent *unfounded* narratives on the Court, such as its alleged partiality in delivering justice, or being so called 'costly'.
> These, Mr President, will *not* distract my Office from striving to create a more just world in accordance with the Rome Statute.
> We will continue to seek the justice we all yearn for, with dedication, objectivity and professional integrity. That is the oath I took; that is what my Office and I have demonstrated in practice, and that is what will continue to guide us.
> We must continue jointly to ensure that the Court can effectively implement its mandate.
> The 15 outstanding ICC arrest warrants is one area where greater collaboration is sorely needed.
> The entire judicial machinery of the Court can be frustrated and held in abeyance unless persons sought by the ICC appear before it.
> Moreover, the interaction with individuals that the Court seeks to arrest cannot

[1041] *Ibid*., p. 8–9.
[1042] GURMENDI, Silvia Fernández de, **Statement to the 16th Session of the Assembly of States Parties to the Rome Statute**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2017, p. 5.
[1043] *Ibid*.

> become 'business as usual'; not least out of respect for the suffering of victims and their yearning for accountability, and greater enforcement of international justice.[1044]

In Bensouda's remarks, the realization of justice is tied to a "yearning for accountability," which comes through the assurance that the ICC can fulfil its mandate.[1045]

The 2018 ASP meeting celebrated the twentieth anniversary of the Rome Statute and took place in the midst of the Jordan appeal process (see Interlude No. 5). The incoming President of the ASP, O-Gon Kwon, in light of the commemorative date, chose to take stock on the challenges for the enactment of the Statute. On the issue of cooperation, the Kwon reflected on the non-compliances with the ICCs arrest warrants.[1046] For him,

> [N]on-cooperation negatively affects the Court's ability to carry out its mandate, as well as its credibility. I continue to attribute great importance to cooperation, and will continue to work with the regional focal points to address the problem of non-cooperation.[1047]

The ASP President linked the posture of arresting and transferring suspects to the ICC with the support for international justice, for it allows the Court to fulfil its role.[1048]

The remarks of the ASP President were followed by the also incoming ICC President, Judge Chile Eboe-Osuji, who made his debut opening speech with a strong emphasis on the contestation against the Court's activities. His words were:

> In the light of the 20th Anniversary Commemoration, I would be remiss to omit touching on the fact that […] there came a certain reproach deployed against the Court; generating a constant of wavelength, no doubt for its content, but more so for its source. Reproaches like that are not new. We have heard them before, from other sources, too.
> But, I urge you to keep in mind that negative commentary, however severe and from whatever source, need not be taken as an alarming 'attack against the ICC' - as the temptation may press it upon us to see it. It is not necessary to demonise those who criticise the Court, merely because we see things differently.

[1044] BENSOUDA, Fatou, **Address at the First Plenary**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2017, p. 6.
[1045] *Ibid*.
[1046] KWON, O-Gon, **Keynote address by the President of the Assembly of States Parties**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2018, p. 2.
[1047] *Ibid*.
[1048] *Ibid*.

> The approach of the Court's leadership is, rather, to see these reproaches as part of the conversation or reflections that the whole world is entitled to have about the value of the Court to our collective humanity.
> INDEED, beyond the need to address and correct the misunderstandings that such reproaches may reveal about the Court and its jurisdiction – always stressing, in particular, the principle of complementarity, as President Kwon has just done – the inspired reflections do much more.[1049]

Besides responding to the criticism behind the contestation practices, the ICC President went on to justify Court's operation in light of its function as a judicial mechanism. He posited that:

> You established this Court 20 years ago and decided to locate it in The Hague.
> […]
> You knew that you were creating a court of law. And you meant to do so. But, courts of law, by their very definition, exist to ensure checks and balances to power: the power of Governments and the power of pre-potent persons (corporate and human). To put it plainly, any court of law worth its name must be, in many instances, a **'pain in the necks'** of those who hold hegemonic power. Therefore, reproaches even severely delivered from powerful sources against courts of law should shock no one. It is part of what a court of law must be prepared to endure in any country in the world, where litigants may pursue unpopular causes and judges may deliver inconvenient judgments. So, too, it must be at the ICC.[1050]

Judge Eboe-Osuji extended his defence of the Court to the OTP's activities, emphasising the way it is at the same time tied to the Court in general and separate. The ICC President advocated for the Prosecution's independence from the Court exemplifying with the decision of the AC which reversed the conviction of Jean-Pierre Bemba Gombo.[1051] In his words:

> Let us recall, in this connection, that a criticism that was recently levelled at the Court – specifically as part of the reproach that I mentioned earlier - is that the judicial branch and the Office of the Prosecutor are 'meld[ed] ... together' in an arrangement in which the OTP is 'an organ of the Court' – an idea that would seem odd indeed in the common law world.
> […]
> On the face of it, that concern is quite understandable. But it does not tell the whole story. The same arrangement – in which the OTP is an 'organ of the Court' – was borrowed from the design-template of other international criminal tribunals,

[1049] EBOE-OSUJI, Chile, **Remarks at the opening of the 17th Session of the Assembly of States Parties to the Rome Statute**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2018, p. 3.
[1050] *Ibid*., p. 4.
[1051] APPEALS CHAMBER, **Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"**, The Hague: International Criminal Court (ICC), 2018.

> specifically the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, which were created by the UN Security Council.
> More importantly, perhaps, the criticism in question ignored the fact that just three or four months earlier, the ICC Appeals Chamber had reversed a conviction of a defendant in a judgment that generated very loud uproar in some quarters, including from victims of the concerned situation and from Civil Society groups that speak for them. I am in a position to say that the uproar was entirely foreseeable to the Judges who rendered that judgment; but they had considered it a matter of foremost judicial duty – above popularity – to render the judgment that was made.[1052]

By evoking the recent AC decision, to which he was one of the Judges, the ICC President sought to demonstrate that not always the Chambers will side with the Prosecution.[1053] His statement went on to also establish the need for a separation between the judicial instances and the ASP:

> It is also imperative to uphold the necessary separation between the Court and the Assembly (and the States Parties); while fully respecting the important roles and functions rightly conceived for each, in the Rome Statute.
> In this connection, we may recall a certain observation registered by the representative of the United States at the proceedings of the UN Preparatory Committee on the Establishment of the ICC, on 3 April 1996. While insisting on the important role that the ICC can play as a mechanism that the United Nations can use in containing threats to international peace and security, he also said that it is a ***'reality ... that States parties to the ICC statute will always remain political entities.'***
> NOW, if that be an appreciable view of States in their membership to the ICC, it requires then that much care must be taken in the practice as to how closely the ASP should engage in their task of oversight, as stipulated in article 112(2)(b) of the Rome Statute. That kind of oversight is the very equivalent of parliamentary or congressional oversight which is a wholly legitimate idea in every democracy. In principle, it is also a very good idea at the ICC. But, it must not be allowed to cross the line into routine, micro-management of a court of law by a political body; lest the suspicion is created that such close proximity and monitoring of a Court of law may result in improper influence on judicial independence – even without intending it. As Robert H Jackson aptly put it: ***'Of course we deal here with a difficult point because it is so little a matter of the statute creating the Court and so much a matter of the spirit of the judges and the foreign offices and of prevailing attitudes among peoples.'***
> What am I saying, then? I am saying this. Because the Court operates in the turbulent sea of national and global politics, and cannot properly protect itself in those treacherous environments, it is right and necessary for States Parties acting alone and collectively to defend the Court at all times. In doing so, they create the space the Court needs to operate with independence. But, it does not help much if they fill that needed space themselves.[1054]

[1052] EBOE-OSUJI, **Remarks at the opening of the 17th Session of the Assembly of States Parties to the Rome Statute**, p. 6.
[1053] *Ibid*.
[1054] *Ibid*., p. 8.

The message in this speech seems to be entirely directed to the criticism against the Court's activities, especially the African contestation practices.

In contrast to the ICC President's remarks, the Prosecutor's words only touched upon the issue of contestation in regard to the non-compliances with the arrest warrants. Bensouda stayed with the already classical link between the cooperation with the Court with the realization of justice. She stated that:

> There is only so much that the Court itself can do. From the moment that the Pre-Trial Chamber issues a warrant of arrest, the responsibility for its execution falls on States Parties, as the Court's executive arm, alongside any other State that may be under an obligation to enforce the warrant. Where these remain outstanding, the Court's capacity to deliver on its mandate is undermined, with not only reputational costs but also real impact for the victims and affected communities. Justice delayed can indeed amount to justice denied.
> [...]
> Ultimately, what is needed is high-level political commitment and consistent diplomatic coordination between the Court, States Parties, other non-member States, and all relevant international and civil society actors.
> We are committed to continuing to do our part, but we need your consistent and concrete support to ensure that the Rome Statute is as inspiring in the service of humanity in action as it is in words.
> […]
> Apart from a treaty obligation to arrest and surrender, surely there is equally a moral responsibility to stand firmly by the maxim of Never Again, not in aspirational terms, but through a recognition that we must act, and it is within our power to do so if we truly wish to see the Rome Statute stand as a beacon of hope for accountability and justice for atrocity crimes and a force of deterrence and prevention for the world's gravest crimes.
> The arrest and surrender of ICC suspects is in many ways a real test of our joint commitment to international criminal justice.
> Together, with the Rome Statute as our guide, we can and must break the silence of impunity with the voice of justice, for this and future generations.[1055]

The 2019 ASP meeting was marked by a radical change of circumstances. Al Bashir suffered a coup d'état in Sudan and was no longer in office, which changed the motivations that sustained the AU contestation (see Interlude No. 6). As for the Court, the year also brought a fierce opposition from the United States government that would build up in the following year with the AC's decision that authorised the

[1055] BENSOUDA, Fatou, **20 years after Rome: Back to the major challenges of cooperation (ASP Plenary session on Cooperation)**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2018, p. 5–6.

OTP to open an investigation into the situation of Afghanistan,[1056] decision which reversed the PTC II judgment that the opening of such investigation was against the interests of justice.[1057]

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[1056] APPEALS CHAMBER, **Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan**, The Hague: International Criminal Court (ICC), 2020.
[1057] PRE-TRIAL CHAMBER II, **Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan**, The Hague: International Criminal Court (ICC), 2019.

4.
The limits of contestation in international (criminal) law: argumentative practices as sources of authority

Throughout the argumentative practices explored in Interlude No. 4, the discourses coming from the Court revolve around the proper way of practising international law. Remarks such as these highlight that international legal practitioners have a "tendency to try to confer upon international law some delimited time, space and subject matter for its 'proper' (albeit not autonomous) operation."[1058] The argumentative practices wielded by the ICC officials as a response to the African States' contestation in relation to the Al Bashir Case in general display a propensity to make sense of the acts of contestation through a set of preestablished conceptions. These notions represent the authoritative preferences that influence the expectations of the field in terms of which values, formats, and actors are deemed appropriate when evaluating legal contestation practices.

Through their iterations regarding the appropriate venue for the African States to voice their disagreements with the legal developments of the Al Bashir Case, the argumentative practices of the ICC officials are conveying the message that the Assembly of the Heads of State and Government of the AU for being a political meeting between political entities in the context of a political organisation does not configure the proper environment to make decisions about the common interpretation of certain provisions of international law, especially ones that affect the ongoings of a case at the ICC. These argumentative practices demonstrate the constant effort made in the discourses of the organs of the Court to steer away from anything that is perceived as political and also repel its manifestations from the environment of international law.

The present chapter addresses how the structural bias of the field of international criminal law affects the way that the officials of the Court make sense of the practices of contestation performed by African States in relation to the Al Bashir Case. It assesses the limits of contestability even when actors manage to enact competent performances mobilising the legal expertise. In order to do that, this chapter is divided in three main sections. The first part of the Chapter inspects

[1058] JOHNS, **Non-Legality in International Law: Unruly law**, p. 8.

the way the argumentative practices stemming from the Court's officials, examined in Interlude No. 4, perceive and interpret the different practices of contestation enacted by African States in relation to the Al Bashir Case. To get a better sense of the reactions these practices of contestation provoked, this section analyses the aspects and institutions that are involved in the performance of each practice as to understand the way these performances affected the work of the Court. This section also establishes one crucial feature that differentiates some of these practices of contestation and that constrain the argumentative practices of the Court in relation to them, which is the fact that they mobilise the other authorities of international legal practice. Lastly, this section analyses the gradual change in the responses of the Court throughout the years, mapping four different phases: in the first, the ICC officials responded to the actions of the African States without taking seriously its legal engagement, it was only a matter of disregard for the Court's request; this phase was followed by a posture of defence of the ICC by its officials once the criticism of the African States begun to grow; the phase that ensued was a moment where the ICC's officials started to frame their arguments as a response to the African practices in relation to the Court, especially the notifications of withdrawal; the fourth phase was marked by a move from a diplomatic to a more steadfast posture in relation to any criticism in relation to the Court, adopting a more exasperated tone. The second part of the chapter builds on this reading about the Court reactions as to analyse one element that has been a constant throughout these phases, which is the expression of certain values that move the Court's work. This section examines the power of expressivism in international legal discourses. Following that is an analysis of a specialized vocabulary that in particular drives the argumentative practices of the ICC officials and serves as a guidon for the Court's officials to make sense of the events surrounding the Court: the fight against impunity. The last part of this section focuses on the role of the narrative on impunity pondering its effect on the practices of contestation enacted by the African States in relation to the Al Bashir Case. The third and last part of the chapter analyses the way the structural bias of the field influences the argumentative practices of the ICC officials. It delves into an examination of what is deemed as appropriate practices of international law in terms of both acts and actors. Influenced by the structural bias, the argumentative practices from the Court work

reinforcing the need for a separation between the legal from the political and anything that is related to latter is marginalised as not appropriate practices of international law. This section also traces the connection between the argumentative practices of the ICC officials articulating the proper practice of international (criminal) law and the barriers that such perspective creates for the practices of contestation practiced by the African States in relation to the Al Bashir Case, finding that it creates a distorted view of these practices which reinforces the narratives that the African engagement is a mere reflection of States' interests.

4.1. Making sense of the African practices of contestation towards the Al Bashir Case: the argumentative practices from the Court's officials

Throughout the years, many practices of contestation were mobilised by different African States Parties to the Rome Statute as explored in Interlude No. 3 and Chapter 3. These practices engage in different ways with international law and also draw differing degrees of response according to the mechanisms and legal sources that are mobilised. As each of the practices of contestation enacted by African States in relation to the Al Bashir Case evoked the international legal formalisms through different aspects and in distinct ways, the way the Court made sense of and responded to these performances through its argumentative practices was different for each contestation. This section goes through the argumentative practices examined in Interlude No. 4 as to start understanding the way the Court responded to the African contestation. It tries to place the responses in relation to the practices that were being enacted as to make sense of the way each contestation affected the Court. The section is divided into two items. The first goes over the discourses of the Court's officials as the practices of contestation were performed by the African States in relation to the Al Bashir Case. The second maps the gradual change in the argumentation practices throughout the years.

4.1.1.
The legal manoeuvres of the African States' contestation: the multiple sovereigns of international (criminal) law

Non-compliances have been the most constant practice enacted by the African States in relation to the Al Bashir Case. These practices have drawn the biggest attention from the organs of the Court because of their degree of institutionalisation and, consequently, the way it affects the functioning of the Court. Cooperation by States Parties with the ICC is one of the backbones of its structure for many activities are dependent on the active participation of these States. This dimension has been frequently voiced in the argumentative practices of the Court's officials. For example, in ICC President Song's remarks on the pending arrest warrants, he places an emphasis on the fact that without the cooperation from States the Court cannot perform its functions.

> For the first time the Court **formally referred matters concerning state cooperation** to the United Nations Security Council and the Assembly of States Parties, specifically the finding on Sudan's non-cooperation and the visits by Mr. Al Bashir to Chad and Kenya. I would like to thank President Wenaweser for taking prompt action on the latter issue.
> […]
> [W]e cannot ignore the fact that the ICC will only be truly effective **if all States fully carry out their legal obligations to cooperate** with the Court.[1059]

Compliance with the Court's arrest warrants is one of the central elements of State cooperation with the ICC and therefore is a heavily institutionalised dimension which involves many organs of the Court. Upon indication that an indicted individual is travelling to the territory of another State, either the OTP or the Registrar notifies the designated Chamber, which orders a request for the State to arrest and surrender the individual in question to the Court. Having confirmation that the supposed visit took place, and it was to the territory of a State Party to the Rome Statute, the Chamber, according to the reasoning provided by the receiving State, decides whether to refer the non-compliance to the ASP (and in this Case the UNSC). Because the Court's statutory dispositions already instructs which

[1059] SONG, Sang-Hyun, **Remarks to the Assembly of States Parties**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2010, p. 4–5.

mechanisms should be put in place in order to deal with the matter of non-compliances, these practices cease to be for the Court a demonstration of dissatisfaction with varying degrees of criticism and becomes a matter of illegality. In that sense, the institutionalisation of non-compliance leaves the Court blind to the complexity and contingency of this phenomenon and all non-compliant States are placed as in violation of its obligations with the Court. The cited instances of the Court treat non-compliance as "a peripheral, implementation problem […] rather than as a significant structuring device in its own right."[1060]

Besides "calling attention of legality's limitations and structural costs," the framing of the non-compliance as illegality "also corresponds to the darker or less credible gradations of the interpretive penumbra surrounding a particular norm – a point beyond which it would be ill-advisable to stray, as a matter of risk assessment and reputation."[1061] In Ocampo's narrative, non-compliances with the Court's arrest warrants for Omar Al Bashir were performed as a means for State's leaders to shield their peers, as allowing impunity to reign. Even though these States articulated the validation of their practices in terms of an impossibility of compliance due to another superseding international legal obligation, in this sense constructing an alternative legal basis to legitimise their practices, the discursive focus of the Court's authorities were turned to the specific needs or underlying concerns of the institution. As such, the argumentative practices constantly reiterated the impact of non-compliances to the proper functioning of the ICC, which in turn was associated with the notion of the rule of law and justice being denied.

In light of "international law's customary dimension, such characterisations of illegality may be preliminary to a taking effect or remaking of legality."[1062] Draft Conclusion 6(1) of the ILC's Draft conclusions on identification of customary international law, states that practice "may take a wide range of forms," including "physical and verbal acts," which "under certain circumstances" may "include

[1060] COOPER, Davina, Institutional illegality and disobedience: Local government narratives, **Oxford Journal of Legal Studies**, v. 16, n. 2, p. 255–274, 1996, p. 255.
[1061] JOHNS, **Non-Legality in International Law: Unruly law**, p. 38–39.
[1062] *Ibid*., p. 39.

inaction."[1063] This means that in some occasions the practices, even if in violation of the law, might reconstitute legality. In relation to the African States' non-compliance of the ICC's arrest warrants for Omar Al Bashir, Professor Claus Kreß's *amicus curiae* submission in the process of Jordan's appeal (see Interlude No. 5) suggested the possibility that these non-compliances by States Parties could become customary international law and indicated to the AC that the customary international law reasoning used in the Malawi and Chad non-compliance decisions may not still be open in the near future.[1064] ICC Judge Chile Eboe-Osuji, however, claimed that "you cannot […] deduce customary international law from silence."[1065] In a lecture about the AC decision on Jordan's non-compliance, in which Eboe-Osuji was the Presiding Judge, he presented the view that "the best way to gauge State practice is what [these States] do when they get together," instead of analysing scattered practices in different places, for in those instances the motivation of these practices is unknown.[1066] According to the Judge, State practice should look at the moments these States were reunited and the legal matter arose. State practice should not be drawn from what States did not do or were vague about. Judge Eboe-Osuji further added that if these practices are "born out of illegality or on national law," they cannot be evidence on "State practice on this question of immunity."[1067] In perspectives such as the one from Judge Eboe-Osuji, non-compliance's illegality is not a trigger for new State practice but a matter of international legal adjudication.

In relation to the production of the non-compliances as illegality, it has to do with the indeterminate character of international law. As a matter of law, there is no way of determining whether these African States by not enacting the ICC's arrest warrants for Al Bashir were in violation of their obligation for there is no way of

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[1063] INTERNATIONAL LAW COMMISSION, **Draft conclusions on identification of customary international law, with commentaries**, New York: United Nations General Assembly, 2018, Conclusion 6.
[1064] KRESS, Claus, **Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05- 01/09-326)**, The Hague: International Criminal Court (ICC), 2018, para. 19.
[1065] EBOE-OSUJI, Chile, Immunity before International Courts: How There Never Was, *in*: **Third Annual International Law and Global Justice Lecture**, Online: Western University, 2021.
[1066] *Ibid*.
[1067] *Ibid*.

knowing a priori "what it is to comply […] independently of choosing between rival interpretations. The question of 'compliance' is not a legal but a technical or a managerial question."[1068] The situation of compliance is about the preferable meaning of the rule, a decision-making between the rule or its exception. In this sense, in light of the possibilities that are presented, the non-compliance can be the chosen route that does not follow the dominant objective.[1069]

> Actors alleged to be in 'non-compliance' will invariably claim that the allegation is based on a mistaken interpretation of the rule, that the rule does not concern them, or that they do comply, albeit in an unorthodox way. It is precisely the openness of the legal language, including any object and purpose it is alleged to have, that is at the heart of the legal debate. And the debate ends – if it ends at all – with a legally competent institution providing an authoritative view on the matter.[1070]

However, even if the competent authority dictates the end point of a dispute, "it is powerless to prevent the legal argument from continuing outside the institutional frame."[1071] As the case under study demonstrate, not only the did legal argument but also other contestation practices sought authorities outside the Rome Statute framework.

Another quite institutionalized practice enacted by the African States was the proposal of amendments. The proposal of amendments takes place within the scope of action of the ASP. The amendment proposed is first assessed by the Working Group on Amendments which identifies the amendments that are to be forwarded to the ASP for consideration.[1072] Through the examination of the reactions by the organs of the Court to the African contestation, it is possible to see that proposing amendments was not thought of as a demonstration of the State's dissatisfaction with the legal developments of the Case. The practice of amendment proposal works in a more indirect way affecting change for future cases. As the argumentative practices of the Court's officials reveal, the practices of contestation are seen as those that challenge the decisions taken by the Court merely for not liking a legal development in the Case. For not having an immediate impact on the

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[1068] KOSKENNIEMI, Law, Teleology and International Relations, p. 17.
[1069] *Ibid*.
[1070] *Ibid*.
[1071] *Ibid*.
[1072] ASSEMBLY OF STATES PARTIES, **Terms of reference of the Working Group on Amendments**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2012.

case under dispute and also not representing a direct impact to exercise of the Court's functions, the practice of amendment proposal was mostly ignored in the argumentative practices of the officials of the Court. Only in one instance there was a discursive engagement with the practice of amendment proposal. Without precisely indicating the event to which he was referring, ICC President Song expressed a worry that some proposals would steer away the statutory dispositions from the values that are enshrined in the Statute. Therefore, States should be cautious with the proposals they would approve. The line of argumentation of President Song sought to pass on to the States that the amendments they propose and approve should add to the values that guide the Court's activities rather than implement a change that would be contrary to them.

The notifications of withdrawal, in turn, even though are also an institutional mechanism, lack the chain of instances that are part of the events of non-compliance and amendment proposals. Once the State submits the notification of withdrawal to the competent authority, according to the Rome Statute, it takes one year for the denunciation of the treaty to be complete. Unless the State rescinds its notification within the year, as was the case of South Africa and the Gambia, there is nothing to be done by any of the instances of the Court. However, the withdrawal of a State does have an impact for the work of the ICC, since besides loosing jurisdiction over the territory of the withdrawing State there is also an entire cooperation dimension that is affected. A State's withdrawal further represents a step behind in the ICC's pretension of universality. These impacts make the practice of State withdrawal a sensible question before the Court, which is reflected in its argumentative practices. There was a change in the kind of response coming from the organs of the Court once the three African States submitted their notifications of withdrawal, as the following item more thoroughly explores. The argumentative practices at the same time sought to have the States reconsider their decisions and also engaged in a narrative that portrayed the withdrawals as a step backwards in the global fight against impunity. In a similar fashion as to the responses given to the non-compliance, there was a heavy emphasis in the dimension of values in the arguments presented by the officials of the Court.

The three other mechanisms of contestation mobilised by the African States reveal another important aspect of the practice of international law. Upon analysis

of the argumentative practices of the Court's officials, there rarely was any mention to the requests for the UNSC to exercise its powers and determine a deferral of the Al Bashir Case, to the expansion of jurisdiction of the African Court through the Malabo protocol to have a concurring jurisdiction to that of the ICC, or to the request for an advisory opinion of the ICJ regarding the immunities of sitting Heads of State before international criminal courts in situations where the State did not waive its rights. These are three movements that lie outside the Court's regulations. The request for deferral, however, is a solicitation for the UNSC to activate a mechanism that is provided for in the Rome Statute, although the motivations for the triggering of said mechanism and the way the UNSC comes to this decision is not in any way regulated by the Statute. These practices of contestation speak to legal and political frameworks and mechanisms of decision-making that are completely outside the domain of action of the organs of the Court. The summoning of other authorities through the enactment of these practices by African States demonstrates how the international legal sovereignty game is not about one sovereign, but many sovereigns. These mechanisms activated by the practices of contestation performed by African States are not addressed in the argumentative practices of the ICC officials because they fall outside their scope of authority. Each of these practices summons a different sovereign authority. The deferral can only be acted upon by the UNSC, the advisory opinion is given by a Court with competence to issue an interpretation on the matter, the ICJ, and is activated by another authority which is the UN General Assembly, and the conferring upon the African Court jurisdiction over international crimes is a matter that is resolved within the regional system and its Member States. For the ICC officials to criticise the mobilisation by African States of these other sovereigns of the practice of international law would be seen as a move of the ICC placing itself as the sovereign of these sovereigns (at least for matters of international criminal law), which can undermine the very argumentative practices of the Court. For criticising the exercise of the deferral powers by the UNSC not only attacks the political body but also the very Rome Statute which established said powers. And the position of the Court, which heavily counts on the 'sanctity of the Rome Statute' to justify its decisions, would also come to be undermined.

Considering the differences between these practices of contestation enacted by the African States, the mechanisms they mobilise, and the way they affect the Court's dynamics and international legal practice in general, there is a considerable variation in the way the Court responded to each of them. The next section makes an assessment regarding the evolution of the ICC officials' responses to these practices throughout the years, identifying the main tendencies and the practices that provoked changes in the way the Court makes sense of these contestations.

4.1.2. Responding the African contestation: the four tendencies in the Court's argumentative dynamics

The Court's responses to the African practices of contestation can be divided into four main tendencies. From 2009 to 2013, the Court was in a period of denial in regard to the African strategy against the Al Bashir Case lying to itself so that it did not have to see the manifestations against the Al Bashir Case for what it was: a complex set of practices with motivations that were not so straightforward, considering that, even if it was performed out of pure political interests, it mobilized the legal formalisms in competent ways. The responses stemming from the organs of the Court (one even phrased it in such way) did not see the African practices as an act of defiance against the ICC or its activities. These actions were seen as scattered and performed without a legal meaning being attached to it. Even when their enactment was accompanied by the constant reiteration of a request to the UNSC for a deferral of the Case. The Court, in that sense, ignored the motivations behind these practices. This posture can be seen, for example, in the Chambers lack of engagement with the non-complying States and merely referring the situations to the ASP and UNSC to consider the appropriate measures (Interlude No. 2) and in the Prosecutor's phrasing of the practice of non-compliance with the arrest warrants for Omar Al Bashir as a matter of other political leaders offering Al Bashir protection (Interlude No. 4). These organs dealt with the events of contestation ignoring that they could represent a legal engagement with the legal issue raised by the Al Bashir Case.

A second phase starts around 2014. With the repeated situations of non-compliance with the arrest warrants for Al Bashir from African States Parties to the Rome Statute and the mounting criticisms regarding the Court's lack of engagement with the African States requests for a clarification of the relationship between articles 27 and 98 of the Rome Statute, the Court began to justify its position. The organs of the Court's response to the African Practices of contestation came in the form of a defence of the ICC and its stance. The way the PTC I changed its dynamics to start reflecting this new demeanour towards the African contestation also indicates a change in the Court's approach. With the recidivism of Chad's non-compliance, the Chamber began to invite submissions from States and upon that practice, it was faced with legal justifications presented by these States and a collective strategy of non-compliance. The Chamber, then, began to issue non-compliance decisions which, besides referring the matter to the ASP and UNSC, defended the legal stance adopted by the Court which affirmed the irrelevance of Al Bashir's immunity in relation to the proceedings before the ICC (see Interlude No. 2). The Prosecution also engaged in such endeavour. In her opening remarks at the ASP meeting, Prosecutor Fatou Bensouda defended the impartiality of her office's decisions, stressing that her prosecutorial strategy was devoid of politics. In the view of the officials of the Court, the ICC was often misunderstood and the criticisms it faced were unfair and unjustified (Interlude No. 4). The African contestation practices were seen at that time as a concerted effort to delegitimise the work of the Court. Even with States mobilizing the legal argumentation as to justify their positions, all the Court's responses dealt with it as an attempt of creating a bad press for the Court and its activities.

The South African non-compliance and the notifications of withdrawal submitted by African States in 2016 changed once again the argumentative practices of the Court. The *modus operandi* until this point had not addressed the African practices as a proper legal contestation. The request for South Africa to cooperate by arresting and surrendering Al Bashir to the Court deflagrated a series of engagements by the State with the different instances of the Court. The State activated the consultation mechanism under art. 97 of the Rome Statute; upon the catastrophic handling of the consultation process by the Single Judge, requested a working group to develop procedures for the implementation of art. 97; and sent a

legal team to participate on a hearing regarding its non-compliance with the arrest warrants for Al Bashir and argued its legal position in relation to the matter. Besides that, between October and November 2016, three African States submitted to the UN Secretary General their respective notifications of withdrawal from the Rome Statute. In light of these events, the officials of the Court began to direct their argumentative practices to these States. Some adopted a more diplomatic tone, demonstrating their regret that these withdrawing States chose to adopt such measure and calling them to dialogue with the Court. Other instances, while still speaking to these States, emphasized that the only way for the Court to maintain its activities was through the cooperation of States, especially in matters related to the arrest of suspects. This approach recognized that these States were not only collectively voicing their dissatisfaction with the legal developments in the Al Bashir Case, but also working through the mechanisms made available by the Statute.

Between 2017 and 2018, the organs of the Court approach towards the practices of contestation of African States gained a more exasperated tone. The Al Bashir Case was attaining a new proportion. After the South African non-compliance decision, the Chambers were engaged in another non-compliance proceeding that was gaining an even bigger share of attention. Upon receiving the non-compliance decision by the PTC II, Jordan appealed the Chamber's decision which rendered the issue a wider engagement (see Interlude No. 5). On top of these developments, acts of contestation began to arise from very different corners, which extended from the Philippines withdrawal to the United States active campaign against the ICC. At this point, the Court's officials went beyond defending their turfs or seeking a more productive engagement with the contesting States. The argumentative practices of the Court were playing defence and offence in relation to the contestations directed at the Court and its activities. This practice came through the creation of binaries that placed on one side the mere enacting of power by these contesting governments and, on the other, the realization of justice through the work of the Court. Such posture can be seen especially in the discourses of the Prosecutor and ICC President. More than in any other phase, the argumentative practices relied on the iteration of a series of shared values and collective interests of the international community.

As a practice that, although it received more emphasis during the last phase, was practiced throughout the years in relation to the contestation practices of African States, the making sense of the events surrounding the Court through the language of values and collective interests deserves a special attention. The next section deals with this aspect of the argumentative practices of the Court, exploring the elements that are evoked in the discourses of international criminal law in response to the contestation practices towards the Al Bashir Case.

4.2. Conveying the message of the practice of international criminal law: the power of the specialized vocabulary

Throughout the argumentative practices enacted by the ICC officials regarding the African States' contestation towards the Al Bashir Case, there was a frequent use of terms such as humanity, justice, and impunity. Such vocabulary oftentimes is accompanied by reference to international legal formalisms as a way to validate the application of a certain interpretation or express the underlying motivation behind a (set of) disposition(s). But also recurrent is the appearance of such the vocabulary *in* these formal international legal instruments. Recent studies have focused on the way the use of these expressions in the field of international criminal law conveys a message.[1073] The choice for a certain language in documents and proceedings of the field establishes a "close link between the (felt) need to express the basic values of international criminal law and the appeal to emotions."[1074] A look through the Decisions issued by the Assembly of the AU demonstrates precisely this evoking of values coupled with the mobilisation of

[1073] CHRISTENSEN, Mikkel Jarle, Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, **International Criminal Law Review**, v. 17, n. 2, p. 239–258, 2017; SANDER, Barrie, The expressive turn of international criminal justice: A field in search of meaning, **Leiden Journal of International Law**, v. 32, n. 4, p. 851–872, 2019; SANDER, Barrie, The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law, **International Criminal Law Review**, v. 19, n. 6, p. 1014–1045, 2019; WERNER, Wouter, Argumentation through Law: An Analysis of Decisions of the African Union, *in*: JOHNSTONE, Ian; RATNER, Steven R. (Eds.), **Talking International Law: Legal Argumentation Outside the Courtroom**, Oxford; New York: Oxford University Press, 2021, p. 203–217.

[1074] WERNER, Argumentation through Law: An Analysis of Decisions of the African Union, p. 207.

values. These documents, more than conveying a criticism to the ICC's activities in the Al Bashir Case, carry a message. This message transmits the deep disappointment of these States with the way the international criminal justice system (even though the frustration is channelled to the ICC) has handled the issue of justice in Africa. This phenomenon, however, is not restricted to documents produced by political organisations. The Rome Statute and multiple decisions issued by the Chambers of the Court have also incorporated these vocabularies. These argumentative strategies are frequently used because of the "semantic authority" that they have come to exercise within the field of international criminal law.[1075] For the place that these vocabularies have come to occupy, they have become a pillar in the practice of international criminal law. Embodying the "main ethos of this field," the use of such language has come to produce "a new form of law that can effectively combat core crimes."[1076] The strategy of mobilising such vocabulary has come to acquire such an established position in the field that the evoking of some terms has become a rite in international criminal law's discursive practices.

In the argumentative practices of both the African States (Interlude No. 3) and the ICC officials (Interlude No. 4), it is possible to see that ending of or the fight against impunity has come to exercise the role of guidon to the work of international criminal justice. The vocabulary of impunity was already seen as a "rallying cry" in the beginning of the ICC's work and since then has also became "a metric of progress" of the Court's work.[1077] In most of the submissions by the African States in response to the Chambers' request for the States' compliance with the ICC's arrest warrants for Omar Al Bashir, before any reason was presented for the Judges of the Court, the States always made sure to reassure the Court of its commitment to the fight against impunity, even though the non-compliance might have indicated the contrary. These lines of argumentation were not restricted to the non-compliances. The other practices of contestation were also enacted with the

[1075] FELMAN, Shoshana, Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust, *in*: ALLEN, Amy (Org.), **Hannah Arendt**, London; New York: Routledge, 2017, p. 502.
[1076] CHRISTENSEN, Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, p. 240.
[1077] SANDER, The expressive turn of international criminal justice: A field in search of meaning, p. 852.

accompanying caveat that reinforced that, despite the criticism and opposition to the Al Bashir Case at the ICC, these contesting African States remained faithful to the effort of ending impunity for international crimes.

It was in the reception of these practices of contestation, however, that these vocabularies were more effusively employed. Many of these practices enacted by African States in relation to the Al Bashir Case have been portrayed in the ICC officials' narratives, regardless of the justifications that were presented, as having an impact in the fight against impunity. Non-compliances with the arrest warrants, requests for a deferral of the Case, and withdrawals from the Statute were regularly associated with fallbacks in the realization of the *raison d'être* of the ICC, for these are activities, as demonstrated, that clearly affect the operations of the Court. The proposals of amendments, however, are not directly linked with impacting the Court's work on promoting accountability for it will depend on the content of the proposal in question. In this case, the South African proposal for amending the UNSC power of deferral would also affect the work of the Court on ending impunity for it would extend the chances of an activation of the deferral mechanism. The Kenyan proposal to edit the Statute's Preamble which extends complementarity to regional systems, in turn, is another matter. Alongside the request for an ICJ advisory opinion and the extension of the African Court's competence in a way that establishes a concurring jurisdiction with the ICC, the Kenyan amendment proposal form a set of practices of contestation that leaves the Court in a conundrum. These practices are not only a complication for resting outside the ICC's range of authority as the previous section introduced. There is another feature in these practices that curtails the argumentative practices from the Court's officials. Although clearly enacted with the purpose of having the direction of the Al Bashir Case go in the way they wanted, these contestations did not exactly contradict the project of ending impunity. The Kenyan amendment proposal for adding complementarity to regional systems to the Preamble of the Rome Statute and the expansion of jurisdiction of the African Court to add crimes against humanity, war crimes, and genocide to its competence would actually expand the capacity of the international community to try these crimes and, consequently, fight against impunity, albeit concomitantly assuring immunity to sitting Heads of State. The request for an ICJ advisory opinion, in turn, would have an international court with competence over the matter

evaluate the underlying facts and all the applicable norms on the topic and issue a position regarding what it considers to be the prevailing obligation. For the ICC officials to voice an opposition to such practices would prove more complex once it would place them in the position of criticizing a project that improves the international fight for impunity, one for expanding the reach of accountability for international crimes, the other for conferring an authoritative positioning on the state of Head of State immunity in the current practice of international law. Finding fault with these practices would mean for these practitioners engaging in the same practices that they condemn African States for. The coherence of the project of international criminal law requires that these instances of the Court stick to a certain script which will be explored in the following pages.

4.2.1.
The structural bias in the discursive practices of the field of international criminal law: the power of the 'fight against impunity'

In the previous chapter, this thesis has conveyed the idea that, for a competent international legal performance, rules, source and methods are not enough. The actor that purports to undertake such endeavour needs to be familiarized with "how to translate these into legal plea and getting socialized in a professional field."[1078] For a successful enactment of international law, one must be able to capture the "sense and sensibility" as to navigate within the values of the fields practice.[1079] Grasping the sense and sensibility means understanding the values and expressions that are entrenched in the more mundane conducts in the field. In relation to the specialized vocabulary employed within the field of international criminal law, it means seeing the routine uses of certain phrases or terms as meaningful communications. These vocabularies function as conditions of possibility, they "more generally 'can authorize, make possible, encourage, make available, allow, suggest, influence, hinder, prohibit and so on.'"[1080] Their performative effects are

[1078] AALBERTS; WERNER, International Law, p. 40.
[1079] *Ibid*.
[1080] LEANDER, Technological Agency in the Co-Constitution of Legal Expertise and the US Drone Program, p. 814–815.

beyond the intentions of the agent that enact it, gaining its own life as they are "woven into practices to the point where they become essential sources of authority and objects of veneration in their own right."[1081]

For the argumentative practices at play in response to the African practices of contestation in relation to the Al Bashir Case, this means that beyond measuring the progress of the Court's work, the language of fighting impunity has come to serve as the criteria to establish which forms of legal knowledge are taken as satisfactory. The fight against impunity has come to be the working motto of international criminal justice, the structural bias which comes across more or less explicitly in the ICC officials' argumentative practices. These "deeply embedded preferences" are not simply discursive practices.[1082] They bring a set of categories and effects. The labelling of particular practices as fostering impunity triggers a language game that categorize that which the work of the Court stands against. These specialized vocabularies "on the one hand describe possible moves and prohibit other, and on the other hand are flexible in that they do not dictate which specific course of action is taken."[1083] Vocabularies such as the language game of 'ending impunity' are associated with the process of fragmentation of the international legal system into specialized fields of practice.

As worked through in Chapter 1, this specialized production increased rather than limited "the room for political manoeuvre within the law."[1084] As to make sense of the field of international criminal law's project in a way that appealed to general international legal practice, this endeavour could not be justified by appealing to a particular norm or objective, especially one that might not resonate with the overarching aims of the international legal system. It was necessary to find a motivating and compelling purpose that would be able to purport "what international criminal law is *for*."[1085] "Courts and tribunals have largely shied away from committing to a specific justice theory or identifying a grand justice narrative

[1081] *Ibid*., p. 815.
[1082] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 607.
[1083] AALBERTS; GAMMELTOFT-HANSEN, Sovereignty Games, International Law and Politics, p. 35.
[1084] AALBERTS; WERNER, International Law, p. 40.
[1085] PENSKY, Max, Impunity: A Philosophical Analysis, *in*: BERGSMO, Morten; BUIS, Emiliano J. (Eds.), **Philosophical Foundations of International Criminal Law: Foundational Concepts**, Brussels: Torkel Opsahl Academic EPublisher, 2019, p. 246.

to justify their own existence."[1086] The ultimate candidate was the 'fight against impunity.' It conveys the notion that there are coherent shared beliefs and collective interests that guide the way society should react in situations of massive violations of individuals' rights. The use of formulations such as reducing impunity, fighting impunity, closing the impunity gap, ending the culture of impunity have been so frequent in the argumentative practices of international criminal law that the scholarship has recognized that an 'anti-impunity norm' "has emerged as a general justifying aim situated at the top of a hierarchy of international criminal law's reasons to exist." [1087] This practice is also a signifying practice in which accountability emerges as the mode of "reassurance and reaffirmation of international criminal law's values (e.g. the need for prevention of crimes or response to moral wrongdoing), or 'help alter social morality."[1088] It is about a representation of the practice of international criminal justice manifested in relation to which that it stands against. In this sense, these reaffirmations are created over the delineations of two sides. The project of international criminal law invests in that sense in the dichotomy between accountability and impunity. From the separation of these two camps other associations follow. The main connection that is created is that between law and politics. The former emphasizes the dimension of the realization of justice, speaking truth to power, and even having bad man be placed in confinement. The latter, in turn, refer to the events that lie outside the normal operation of the system of international legal justice. Impunity is injustice. Impunity stands for political power winning over the rule of law, of perpetrators of the most abhorring crimes lacking accountability for their actions. In light of such scenario, there is no room for choice for it is all too easy to know which side one must stand. In this sense, any kind of compromise or negotiation means acquiescing to the side of impunity while the true realization of justice should be doing the opposite. In the South African art. 97 consultation, in response to the iteration by the South African Ambassador of the possibility of finding a common ground regarding the South African non-compliance, both the Single Judge and the OTP's

[1086] STAHN, Carsten, **International Criminal Law as Expressivist Justice: Meanings, Implications, and Critiques**, Oxford; New York: Oxford University Press, 2020, p. 393.
[1087] PENSKY, Impunity: A Philosophical Analysis, p. 246.
[1088] STAHN, **International Criminal Law as Expressivist Justice: Meanings, Implications, and Critiques**, p. 391.

legal advisor emphatically denied such possibility. While the Judge argued that there was not much room for manoeuvre and any compromise at that stage was not possible for there already existed an arrest warrant, the OTP posited that there was no possibility other than following the existing decisions by the Chambers of the ICC. The posture adopted by the ICC officials precisely reflect the way the expressivism of the language of impunity works. It does not require a grounding in the international legal formalisms for it is an overarching value that is greater and larger than any international legal authority. In that sense, the realization of justice does not waiver in the face of political power.

Nevertheless, not allowing room for impunity does not suffice. Impunity is not to be tolerated. Therefore, the project of international criminal justice amounts to a combat to or a fight against impunity. This project relies "on messaging and performance in order to reinforce certain virtues or ideas, such as the triumph or order over chaos."[1089] It all amounts to the domestic analogue explored in Chapter 1 for two reasons: (1) national jurisdictions do not need to rely on legal gap filling, for the law can be projected to all territory; and (2) national jurisdictions also do not have to rely on third parties for enforcement. As to develop international criminal law, the narrative frames the work towards ending impunity as matter of covering the legal lacunas of international politics. And this is where the practices of contestation of withdrawing from the international court touch upon a sensitive matter. Having a State withdraw from the ICC means reducing the range or jurisdiction of the Court. In the expressivism of the Court's officials this, then, comes to be associated with the movement contrary to the end of impunity, which in the dichotomous rationalization amounts to fostering impunity. Besides covering the global map with jurisdiction, the international criminal justice project also "need[s] to overcome more obstacles than domestic entities in order to trigger enforcement."[1090] The reliance on States' cooperation to arrest and surrender indicted individuals creates for the Court the scenario in which to have its project of ending impunity come to fruition it has to foster in States Parties the perception that this is also their fight. This makes the fight against impunity also a message that not only justifies the work of the specialized regime but that seeks to engage

[1089] *Ibid*., p. 399.
[1090] *Ibid*., p. 394.

States in its project. Discourses of such nature have been embraced by the organs of the Court. Expressivism becomes a wholesome strategy that at the same time "show[s] resistance to crimes, break[s] 'silences,' [and] mobilize[s] empathy."[1091] The expressions of ICC officials become practices of representation through which it is established on whose behalf the institution is acting. Accordingly, alongside the technocratic ways of invoking international law are the mobilisations of community notions. In the AC decision regarding Jordan's appeal (see Interlude No. 5), the Chamber worked with this dichotomous approach as to justify its role as acting on behalf of the entire international community. In the text of the decision, it was stated: "While the latter are essentially an expression of a State's sovereign power, which is necessarily limited by the sovereign power of the other States, the former, when adjudicating international crimes, do not act on behalf of a particular State or States. Rather, international courts act on behalf of the international community as a whole."[1092] In events of non-compliances, as the Jordan case demonstrates, the Court turns to the mobilisation of the notion that its work represents the collective interests and shared beliefs of the entire international community.

This strategy is not only restricted to the ICC. Chief Prosecutor of the SCSL, David Crane, made use of this argumentative practice of "(re)constituting and (re)storing the common bonds that hold the global community of peoples together"[1093] in his opening statement to the case against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa. The Prosecutor mobilised both the idea that he spoke in the name of mankind and that these trials represented the triumph of justice in the face of impunity. The statement of the Prosecutor was:

> On this solemn occasion, mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice.
> [...]
> Horrors beyond the imagination will slide into this hallowed hall as this trek upward comes to a most certain and just conclusion.
> The long dark shadows of war are retreating. The pain, agony, the destruction and the uncertainty are fading. The light of truth, the fresh breeze of justice moves freely

[1091] *Ibid*.
[1092] APPEALS CHAMBER, **Judgment in the Jordan Referral re Al-Bashir Appeal**, The Hague: International Criminal Court (ICC), 2019, para. 115.
[1093] WERNER, Argumentation through Law: An Analysis of Decisions of the African Union, p. 208.

> about this beaten and broken land.
> The rule of the law marches out of the camps of the downtrodden onward under the banners of "never again" and "no more".
> A people have stood firm, shoulder to shoulder, staring down the beast, the beast of impunity. The jackals of death, destruction, and inhumanity are caged behind bars of hope and reconciliation.
> The light of this new day-today-and the many tomorrows ahead are a beginning of the end to the life of that beast of impunity, which howls in frustration and shrinks from the bright and shining spectre of the law. The jackals whimper in their cages certain of their impending demise. The law has returned to Sierra Leone and it stands with all Sierra Leoneans against those who seek their destruction.[1094]

Crane further associates the scenario before the creation of the ICTY and ICTR as the "brink of chaos," and that these institutions were responsible for bringing mankind back to civilization.[1095] In the argumentative practices examined in Interlude No. 4, the link between the Court's project and its realization in the name of humanity gains a third layer. It is added to this correlation the notion that for being a project in the name of the international community as a whole States should also serve in this cause. Bensouda's statement in 2013 established this correlation and fostered the idea that States Parties were 'custodians' of the Rome Statute.

Not only non-compliances, but also the deferral of the Al Bashir Case, as requested by the African States, would also impair the Court's work in combating impunity, since it goes against the values propagated by the Rome Statute. However, as previously commented in this chapter, a critique to the exercise by the UNSC of its powers of deferral would create a contradiction as such powers are guaranteed by the very Statute. In that sense, the officials of the Court conveniently emphasize only one of the UNSC's powers over the operations of the Court, the capacity to refer situations to be investigated by the OTP. Such posture is reflected in Bensouda's remarks on a meeting about ICC-UNSC relations. The Prosecutor affirmed that:

> The drafters of the Rome Statute, and the States that brought this treaty so crucial to the fight against impunity to life, recognised the importance of this relationship in the preamble when they underlined that atrocity crimes constitute a threat to "the peace, security and well-being of the world." They further entrenched this relationship by endowing the Council with referral and deferral powers, respectively under articles 13(b) and 16 of the Statute. Indeed, in codifying this nexus between

[1094] OFFICE OF THE PROSECUTOR, **The Opening Statement of David M. Crane**, The Hague: Special Court for Sierra Leone (SCSL), 2004.
[1095] *Ibid*.

> the UNSC and the Court, States, including participating permanent members of this august body, saw in the Council an important mechanism through which, the Court's jurisdictional reach could be further extended, where the aims of Chapter VII of the Charter of the United Nations and the Rome Statute so require, so as to avoid an impunity gap.[1096]

Considering the need for the project of the fight against impunity to be welcomed by all international actors, the remarks remain on the safe side and do not address the consequences of the deferral for the work of international criminal law.

In regard to the other practices of contestation, the matter of upholding the value of combating impunity stands in a more blurred position for not precisely being moves that contradict the realization of justice but at the same time being performed in ways that are clear attempts to have the Al Bashir Case (and any future cases against African sitting Heads of State) in the ICC be discontinued.

The silence of the Court in these situations results, therefore, from the ambiguous position it is placed, a condition that is a common recurrence in international legal practice. Considering that the specialized vocabularies from regimes that influence general legal practice need to be open in a way to fit general international law's "macro objectives" and aspirations, it is not possible for the framing of the materialization of these principles to be so strict.[1097] In this sense, the battle against impunity in the everyday practice of international law faces a number of situations of incongruity. The oxymoron 'culture of formalism,' analysed in Chapter 2, conveys this situation well. The fight against impunity becomes timid in situations which involves the other sovereigns of international law. The *raison d'être* of the Court's work shies in certain situations while is fierce in others. This on and off switching of international criminal law's self-assurance regarding its project demonstrates that the competent international legal practice "need not be limited by past ambitions."[1098] Concerning the practices of non-compliance and withdrawal, and to some degree the amendment proposals, the ICC

[1096] BENSOUDA, Fatou, **Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at first arria-formula meeting on UNSC-ICC relations**, International Criminal Court. Available at: <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-first-arria-formula-meeting>. Accessed: 13 dec. 2021.
[1097] STAHN, **International Criminal Law as Expressivist Justice: Meanings, Implications, and Critiques**, p. 192.
[1098] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 573.

officials have demonstrated an unwavering defence of its project through the placing of constant emphasis and at the same time criticizing the practices of States Parties that, in their perceptions, might impair said project. Throughout its argumentative practices, the dichotomic placement of agents as either in favour or against the fight against impunity was very prominent through the notions of legal and political, which will be further explored in the next section.

4.3. The embedded preferences in the practice of international criminal law: the realm of utopic legalism

In the ICC officials' argumentative practices about the fight against impunity, explored in Interlude No. 4 and analysed in the previous section, the rationalisation of the Court's work in terms of the dichotomy accountability/impunity also draws other parallels. Impunity represents the terrain of conflict, chaos, and unruliness, while accountability stands for the means to achieve a peaceful and just society. In international legal discourses in general, but more emphatically in the field of international criminal law, the former comes to be associated with the messiness, inequality, and subjectivity of international politics and the latter with regulation, order, and the rule of law. It is "either the true reality of society and social violence or the true reality of the rule and its immanent logic."[1099] Anything that stands in the way of legal justice is treated as a less adequate solution. In the argumentative practices of the Court, the South African consultation process being the event where this position was more evident, the judicial decisions occupy a different position, representing the moral high ground. During the art. 97 consultation, after the South African Ambassador stated his intent to negotiate a common position in relation to the non-compliance, the Singe Judge promptly responded that there could be no solution other than the one provided by the law. Negotiation, in these narratives, is

[1099] LATOUR, **The Making of Law: an Ethnography of the Conseil d'Etat**, p. 142.

seen as a diplomatic, therefore, political practice. The Court, as were the words of the Judge, is "a judicial body," which "stick[s] to the law."[1100]

The South African art. 97 consultations allows us to go further in this binary way of understanding the relationship between the legal and the political. Considering that there is no statutory provision, nor in the Rules of Procedure and Evidence, that establishes what exactly the art. 97 consultation process should entail, the Single Judge informed the South African Ambassador that the Court's officials did not know if the merits of the consultations would be executive, political, or judicial. In light of that, the Registrar organized an audience which was set up as "a way in between a courtroom, a real courtroom, and maybe a place where a kind of consultation process which are more or less formal to take place."[1101] The representative from the Registrar claimed that this was the best forum to have such discussion, while the South African Ambassador declared to have been caught by surprise, for he was expecting to make his request for a consultation before the three Judges of the Chamber. As the courtroom is not the place for political considerations, the Registrar found a middle-ground. Neither was the Chamber to be associated with the politics that might arise during consultations, neither was any other instance of the Court would be seen making legal decisions, so a Single Judge took charge of the proceedings. This situation evokes another feature that derives from this dichotomised view and that could be seen throughout the argumentative practices explored in Interlude No. 4, which is the idea that there is a proper place for (international) legal discourse to take place. ICC President Song voiced such perception when commenting the debate on the indictment of sitting Heads of State and Government that occurred under the auspices of the ASP, uttering the notion that this was the most appropriate forum to discuss matters related to the system of international criminal justice.

Such view, beyond the political strategy of having the criticism to the ICC framework happen 'in house' consequently avoiding making the headlines, conveys the idea that, in spite of its political nature, the ASP provides for a better environment to hold discussions on legal matters. Veiled in this discourse is the

[1100] REGISTRAR, **Registry Report on the consultations undertaken under Article 97 of the Rome Statute by the Republic of South Africa and the departure of Omar Al Bashir from South Africa on 15 June 2015, Annex 2**, p. 10.
[1101] *Ibid*., p. 15.

'instead of…,' meaning that President Song's remarks, as other similar argumentative practices from the ICC officials, are saying that the ASP is a better place *than* the Assembly of the AU to discuss matters that involve the Court's activities. Although the decisions made by the Assembly of the AU "are legally valid, as they have been issued in accordance with the proper power-conferring rules under a valid treaty in international law," the content of these decisions "goes beyond normative prescriptions."[1102] In other words, at the same time these decisions concern legal developments that take place in the courtroom and are not legal enough for they "do not contain in-depth doctrinal analyses, as the AU did […] in its submission in the case against Jordan."[1103] Through its own expressivist narrative, these decisions challenge the Court's project of fighting against impunity in the name of the entire international community, for it signals that the "ICC does not hold a monopoly on how the international community is to be understood nor how the fight against impunity should be conducted."[1104] But beyond the position of defiance, these AU decisions represent for the ICC officials a legal decision that is completely based on political positions, something that in their legalist lens is not the proper way of doing international law. As the Court is not the place for politics, none of the remarks made by the ICC officials addressed the AU Decisions, not even in informal circumstances. For example, in ICC President Eboe-Osuji's lecture, quoted in the first section of this chapter, where he expressed his view on the non-compliances by the African States being considered as customary international law, the Judge pointed that the absence of a clear motivation and the fact that these were scattered practices were not enough for them to become a custom. Customary international law would appear in situations where these States reunited and discussed the matter. However, not at any point during this reflection did President Eboe-Osuji consider the Assembly of the AU Decisions, which regardless of its lack of legal arguments in the traditional sense "constitute valid law, being one of the sources of the legal order of the AU."[1105]

Instead of engaging with the AU Decisions, the remarks that originated from the Court's authorities focused on emphasizing the legal purity of their work, in

[1102] WERNER, Argumentation through Law: An Analysis of Decisions of the African Union, p. 210.
[1103] *Ibid*.
[1104] *Ibid*., p. 211.
[1105] *Ibid*., p. 215.

speeches and written statements that were very similar to the following discourse by ICC President Song:

> The hallmark of the Court is its independent, judicial nature. The drafters of the Rome Statute took great care to exclude political considerations from the work of the judges. Once a situation comes before the Court, justice follows its course. The Prosecutor and judges cannot and will not take political considerations into account. Judges make judicial judgments on judicial facts. Those who wish to discuss political issues will need to do so in political forums. Those who wish to engage the judges should do so through judicial proceedings.[1106]

Statements like this are frequent in the field of international criminal law's iterations, most often coming from Prosecutors (as this thesis has here and there presented with examples from other international criminal courts) and Judges. These international legal practitioners "regard themselves as aloof from politics."[1107] There is a recognition that these international criminal trials operate on a heavily politicised environment, but these Court's officials as representatives of the rule of law are able to maintain their legal objectivity. ICC President Song's remarks continues to address such notion:

> At the same time, this judicial institution operates within a political world. It depends on States and others not just for cooperation, but also to respect, to protect and to enhance its judicial independence. If there are misperceptions, all stakeholders – States, international organizations and civil society – should continue to promote awareness and understanding of the Court's purely judicial nature."[1108]

States should not only respect the notion that the Court is purely judicial but join the call to arms against narratives that propose the opposite. Such "appearance of insularity," however, does not give the proper image of the reality.[1109] It is a position that retains an "outdated" notion regarding the "automatic character of law-

[1106] SONG, Sang-Hyun, **Address to the Assembly of States Parties**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2009, p. 5.
[1107] SIMPSON, **Law, war and crime: war crimes trials and the reinvention of international law**, p. 24.
[1108] SONG, **Address to the Assembly of States Parties**, p. 6.
[1109] SIMPSON, **Law, war and crime: war crimes trials and the reinvention of international law**, p. 24.

application and of the logic of legal deduction."[1110] International legal practice in such perspective amounts to a "bureaucratic formalism."[1111]

The legalist position that comes from the Court means more than the mere belief from these individuals that their work is actually able to transcend the politics that floats around international criminal trials. The demarcation of territory between the spaces politics is able to go and the point where it is no longer accepted is also a means of (self-)legitimation and (self-)preservation. The contradiction of the position is quite evident. The AU Decisions are dismissed for their inadequacy, it is a legal document that defies the traditional way of doing international law. The Chambers of the Court and Prosecution, despite its position, also appeals to the extra-legal. The *motto* of the fight against impunity, which is a way of creating symbols and conferring meaning to practices as on the side of law and on the side of politics, is in itself a token of the extra-legal. In this sense, while "judges quite clearly admit their prejudices" in relation to that which lies outside the realm of law, only make sense of their functions by reaching out to that same domain which they rejected.[1112]

The bias in relation to the separation between legal and political practices also extends to the actors. The previous chapter discussed that the legalisation of international politics also meant a larger engagement from political actors in competent enactments of international law. This did not mean, however, that it also involved the acceptance of the practices performed by these actors. This means that the divorce of law from politics also extends to the practitioners. ICC President Eboe-Osuji left this aspect quite clear in his remarks at the ASP meeting, for the Judge, the States Parties should be mindful of their roles in the ICC framework and adopt a certain distance from the judicial functions of the Court. Even though these States might engage in debates and voice their interpretations regarding the legal developments of the cases, "States parties to the ICC statute will always remain political entities."[1113] Their role in the Court's framework should be of guaranteeing

[1110] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 25.
[1111] SHKLAR, **Legalism: law, morals, and political trials**, p. 15.
[1112] LATOUR, **The Making of Law: an Ethnography of the Conseil d'Etat**, p. 143.
[1113] EBOE-OSUJI, **Remarks at the opening of the 17th Session of the Assembly of States Parties to the Rome Statute**, p. 8.

that the judicial instances are able to function properly, which means without the interference of political actors. From this point of view, the legal operator performs an "irrefutable and entirely procedural" task that are not to be suffused with politics in any form.[1114] The inherent contradiction of this position is inescapable. The activity of States bears a pervasiveness that corrupts the legal process and at the same time State practice is not only a source but the main driver of the legalisation of international law.

This position adopted by the ICC officials in relation to the political practices and actors had a clear impact on the process of legal contestation enacted by the African States in relation to the Al Bashir Case. The practices performed by the African States demonstrated the impossibility of any demarcation between law and politics. Consequently, even though these practices have clearly a legal dimension, the Court was only able to see its political aspects. In this sense, the only possible engagement is the one that is already comprehended by the Rome Statute, which are the proceedings for situations of non-compliance. But even in these instances, the Chambers, by dealing with the non-compliances as a 'black box' practice without considering the context, are holding on its utopian legalist position and demonstrating the incapacity to contemplate the political context of the law. Such a utopian legalist stance, which would be equivalent to what Simpson labelled 'transcendent legalism' as explored in Chapter 1, renders the Court unable to engage with any of the practices of contestation enacted by the African States. As these practices are always seen for their political dimension, the utopian legalist mindset does not allow for any room for manoeuvre. For example, the non-compliances are not understood in any way as a legal engagement, even though in the non-cooperation process with the Chambers the States submit their positions. During the South African art. 97 consultation, this idea was very clearly posited when the Single Judge affirmed that regardless of anything there were pending arrest warrants and it was up to the South Africa to either honour its obligation toward the Court or choose the illegal path of non-compliance. The idea of a "conscientious lawbreaking" runs far from the possibilities that the ICC officials' utopian legalism allows them.[1115] The attachment to their utopic view drives these

[1114] LATOUR, **The Making of Law: an Ethnography of the Conseil d'Etat**, p. 32.
[1115] JOHNS, **Non-Legality in International Law: Unruly law**, p. 39.

operators of the law to only consider as proper legal engagements the ones that reproduce (not any but) their natural morality. Consequently, this position renders the Court unable to see the practices performed by African States as contestation and engage with them accordingly. Rather, it leaves the Court with activities that many times are based on principles and not able to clearly show the existence of the very values it purports to stand for in a reliable way. Even as these African States engage in their practices of contestation through legal mechanisms, the projection of these actions as running against the Court's fight against impunity turns the institution blind to any productive contestation that might arise. While these actions keep being addressed as attempts to shield a criminal State leader or at blackmailing the international community that peace is being harmed by justice, as their normative content is completely left aside, there is no room for cooperation. In the Court's approach the word cooperation loses its meaning of a mutual endeavour and to signify only a one-way assistance.

The utopian legalism of the ICC officials ends up not only reflecting in a prejudicial stance in relation to States practices and closing the gates for these practices to be able to have a more meaningful impact in the Court's work but also rendering the Court unable to have any productive engagement with these practices. The result are argumentative practices from the Court that, for not directly addressing these contestations and actually seeing these States, are only 'preaching to the choir' and keep repeating the same dichotomised view of reality. The critical discussion with the legal developments of the Al Bashir Case, however, was fuelled and was increasingly taking place in sites outside the Court. In the Interlude ensuing this chapter, it is explored a situation in which the AC made a move that surprised many and invited scholars, States and regional organisations to submit their observations on the legal matter under dispute, but the unfolding of events left many wondering the reason for such move, as the *modus operandi* adopted in the previous approaches of the Court up until that point reigned in the end.

Even though the portrayal of the 'ICC officials'' argumentative practices in this thesis has indicated the sources of the discourses as to differentiate the instances that utter each message, most of the analysis in this Chapter has identified tendencies as one that encompasses all the organs of the Court. This thesis delves into the argumentative practices of the OTP, Chambers, Presidency of the Court,

and Presidency of the ASP. While the Prosecutor and Judges usually opt for a more legalist tone, the Presidencies, for their executive role, at times are more diplomatic, depending on the leadership. Since these organs of the ICC follow a general guidance for governance under the One-Court principle,[1116] they are in general very much in line in their defence of the values of the Court.

4.4.
The limits of legal contestation: decision-making at the ICC

This chapter is about the many (kinds of) auhtorities of international legal contestation. Through a look at the way the Court has responded to the practices of contestation from African States, there is a general portrayal that these acts only motivation is the manifestations of States' interests. Despite the Court's lack of direct engagement with the contestation practices, as the African States elevated the tone and opted for measures like State withdrawal, there was also an accompanying change in the argumentative practices in relation to these evens from the Court. The interesting element is that the discourses of the ICC officials became gradually more emphatic and demonstrated to be responding to the practices of contestation as these practices became more radical and engaged less with the interpretive specificities of the Case. Nevertheless, the interpretive and other legal endeavours from these States were mostly rebuffed, instead of welcomed.

Throughout the years, regardless of the situation's state of hostility, the iterations of the ICC officials heavily relied on expressing its mission of ending impunity. The fight against impunity worked not only as a banner of the Court's work, but as a mechanism through which the ICC officials made sense of the events taking place, including the practices of contestation. The mechanism of making sense of events surrounding the Court through the notion of impunity also opened

[1116] The Independent Expert Review, which submitted its report on 2020, noted that there was an absence of a clear definition and interpretation of this principle, but "understood it to refer to the different entities within the Court and their leaders acting jointly, as one institution." INDEPENDENT EXPERT REVIEW GROUP OF THE ICC, **Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report**, New York: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2020, p. 12, note 19.

space for other parallels associated with this idea to be drawn, in particular the association of impunity with processes of negotiation, i.e., politics, while accountability is the prevalence of the rule of law.

The practices of contestation enacted by the African States in relation to the Al Bashir Case represented a complex set of performances that worked through the realms of law and politics in such a way that made it impossible to demarcate any kind of border. However, the perception of "something as 'political' or 'legal' results, as Morgenthau and others noted a long time ago, not from the intrinsic character of that item or topic."[1117] Considering the frame through which the Court tried to make sense of these practices, which was mainly through a language that heavily relied on the binaries of accountability/impunity and rule of law/politics, these practices were all squeezed into the category of political practices and, consequently, as fostering impunity.

The position of apparent objectivity that the narratives of these ICC officials created, actually forced upon the meaning of these practices a utopian legalist view, which reinforced at the same time a natural morality and a purist understanding of international legal practice. The practices of contestation enacted by the African States in relation to the Al Bashir Case failed to fit into the proper engagement with international law coming from these narratives of the ICC officials. Consequently, from the Court's perspective, there was only unproductive engagement coming from these States, which provoked a move of warding off instead of opening for dialogue. These practices of contestation for not speaking the language of the Court were not allowed in and, consequently, were not able to foster the desired dialogue. The only possibilities of engendering any productive outcome in relation to its position was through the mobilisation of the other sovereigns of international legal practice, the UNSC, the ICJ, and the African Court. In that sense, speaking the law is still "ultimately reserved to those in a position to do so."[1118]

The different phases of Court's responses, however, demonstrates that the African contestation practices managed to create some impact, even with the many difficulties. The many complexities standing in the way of certain States' ability to

[1117] KOSKENNIEMI, Law, Teleology and International Relations, p. 23.
[1118] AALBERTS; BOER, Entering the Invisible College: Defeating Lawyers on Their Own Turf, p. 19.

navigate through international law makes it so that frequently "the main outcome of the process of contestation to [international courts] is critique in itself."[1119] As the ensuing interlude and chapter demonstrate, the effects of the position of the Court in relation to the practices of legal contestation performed by these African States created a wider engagement from different international actors disputing the ICC Chambers interpretation regarding the matter of the obligation to arrest and surrender Al Bashir.

The demarcation of space used by Court in its argumentative practices is a move that involves productive power. The institution of binaries in relation to what is the proper way of enacting international law or the values that are not to be crossed makes the practice of international (criminal) law into a practice of inclusion and exclusion. This chapter navigates through the authority(ies) that are involved in establishing the limits of contestation, which includes the fight against impunity for the place it has come to occupy in the practice of international criminal law. The next chapter, in turn, goes into the deeper meanings that are veiled in these practices of boundary drawing as to understand what is the function that they perform in the international legal system. An event that gives a valuable insight into the direct effect of these frontiers in the practice of the ICC was the process of Jordan's appeal to the PTC II non-compliance decision, which is examined in the following interlude.

[1119] MADSEN; CEBULAK; WIEBUSCH, Backlash against international courts, p. 207.

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Interlude No. 5: The Jordan Appeal

The non-compliance with the ICC's warrants of arrest against Omar Al Bashir did not stay restricted to the African continent. The Registry reported, on 24 March 2017, that the Kingdom of Jordan was to receive the Sudanese President in its territory for an Arab League summit and that it had requested information from the Jordanian authorities. [1120] The response for Jordan was that the Sudanese government had registered President Al Bashir as part of the delegation for the summit, however, there had been no official confirmation nor any further information on his arrival and departure. It was also pointed that "Jordan adheres to its international obligations, including those the applicable rules of customary international law, while taking into account all its rights thereunder."[1121] On 28 March 2017, Jordan informed the Registry that it had received confirmation of Al Bashir's attendance and also affirmed that it considered that Al Bashir as President of Sudan was entitled to sovereign immunity under the rules of customary international law. The Jordanian second *Note Verbale* justified its position by stating that it considered he immunities to which Al Bashir is entitled to were not waived by Sudan and Resolution 1593(2005) does not have any stipulation that might lead to the conclusion that it was doing so. It added that "nothing in the subsequent practice of the Security Council, including its subsequent resolutions, may be interpreted to conclude that the language in resolution 1593 […] to be a waiver of immunity of President Al Bashir" and it is also not possible to find anything in said resolution "that mandates States, including State Parties to the Rome Statute, to bypass such immunity."[1122] The Jordanian authorities concluded that this meant that the requests for arrest and surrender from the Court were

[1120] REGISTRAR, **Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan**, The Hague: International Criminal Court (ICC), 2017, para. 4-5.
[1121] REGISTRAR, **Report of the Registry on information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan, Annex 2**, The Hague: International Criminal Court (ICC), 2017, p. 2–3.
[1122] REGISTRAR, **Report of the Registry on additional information received regarding Omar Al Bashir's potential travel to the Hashemite Kingdom of Jordan, Annex 1**, The Hague: International Criminal Court (ICC), 2017, p. 2–3.

inconsistent with their obligations under customary international law, citing article 98(1) of the Statute as their guide as to how to proceed in such situations.[1123]

In light of confirmation that Omar Al Bashir had travelled to Jordan and had not been arrested and surrendered to the Court, the PTC II, considering that regulation 109(3) of the Regulations of the Court mandates that the Chamber has to hear from the requested State, gave Jordan the opportunity to provide additional submissions. [1124] In its submission, Jordan reiterated its previous argument affirming that, since Sudan is not a contracting State of the Rome Statute, which means it has not waived the immunity of its officials neither from the criminal jurisdiction of the Court nor from the criminal jurisdiction of other States, the legal relationship between Jordan and Sudan is not governed by the Rome Statute but by the rules of customary international law and, because this visit has to do with a meeting from an international organization, the applicable treaty rules.[1125] After presenting its arguments to defend its position that Jordan did not act inconsistently with its obligations under the Rome Statute, the Jordanian authorities, positing that the Chambers are only entitled to settle disputes relating to its judicial functions but no provide authentic interpretation of UNSC resolutions, also urged the Court to seek an authoritative interpretation from the UNSC as to the meaning of paragraph 2 of Resolution 1593(2005).[1126] The OTP responded to the submission by Jordan by arguing that previous decisions by the PTCs had already cleared that the "alleged legal impediments" used for not complying with the ICC's warrants did not provide a basis under article 98(1) or 98(2) of the Statute to nullify Jordan's obligation before the Court. [1127] In that sense, the Prosecution defended that Jordan's obligations were clear and unambiguous and its non-compliance warranted a referral to the ASP and the UNSC.[1128] In light of the arguments presented by Jordan

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[1123] *Ibid*., p. 3.
[1124] PRE-TRIAL CHAMBER II, **Decision inviting the Hashemite Kingdom of Jordan to provide any further submissions on its failure to arrest and surrender Omar Al-Bashir to the Court**, The Hague: International Criminal Court (ICC), 2017, paras. 6 et seq.
[1125] REGISTRAR, **Transmission of a note verbale from the Embassy of the Hashemite Kingdom of Jordan dated 30 June 2017, Annex**, The Hague: International Criminal Court (ICC), 2017, p. 3.
[1126] *Ibid*., p. 9.
[1127] OFFICE OF THE PROSECUTOR, **Prosecution's response to the "Transmission of a note verbale from the Embassy of the Hashemite Kingdom of Jordan dated 30 June 2017"**, The Hague: International Criminal Court (ICC), 2017, para. 18.
[1128] *Ibid*., paras. 21 and 26.

that Al Bashir enjoyed immunity from criminal jurisdiction during his attendance of the Arab Summit as a matter of treaty law, the PTC II requested to be provided with an authoritative text in English of the 1953 Convention on the Privileges and Immunities of the Arab League and the status of its ratification.[1129] The requested documents were provided to the Court by Jordan in Arabic and the Registry prepared an official court translation into English.[1130]

The PTC II, on 11 December 2017, released its finding of non-compliance with the Court's request to arrest and surrender Omar Al Bashir. The Chamber established is task to decide whether Jordan was entitled not to execute the Court's request, as evaluating the legal basis presented by Jordan for Al Bashir's immunity at the relevant time. The Chamber repeated its argument from the South Africa non-compliance decision in which it affirmed that the Chamber was not able to identify a rule of customary international law that "would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court."[1131] As to Al Bashir's immunity from arrest deriving from the Arab League 1953 Convention, the PTC II pointed that representatives of Member States of the League of Arab States which are not parties to the Convention do not enjoy immunities under the provisions of said conventions even in regards to those States which are parties to it. Since the Court was not able to have official confirmation that Sudan was a party, the Chamber considered itself "unable to conclude that it has been established before it that Sudan is a party to the 1953 Convention,"[1132] which meant that Jordan's argument that its treaty obligations served as an impediment for the arresting and surrendering Al Bashir to the Court could not be further considered.[1133] Therefore, the Chamber considered itself unable to subsume the Convention under article 98(2) of the Statute.[1134]

[1129] PRE-TRIAL CHAMBER II, **Decision requesting the Hashemite Kingdom of Jordan to provide further information**, The Hague: International Criminal Court (ICC), 2017, paras. 4 et seq.
[1130] PRE-TRIAL CHAMBER II, **Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir**, The Hague: International Criminal Court (ICC), 2017, para. 13.
[1131] *Ibid*., para. 27.
[1132] *Ibid*., para. 30.
[1133] *Ibid*., para. 31.
[1134] *Ibid*., para. 32.

The Chamber pointed that article 27(2) has a twofold effect, at the same time bars any State Party from raising any immunity before the Court and prevents these immunities to be invoked in regard to another State Party for the effects of cooperation. The Chamber held that there is no immunity from arrest and surrender regarding proceedings before the Court based on official capacity where any such immunity would otherwise belong to a State Party to the Statute. Once the situation in Darfur was referred by the UNSC, the Court's jurisdiction over the situation was regulated by the Rome Statute, meaning that the Statute applies to Sudan as it did for any State Party, which includes article 27(2) that renders any immunity on the ground of official capacity belonging to Sudan inapplicable. This means that article 98(1) of the Statute is not applicable, because there is no immunity to be waived, and States Parties are under the obligation to arrest and surrender Al Bashir to the Court. The Chamber also pointed that it is up to the Court, not to the State Party, the responsibility to address the matter and Jordan was not entitled to rely its own understanding of article 98 of the Statute to decide not to comply with the ICC's request.[1135] The discussion on immunities ended with the Chamber affirming that even assuming "its existence, such a conflict of obligations would not have relieved Jordan of its duties vis-à-vis the Court, or given it discretion to dispense with such duties"[1136] because article 98 of the Statute does not have this effect, since it does not foresee the possibility for a requested State Party to unilaterally refuse compliance with a Court's request for arrest and surrender."[1137]

Considering the presented arguments, the PTC II maintained the most recent findings that Al Bashir was not entitled to immunities due UNSC Resolution 1593's imposition of the duties and obligations of the Rome Statute to Sudan, rendering it in a position analogous of a State Party. And Al Bashir's immunities under customary international law do not stand in the way for States Parties to execute the arrest warrants. Jordan, the Chamber concluded, as a Member State of the ICC, was in violation of its obligations with the Court.[1138] The Chamber decided, then, to refer Jordan's non-compliance to the ASP and the UNSC.[1139]

[1135] *Ibid*., paras. 33 et seq.
[1136] *Ibid*., para. 43.
[1137] *Ibid*., para. 45.
[1138] *Ibid*., para. 44.
[1139] *Ibid*., para. 55.

In light of this decision, Judge Brichambaut submitted a minority opinion due to his disagreement with the line of reasoning adopted by the PTC II's majority. The Judge agreed that Jordan had failed its obligations of honouring the Court's request for cooperation and was also concurred with the decision of referring the matter to the UNSC and the ASP.[1140] However, Judge Brichambaut did not acquiesce with the Chamber's reasoning for removing Al Bashir's immunity. The Judge reiterated his previous position that the 1948 Genocide Convention is the applicable law in this case. In his minority opinion, Judge Brichambaut also pointed that in the absence of any clarification from the UNSC or any development in State practice regarding the immunities of serving Heads of State accused of international crimes since his minority opinion of 6 July 2017, the Judge still fell uncertain towards: the status of Sudan following the referral to the ICC, in terms of the situation of Sudan as equivalent to a State Party to the Statute, rendering article 98(1) inapplicable; the interpretation of UNSC Resolution 1593(2005) as waiving the immunities enjoyed by Al Bashir as sitting Head of State; and the effect of the involvement of an international court in the application of the rule of customary international law which governs the personal immunity of Heads of State in the context of relations between States. Even not agreeing with the majority's arguments, Judge Brichambaut agrees that such conclusion can be drawn regarding the consequences of the 1948 Genocide Convention.[1141]

It was not only the fact that it was a State outside Africa that made this last episode important in the Al Bashir Case saga. The Jordanian authorities appealed the PTC II's, a move that opened the space for further discussions after conflicting decisions by the Chambers of the Court on the matter of Al Bashir's immunities. After the PTC II issued the decision on Jordan's non-compliance, on 11 December 2017, finding that Jordan failed to comply with its obligations under the Statute when it did not execute the Court's request for the arrest of Omar Al-Bashir and his surrender to the Court and referring the matter to the ASP and the UNSC, the

[1140] PRE-TRIAL CHAMBER II, **Minority Opinion of Judge Marc Perrin de Brichambaut**, The Hague: International Criminal Court (ICC), 2017, para. 1.
[1141] *Ibid*., paras. 2-3.

Jordanian authorities sought leave from the Chamber to appeal said decision.[1142] In its request to the Chamber, Jordan started by pointing that, unlike the Republic of South Africa, the PTC II "did not accord to Jordan an opportunity to present its views in a public hearing before the Chamber prior to the issuance of its Decision, nor to provide a written submission in anticipation of such a hearing."[1143] Consequently, the Chamber moved forward with its Decision "without the benefit of Jordan's full views" on the legal reasoning used in the Chamber's South African non-compliance decision (upon which the 11 December decision relies heavily), on the matter of South Africa's non-compliance and the Chamber's decision to not refer the matter to the UNSC and the ASP, or even on the Prosecutor's submission on the alleged non-compliance by Jordan (which also returns heavily to the South African non-compliance decision). According to the Jordanian authorities, not giving them such opportunity "was procedurally unfair and unjustified."[1144]

Jordan was seeking leave to appeal the 11 December 2017 decision on four issues: (1) the PTC II erred regarding a matter of fact when it concluded that Sudan was not a party to the 1953 Convention on the Privileges and Immunities of the Arab League and regarding a matter of law in concluding that the Sudanese accession was an essential precondition for Jordan's obligation to give effect to Al Bashir's immunity under said Convention; (2) the Chamber also "erred with respect to matters of law in its conclusions regarding the effects of the Rome Statute upon the immunity of President Al-Bashir," more precisely in its assertions that Article 27(2) of the Statute excludes the application of Article 98, that Article 98 establishes no rights for States Parties, that Article 98(2) does not apply to the 1953 Convention, and that even if Article 98 were applicable it would provide no basis for Jordan not to comply with the arrest warrants; (3) the PTC II further erred in matters of law by contending that UNSC Resolution 1593 (2005) interfered Jordan's obligation under customary and conventional international law; and, (4) if the decision on the non-compliance were to be correct (something that Jordan is

[1142] THE HASHEMITE KINGDOM OF JORDAN, **The Hashemite Kingdom of Jordan's Notice of Appeal of the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir; or, in the Alternative, Leave to Seek Such an Appeal**, The Hague: International Criminal Court (ICC), 2017, para. 1.
[1143] *Ibid*., para. 3.
[1144] *Ibid*., para. 3.

adamant that it is not), the Chamber "abused its discretion" in deciding to refer the matter to the ASP and the UNSC.[1145]

Soon after the Jordanian authorities submitted their leave for appeal, the OTP presented its response in which it conceded that the PTC II had previously held that decisions under article 87(7) of the Statute may be appealed pursuant to article 82(1)(d) conditioned to leave being granted by the PTC.[1146] The Prosecution did not object to leave being granted on the second and third issue. However, per the OTP, issues one and four did not qualify as appealable issues within the meaning of Article 82(1)(d).[1147]

"[T]o more accurately reflect the Decision, and to encapsulate all legal matters presented under those issues," it was the Prosecution's view that the issues should be reframed. The second issue should question:

> Whether the immunities of Omar Al-Bashir as Head of State, under customary international law or a pre-existing treaty obligation, bar States Parties to the Rome Statute from executing the Court's request for his arrest and surrender for crimes under the Court's jurisdiction allegedly committed in Darfur within the parameters of the Security Council referral.[1148]

And the third should inquiry

> Whether the rights and obligations as provided for in the Statute, including article 27(2), are applicable to Sudan, by imposition of the Security Council acting under Chapter VII of the UN Charter.[1149]

In the OTP's rationale, having an authoritative resolution of these legal matters by the Appeals Chamber (AC) would facilitate "the Prosecution's capacity to secure the ongoing and future cooperation of States Parties."[1150] And this is the reason why the Prosecution believed that the PTC II should grant Jordan's leave to appeal the second and third issues.[1151] As a response, the Jordanian authorities

[1145] *Ibid*., para. 4.
[1146] OFFICE OF THE PROSECUTOR, **Prosecution's response to the Hashemite Kingdom of Jordan's notice of appeal against the article 87(7) decision, or in the alternative, application for leave to appeal the decision under article 82(1)(d)**, The Hague: International Criminal Court (ICC), 2017, para. 2.
[1147] *Ibid*., para. 4.
[1148] *Ibid*., para. 3.
[1149] *Ibid*., para. 3.
[1150] *Ibid*., para. 12.
[1151] *Ibid*., para. 13.

argued that all four issues were important for fully addressing the matter.[1152] Jordan further stated that it did not accept the OTP's reframing of the second and third issues, declaring its wish to maintain the "much-clearer" two issues as originally formulated.[1153] The Jordanians reasoned that it was not their wish "to develop the Court's case law in the abstract," rather than appealing issues in the decision that directly concern to Jordan, and this is what makes the fourth issue – the referral of the matter to the ASP and the UNSC – of particular importance.[1154]

On 21 February 2018, the PTC II, under Judges Tarfusser, Brichambaut and Chung, issued its decision, by majority, granting Jordan leave to appeal the 11 December 2017 decision with respect to issues two, three and four, claiming that an authoritative resolution by the AC regarding this three topics "would provide clarity and finality on these matters."[1155] In the matter of issue one, regarding the assessment of whether the 1953 Convention gave immunity from arrest to Al Bashir during his presence in Jordan, the Chamber clarified that it did not reach the conclusion that Sudan was not a party to said Convention. The Chamber instead affirmed to be unable to conclude that Sudan was a party to the Convention.[1156] Regardless of the ascertainment of this question, the matter to be addressed was whether the issue qualified for certification under Article 82(1)(d) of the Statute. In order to do so, "it must be 'constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.'"[1157] And, for the PTC II, since it had argued in its December 2017 decision that even if Sudan was indeed a party of the Convention, this would not have had any impact on the Chamber's conclusion that immunity was applicable. For that reason, the Chamber posited that the first issue did not constitute an appealable issue within the meaning of Article 82(1)(d) of the Statute.

[1152] THE HASHEMITE KINGDOM OF JORDAN, **Reply to the prosecution's response to the Hashemite Kingdom of Jordan's notice of appeal against the article 87(7) decision, or in the alternative, application for leave to appeal the decision under article 82(1)(d)**, The Hague: International Criminal Court (ICC), 2018, para. 2.
[1153] *Ibid*., para. 10.
[1154] *Ibid*., para. 10.
[1155] PRE-TRIAL CHAMBER II, **Decision on Jordan's request for leave to appeal**, The Hague: International Criminal Court (ICC), 2018, para. 15.
[1156] *Ibid*., para. 8.
[1157] *Ibid*., para. 9.

The PTC II decided to grant leave for appeal unanimously for the second and third issues and for the fourth issue by majority. The second and third for having several issues that compose the core of the decision and speaking to the subject-matter of the Chamber's finding.[1158] Issue four, in turn, constitute an appealable issue for it is decided after the Chamber's considerations.[1159] Lastly, the Chamber, by majority, sustained that there was no reason to reframe the issues in the way that was proposed by the Prosecution, since "it is for the prospective appellant to specify the issues intended to form the subject-matter of the prospective appeal" and the AC has the powers to ensure that the issue is wholly and properly considered in substance.[1160] This decision meant that, for the first time, the issue of whether the Rome Statute has the horizontal effect of relinquishing Al Bashir's immunities and therefore creating for its States Parties the obligation to comply with the Court's arrest warrants against him was to be before the AC.

The decision by the PTC II was by majority for Judge Marc Perrin de Brichambaut appended a minority opinion. Judge Brichambaut disagreed with the decision of the majority to grant leave to appeal the fourth issue, siding with the OTP's contention that there was no appealable issue under article 82(1)(d) identified in Jordan's request.[1161] The Judge also argued that the reframing of the second and third issued by the Prosecutor encapsulated more accurately the legal and factual issues whose consideration by the PTC II led to the December 2017 decision. The Chamber, therefore, should have accepted the reframed issues since it would allow the AC to address the decision "in the most comprehensive manner," something that holds particular importance considering the divergent views the Chambers have presented in regard to the question of immunities.[1162] On the theme of the reframing, there was a further divergence which was related to the Chamber's power to reframe an issue. For the Judge, "it is well established that Pre-Trial and Trial Chambers have the power to reframe issues in relation to which leave to appeal is sought and, as a consequence, to expand upon them."[1163] And since the

[1158] *Ibid*., para. 11.
[1159] *Ibid*., para. 13.
[1160] *Ibid*., para. 12.
[1161] PRE-TRIAL CHAMBER II, **Minority Opinion of Judge Marc Perrin de Brichambaut**, The Hague: International Criminal Court (ICC), 2018, para. 2.
[1162] *Ibid*., para. 3.
[1163] *Ibid*., para. 6.

Chamber expects the decision by the AC to provide finality on these matters, finding the best way of framing the issues is important, especially because the AC has previously held that it would "not render 'advisory opinions on issues that are not properly before it.'"[1164]

Judge Brichambaut also added that "the exhaustive resolution of all the legal issues bearing on the obligation of States Parties to the Rome Statute to cooperate with the Court in the arrest and surrender of Omar Al-Bashir" would require an additional related issue to be addressed, the full participation of Sudan and Jordan in the 1948 Genocide Convention, which has the effect of lifting Al Bashir's immunity and compelling contracting parties to the Convention to arrest him when in their territory pursuant to their obligation to cooperate with the ICC.[1165] For this reason, not only the PTC II should have reframed the issues, the third issue should be reframed in order to encompass the Genocide Convention.[1166]

Once the PTC II granted Jordan the leave to appeal the second, third and fourth issues, the Jordanian authorities submitted, on 12 March 2018, their appeal for the appreciation of the AC. The appeal reframed the former second issue so to encompass the matter of its immunity obligations regarding the 1953 Convention.[1167] The appeal, then, centred on the following three issues:

> a) The Pre-Trial Chamber erred in its conclusions regarding the effects of the Rome Statute upon the immunity of President Al-Bashir, including its conclusions that article 27(2) of the Rome Statute excludes the application of article 98; that article 98 establishes no rights for States Parties; that article 98(2) does not apply to the 1953 Convention on the Privileges and Immunities of the Arab League"; and that even if article 98 applied it would provide no basis for Jordan not to comply with the Court's request ("First Ground of Appeal");
> b) The Chamber erred in concluding that Security Council resolution 1593 (2005) affected Jordan's obligations under customary and conventional international law to accord immunity to President Al-Bashir ("Second Ground of Appeal"); and
> c) Even if the Chamber's December 2017 Decision with respect to non-compliance was correct (quad non), the Chamber abused its discretion in deciding to refer such

[1164] *Ibid*., para. 6.
[1165] *Ibid*., para. 4.
[1166] *Ibid*., para. 14.
[1167] THE HASHEMITE KINGDOM OF JORDAN, **The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"**, The Hague: International Criminal Court (ICC), 2018, paras. 1 et seq.

> non-compliance to the Assembly of States Parties and the Security Council ("Third Ground of Appeal").[1168]

Per Jordan, these grounds of appeal touched upon important matters that pertain to the very core of the functioning of the Court in the context of the arrest and surrender of indicted individuals. Therefore, it is important to gain clarity over "the conflict-avoidance rules set forth in article 98," the effects of UNSC referrals under article 13(b), and the proper interpretation of UNSC resolutions.[1169] The appeal further stressed that the fight against impunity cannot be "done at the expense of fundamental rules and principles of international law aimed at securing peaceful relations among States," since overlooking them can implicate in more harm than good in the long term.[1170] In the last point of the appeal, Jordan asked for the possibility to respond further either in writing or in an oral hearing to future pleadings in the appeal proceedings.[1171]

The Appeals Chamber, on 29 March 2018, pursuant to rule 103 of the Rules of Procedure and Evidence, issued an order inviting the UN, the AU, the European Union, the League of Arab States, the Organization of American States to submit *amici curiae* observations on the merits of the legal questions presented in Jordan's appeal against the PTC II's decision of 11 December 2017. The submission of *amici curiae* observations, upon leave, was extended to States Parties (describing its interest in the legal question presented) and Professors of International Law (describing the particular expertise in the legal question presented). It was also stated that the AC would later render a decision "selecting the States Parties and Professors of International Law considered best placed to be invited to submit observations on the merits of the legal questions presented in the appeal."[1172] Justifying its decision, the AC reasoned that the Jordan appeal raised legal issued that would have implications beyond the ruling of the Jordanian non-compliance.

[1168] *Ibid*., para. 3.
[1169] *Ibid*., para. 4.
[1170] *Ibid*., para. 5.
[1171] *Ibid*., para. 117.
[1172] APPEALS CHAMBER, **Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)**, The Hague: International Criminal Court (ICC), 2018, p. 4.

So, to assist the Chamber in its determination, it considered desirable to invite observations on the merits of the legal questions presented in the appeal.[1173]

This decision gave the impression that the AC was taking a completely different approach from the PTCs. In the face of several controversies facing this case, the international law community, in general, welcomed the AC's decision to reach to legal scholars to elaborate submissions to assist the Court in putting an end to this long-lasted debate that had generated a lot of controversy for the ICC. This was the first time the Court invited a large number of submissions by legal scholars, a move that resembled a practice that is usually adopted by *ad hoc* tribunals, such as the ICTY and SCSL.[1174]

By the deadline of 30 April 2018, there was one expression of interest from a State Party (Mexico, that in the end did not file any observation) and 16 expressions of interest from international legal scholars requesting leave to submit their observations pursuant to rule 103 of the Rules.[1175] The AC, upon analysis of the antecedents of the responding scholars, considered "it desirable for the proper determination of the case to invite" 11 out of the 16 requests: Annalisa Ciampi, Paola Gaeta, Yolanda Gamarra, Claus Kreß, Flavia Lattanzi, Konstantinos D. Magliveras, Michael A. Newton (excluding Oliver Windridge); Roger O'Keefe; Darryl Robinson, Robert Cryer, Margaret deGuzman, Fannie Lafontaine, Valerie Oosterveld and Carsten Stahn (excluding Sergey Vasiliev); Nicholas Tsagourias (excluding Michail Vagias); and Andreas Zimmermann.[1176] Besides the individuals excluded from group submissions, the Court also did not accept the submissions by: Max du Plessis, Sarah Nouwen and Ms Elizabeth Wilmshurst; Dov Jacobs; Asad Kiyani; Bonita Meyersfeld and the Southern Africa Litigation Centre; and Philippa Webb and Ben Juratowitch.[1177] The criteria established in the invitation was that scholars had to be Professors of International Law. The proceedings for

[1173] *Ibid*.
[1174] MAO, Xiao, The Function of Amicus Curiae Participation by Legal Scholars: The Al-Bashir Appeal Case at the International Criminal Court as an Illustration, **Chinese Journal of International Law**, v. 18, n. 2, p. 393–424, 2019, p. 394.
[1175] APPEALS CHAMBER, **Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal**, The Hague: International Criminal Court (ICC), 2018, p. 3.
[1176] APPEALS CHAMBER, **Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal**, para. 10.
[1177] *Ibid*., para. 10.

choosing the submissions were not, however, the most transparent. Amongst the five expressions of interest that were rejected, three adopted a position heavily against the reasonings given so far by the Chambers of the Court. There are, though, in the list of scholars invited also those who refute the stances adopted so far by the PTCs. The parameters are not clear. The closest guess has been that the rejections had to do with the applicants not fulfilling the full Professor of International Law criteria. This meant that individuals that had a lot of expertise in the field were denied the possibility of submitting observations to the case. Besides the invitations for written submissions, the AC scheduled a hearing in this appeal to take place on 10, 11 and 12 September 2018.[1178]

There was a total of 11 observations by scholars besides the submissions by the AU and the League of Arab States. The *amici curiae* had to address the three issues appealed by Jordan, but in general they were mostly centred around the second ground of appeal, i.e., that the Chamber was wrong to conclude that UNSC Resolution 1593 (2005) waived Al Bashir's immunities for the purposes of proceedings before the ICC and, therefore, the compliance with the Court's arrest warrant did not violate any obligations Jordan had under customary international law. The arguments presented as to this ground of appeal can be grouped in four major clusters: (1) a more refined version of the customary international law avenue adopted in the Chad and Malawi non-compliance decisions; (2) the contention that UNSC Resolution 1593 (2005) removed Al Bashir's immunities, as seen in the DRC, South Africa and Jordan non-compliance decisions; (3) a novel reading that purports that Sudan's lack of cooperation created a situation of abuse of rights, which renders it unable to invoke immunities for Al Bashir; and (4) the reasoning that the Court cannot require its States Parties to arrest and surrender Al Bashir because his immunities are not waived in relation to third States.

In the first cluster of arguments, there is only the submission of Professor Claus Kreß. His submission defended that Jordan would not have acted inconsistently with any of its obligations under international law as referred to in article 98(1) and 98(2) of the Statute had it complied with the arrest warrant for Al

[1178] *Ibid*., para. 13.

Bashir while he was in Jordanian territory.[1179] In his submission, Kreß only addressed article 98(1), for Jordan did not point to the existence of any international agreement within the meaning of article 98(2).[1180] The main argument was that the AC should follow the line of reason used in the PTC I's Malawi and Chad non-compliance decisions, which was labelled as the 'customary international law avenue.' Such position would hold that "there exists a customary international law exception to the customary international law immunity right *ratione personae* of States for the purpose of proceedings before the Court" which would be extend, fitting in this sense the case at hand, to the triangular relationship of vertical cooperation between the Court, a requested State Party and the Non-State Party.[1181] Kreß seems somewhat critical of the change in the reasoning of the Chamber in its 9 April 2014 DRC decision that uses the UNSC Resolution 1593 (2005) as the reason for the waiver of Al Bashir's immunities. For Kreß, the AC should take the 'customary international law avenue' for its decision has implications that transcend the case in question.[1182] It would allow the Court "*equally* to exercise its jurisdiction under article 12(2) of the ICC Statute, over those Non-State Party officials who generally enjoy immunity *ratione personae*," meanwhile the UNSC Resolution avenue is only opened in cases where the UNSC "makes a *political* decision to that effect."[1183] Kreß states, however, that the customary international law avenue exists but it is not yet firmly entrenched and fortified since only one international judicial decision at that point had adopted such reasoning to decide a case. It had been the AC of the SCSL in the Charles Taylor Case. The Chamber reasoned that customary international law had "crystallized an exception from the traditional immunity right *ratione personae* before *international* criminal courts."[1184] Kreß further recognizes that this decision only covered the existence of a customary international law exception not addressing the idea that this exception

[1179] KRESS, **Written observations of Professor Claus Kreß as amicus curiae, with the assistance of Ms Erin Pobjie, on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018 (ICC-02/05- 01/09-326)**, para. 1.
[1180] *Ibid*., para. 2.
[1181] *Ibid*., para. 3.
[1182] *Ibid*., paras. 5 and 6.
[1183] *Ibid*., para. 7 [highlighted in original].
[1184] *Ibid*., para. 8 [highlighted in original].

extends to the triangular cooperation which is the subject of article 98(1) of the Rome Statute.[1185] The acceptance of the customary international law avenue means going "beyond the consideration of State pronouncements or judicial decisions that *directly* articulate the existence of the customary law rule in question."[1186] According to Kreß, this position does not question the ICJ's decision in the Arrest Warrant Case, which established that customary international law had not crystallised an international criminal law exception to *ratione personae* immunity for the purposes of national criminal proceedings. For Kreß, there is a clear distinction between national and international criminal proceedings for the situation of States adjudicating crimes on behalf of the international community is much more susceptible to States' interests.[1187] And the ICJ made such distinction when affirming that it is possible to conceive an exception to the customary law of immunity *ratione materiae* before certain international courts as the ICC.[1188] But the adoption of the customary international law avenue by the AC needs to be further substantiated with the idea that the *national/international* distinction "only holds if the jurisdiction of the international criminal court in question transcends the delegation of national criminal jurisdiction by a group of States" being instead "the *direct embodiment of the international community for the purpose of enforcing its ius puniendi.*"[1189] The obligation of a requested State Party to comply with the international criminal court's arrest warrant, in the opinion of Kreß, is resolved by a matter of principle. Considering that the arrest and surrender are part of the operation of the international criminal justice system and the ICC relies on the cooperation of States to enforce their decisions, the execution of an arrest warrant by the requested State is an act within that system. For Kreß, this would make a convincing point to extend the exception of the customary international law of immunity *ratione personae* that the ICC is entitled to the bilateral relationship between the Non-State Party concerned and the requested State Party.[1190] Kreß

[1185] *Ibid*., para. 8.
[1186] *Ibid*., para. 9 [highlighted in original].
[1187] *Ibid*., para. 12.
[1188] *Ibid*., para. 13.
[1189] *Ibid*., para. 14 [highlighted in original].
[1190] *Ibid*., para. 17.

thereafter recognizes that the customary international law avenue may not remain open forever if subsequent State practice points to the contrary.[1191]

The second cluster of arguments, and the one most supported by the submissions, mostly repeated the PTC I's line of reasoning in the DRC, South Africa and Jordan non-compliance decisions that UNSC Resolution 1593 (2005) rendered Sudan in a position analogous to a State Party to the Rome Statute which makes it bound by article 27 of said Statute. Within this group there is a variation in the matter of how the UNSC Resolution triggers the ICC jurisdiction and how it reaches the horizontal relationship between States.

Professor Annalisa Ciampi upheld in her submission that paragraph 2 of the Resolution 1593 (2005), which imposes upon Sudan the obligation to cooperate fully with the Court, renders Sudan unable to claim immunity for its Head of State, since it places Sudan in a legal position analogous to that of a State Party in matters of cooperation, which includes the ineffectiveness of personal immunities pursuant to article 27(2). The Rome Statute, however, does not apply in its entirety to Sudan.[1192] In her submission, Ciampi makes the point that it is the context of the whole Resolution that confirms such interpretation as, for example, paragraph 6 expressly grants immunities for officials of Non-Party States contributing to operations in Sudan established by the UNSC or AU, reasoning that "[h]ad the Security Council intended to safeguard the immunities of other non-party Sates, it would have done so explicitly."[1193] Ciampi further reasons that the power granted by article 119 of the Statute to the Court to settle any dispute concerning its judicial functions, confers the ability to the Court to authoritatively interpret UNSC Resolutions of which it is the principal addressee.[1194] Taking the position that the distinction between the jurisdiction to adjudicate and jurisdiction to enforce has no place in relation to the exercise of criminal jurisdiction by an international court for the purposes of ascertaining individual criminal responsibility, Ciampi held that the

[1191] *Ibid*., para. 19.
[1192] CIAMPI, Annalisa, **Amicus curiae observations of Prof. Annalisa Ciampi pursuant to rule 103 of the Rules of Procedure and Evidence**, The Hague: International Criminal Court (ICC), 2018, p. 6–7.
[1193] *Ibid*., p. 9.
[1194] *Ibid*., p. 6.

obligation to arrest and surrender is also encompassed by paragraph 2 of Resolution 1593 (2005).[1195]

Professor Yolanda Gamarra departs from the conception that article 98(1) of the Rome Statute is not applicable to the case in question, since it is only relevant in situation where the Court still has to obtain the cooperation of the third State for the waiver of immunity before proceeding with the request to a State Party to arrest and surrender the individual with immunity.[1196] The question of immunity in the Al Bashir Case is regulated by article 27 of the Statute. UNSC Resolution 1593 (2005) "established an obligation to 'cooperate fully with and provide any necessary assistance to the Court and the Prosecutor'" for Sudan.[1197] As for third States, as UN member States, their discretion to consider whether to cooperate with the Court is "greatly limited" by Resolution 1593 (2005),[1198] since paragraph 2 created this vertical obligation.[1199] The horizontal cooperation would be covered by the primacy provided to the Court by the UNSC "over UN member States" which would entitle the Court "to request the cooperation of States on a variety of judicial matters."[1200] This means, for Professor Gamarra, that article 27 of the Rome Statute has both vertical and horizontal effects for third States.

In her submission, Professor Flavia Lattanzi found that the central legal issue regarding Al Bashir's immunity upon his visit to the territory of the Hashemite Kingdom of Jordan was Sudan's right in relation to other States.[1201] Professor Lattanzi's reasoning contends that the inevitable consequence of the UNSC Resolution is the indirect delegation of powers to the Court which binds non-Parties

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[1195] *Ibid*., p. 4.
[1196] GAMARRA, Yolanda, **Amicus Curiae Observations Pursuant To Rule 103 Of The Rules Of Procedure And Evidence On The Merits Of The Legal Questions Presented In The Hashemite Kingdom Of Jordan's Appeal Against The Decision Under Article 87(7) Of The Rome Statute On The Non-Compliance By Jordan With The Request By The Court For The Arrest And Surrender Of Omar Al-Bashir Of 12 March 2018**, The Hague: International Criminal Court (ICC), 2018, para. 7.
[1197] *Ibid*., para. 14.
[1198] *Ibid*., para. 17.
[1199] *Ibid*., paras. 20 et seq.
[1200] *Ibid*., para. 15.
[1201] LATTANZI, Flavia, **Amicus curiae observations submitted by Prof. Flavia Lattanzi pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'" of 12 March 2018**, The Hague: International Criminal Court (ICC), 2018, para. 3.

States to the Rome Statute. The wording in the Statute does not create such powers to the Council, it merely attests to this ability.[1202] The *chapeau* of article 13 would warrant that referred cases are to be considered under all the provisions of the Rome Statute since it states that the Court would exercise "its jurisdiction on all individual cases 'in accordance with the Statute'" and the wording of Resolution 1593 (2005) would validate such conclusion.[1203] The obligation to cooperate stated in paragraph 2, according to Lattanzi, extends to Sudan all the obligations under the Rome Statute that are necessary for the proceedings before the Court, which includes article 27 and all the cooperation framework established in the Statute under part IX.[1204] In her view, UNSC resolutions are not to be seen as self-contained. "The incorporation of the relevant provisions of the Rome Statute in a UNSC referral decision is the result of the well-known legal technique of *renvoi* used in relations between different *corpora iuris* within the same legal system or between different systems of law," article 13(b) of the Statute being an example of such practice.[1205] As a consequence, Lattanzi claims that Jordan's reliance on article 98(1) of the Statute is incorrect for article 27(1) is also applicable in the horizontal relationship between a requested State Party and a non-Party State referred to the Court by the UNSC.[1206]

Professor Nicholas Tsagourias, in turn, while arguing that Jordan's request should be rejected, contended that there is no lacuna in the question of immunities in the case in question. The matter is already dealt explicitly and exhaustively in article 27 of the Rome Statute and, therefore, does not require any recourse to external sources of law, such as those invoked by Jordan.[1207] Professor Tsagourias asserted that Resolution 1593 (2005) rendered Sudan in the situation of a *quasi*-State Party to the Statute. The requirement of second paragraph of the Resolution that States Parties cooperate fully with the Court in accordance with the provisions

[1202] *Ibid*., paras. 4 et seq.
[1203] *Ibid*., para. 6.
[1204] *Ibid*., para. 6.
[1205] *Ibid*., para. 7.
[1206] *Ibid*., para. 10.
[1207] TSAGOURIAS, Nicholas, **Amicus Curiae Observations Pursuant To Rule 103 Of The Rules Of Procedure And Evidence On The Merits Of The Legal Questions Presented In The Hashemite Kingdom Of Jordan's Appeal Against The Decision Under Article 87(7) Of The Rome Statute On The Non- Compliance By Jordan With The Request By The Court For The Arrest And Surrender Of Omar Al-Bashir Of 12 March 2018**, The Hague: International Criminal Court (ICC), 2018, para. 6.

of the Statute, including article 27, had both a vertical and horizontal scope of application.[1208]

Still in this group of arguments, but moving towards a more policy oriented approach, Professor Konstantinos D. Magliveras asserted that the fact that politics had overshadowed legal considerations in this case should have a weight in the AC's judgment.[1209] For Magliveras, the cooperation requests in the situation in Darfur are orders from the Court acting pursuant to a mandate given by the UNSC, which means that the Court's orders hold "the same binding effect as UNSC resolutions" and, consequently, must be executed promptly and in full by the requested State.[1210] As to the conflicting obligations alleged by Jordan, the solution is to be found through the principle of effectiveness. The obligations stemming from the Rome Statute are meant to ensure that the most heinous crimes are prosecuted and the non-execution of the warrants of arrest issued by the ICC are a threat to the efficacy of the Court. In light of such function, Professor Magliveras contends that "treaties are living instruments" that "depending of the applicable circumstances […] may require adjustments."[1211] And article 13(b) represents "a further step in the evolutionary process towards a globalized criminal justice transcending continents and states and focusing on protecting the life and the personality of the individual."[1212] This appeal, argued Magliveras, provides the AC the opportunity to avoid the "troubling circumstances" it faces today and "employ a sound legal reasoning to disperse any legal ambiguities on Rome Statute's proper interpretation" and to send the clear and unambiguous message that undermining the Court is an affront to humanity and to the victims.[1213]

In their submission, Professors Darryl Robinson, Robert Cryer, Margaret deGuzman, Fannie Lafontaine, Valerie Oosterveld and Carsten Stahn departed from the contention that the appealed decision of the PTC II should be upheld and

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[1208] *Ibid*., paras. 13 et seq .
[1209] MAGLIVERAS, Konstantinos D., **Amicus Curiae Observations Under Rule 103 Of The Rules Of Procedure And Evidence On The Merits Of The Legal Questions In The Appeal Of The Hashemite Kingdom Of Jordan Lodged On 12 March 2018 Against The Finding Of Pre-Trial Chamber Ii That It Did Not Comply With The Request To Arrest And Surrender President Omar Al-Bashir Of Sudan**, The Hague: International Criminal Court (ICC), 2018, para. 4.
[1210] *Ibid*., para. 8.
[1211] *Ibid*., para. 9.
[1212] *Ibid*., para. 10.
[1213] *Ibid*., para. 13.

presented their arguments to assist the Chamber in the analysis of common criticisms to that interpretation.[1214] For them, the UNSC has a wide array of powers exhaustively conveyed in articles 41 and 42 of the UN Charter but, as confirmed by the ICJ, not confined to this list of examples. Immunities for international crimes are not one of the limitations to these powers, as are *jus cogens* norms. In their interpretation, the argument that contends that the UNSC cannot override customary international law is flawed, since affecting customary law is an inevitability of the UNSC's decisions.[1215] One of the powers the UNSC exert is the ability to order UN member states to cooperate with other bodies and in doing so the UNSC does not "'make a state a party' to the relevant treaty."[1216] Instead, the order to cooperate with the ICC has the resolution as the *source* of the obligation but the *content* of said obligation is set forth in the Rome Statute, which means that the Statute is not being applied in the capacity of a treaty but being incorporated by the UNSC "to delineate the obligation imposed by the resolution."[1217] Responding to the argument that the UNSC must explicitly remove immunities, Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld and Stahn held that the practice of the UNSC has been the opposite, being explicit when it wishes to preserve immunities and that Resolution 1593 (2005) obliges Sudan to cooperate fully, leaving only the question of which cooperation obligations are included.[1218] The submission established a parallel between the phrasing 'cooperate fully' using in the referral of the situation in Darfur with the Resolutions (and Statutes) that established the ICTY and ICTR, which used the same wording and had the effect of waiving immunities.[1219] For them, the plausible interpretation of such phrasing is that the State being ordered to cooperate be subjected to the same limitations enjoyed by States Parties, any other standard would not reflect the fully cooperation expressed in the resolution. It does not, however transform Sudan into a State Party.[1220] They arrived at the same conclusion that the PTC I contending that article

[1214] ROBINSON, Darryl *et al*, **Amicus Curiae Observations of Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld, and Stahn**, The Hague: International Criminal Court (ICC), 2018, para. 1.
[1215] *Ibid*., paras. 3 et seq.
[1216] *Ibid*., para. 5.
[1217] *Ibid*., para. 5.
[1218] *Ibid*., para. 7.
[1219] *Ibid*., para. 8.
[1220] *Ibid*., paras. 10 et seq.

27(2) has both vertical and horizontal effects among States Parties and States subject to a UN Charter Chapter VII duty to 'cooperate fully.' Immunities, then, can relinquished by virtue of a UNSC referral to the ICC which orders the State to fully cooperate with the Court.[1221] Nevertheless, the submission by Professors Robinson, Cryer, deGuzman, Lafontaine, Oosterveld and Stahn made the admonition that there are legal grounds to respect immunity of a head of state participating in a conference of an intergovernmental organization and that the ICC should not take lightly these legitimate concerns. The Statute "is not a single-minded document."[1222] It balances instead competing concerns not only having as its goal the fight against impunity. It is possible to argue that article 98 preserves respect for the immunity extended by the intergovernmental organization and, consequently, there are no conflicting obligations, since article 98 explicitly yields to immunities that have not been relinquished.[1223]

The third cluster of arguments in the *amici curiae* submissions is the only one that brings a novel line of argumentation in this discussion on whether ICC Member States have the duty to cooperate with the Court by arresting and surrendering Omar Al Bashir. There is only one *amicus* using this reasoning, which is Professor Andreas Zimmermann. From the outset, Professor Zimmermann framed the matter as a sensitive issue with a divergence of views among the international community, the lack of further action by the UNSC beyond the referral being the evidence of it, and its implications "extend far beyond the case at hand."[1224] He contended that once UNSC Resolution 1593 (2005) imposes upon Sudan a duty to cooperate fully with the Court, Sudan is bound by the obligation, by virtue of article 25 of the UN Charter, to execute the arrest warrants issued by the Court.[1225] This violation by Sudan of the obligations vis-à-vis the ICC has "the further effect that any head of State immunity, which otherwise *might* protect Omar Al-Bashir against his arrest and surrender by third States […] cannot be invoked by Sudan for its benefit, for

[1221] *Ibid*., para. 14.
[1222] *Ibid*., para. 18.
[1223] *Ibid*., paras. 18 et seq.
[1224] ZIMMERMANN, Andreas, **Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence on the Merits of the Legal Questions presented in the Hashemite Kingdom of Jordan's Appeal against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir of 12 March 2018**, The Hague: International Criminal Court (ICC), 2018, para. 4.
[1225] *Ibid*., paras. 7 et seq.

such invocation would constitute an *abuse of rights*."[1226] Therefore, Zimmermann held that the AC does not need to take a position in regards to the obligation of third States to arrest and surrender Al Bashir to the Court, for the very situation of *abuse of rights* that Sudan has created by not complying with its UNSC established obligation to fully cooperate with the Court put it in a position of losing the right to have its head of State immunity respected by third States.[1227]

Lastly, the fourth cluster of arguments reasoned that Sudan is entitled to claim immunities for its incumbent Head of State. Professor Paola Gaeta posited that Sudan is not a State Party to the Rome Statute, which makes it not bound by the provisions contained therein. For her, the argumentation that ties the obligation to arrest and surrender Al Bashir with the UNSC Resolution is a dangerous move and not a convincing line of reasoning. This position departs from the notion that the UNSC referral "*constitutes the source* of the jurisdiction of the Court on that situation absent the requirements set forth in Article 12 of the Rome Statute."[1228] It results in two regimens: one for the States Parties of the Statute and other for situations over which jurisdiction was given by the UNSC, making the latter "the 'master' of the jurisdiction" of the ICC.[1229] And this possibility opens the risk that the ICC appears ready to serve political goals of the Council. Professor Gaeta contends that the UNSC referral removes the pre-conditions on the exercise of jurisdiction by the ICC but is not the basis of that jurisdiction. Consequently, "Sudan's position vis-à-vis the Rome Statute is not actually altered by the Security Council referral that triggered the Court's jurisdiction."[1230] Instead of imposed by the UNSC on Non-States Parties, the ICC jurisdiction over the referred situation is grounded on the Rome Statute. The jurisdiction has to stem from the Statute, otherwise it would open the Court for the situation that the UNSC is able to limit the ICC's scope of jurisdiction. Accordingly, it cannot be argued that the Resolution makes the enforcement of the arrest warrants against Al Bashir lawful without the

[1226] *Ibid*., para. 12.
[1227] *Ibid*., paras. 12 et seq.
[1228] GAETA, Paola, **Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the 'Decision under Article 87 (7) of the Rome Statute on the non- compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir' of 12 March 2018**, The Hague: International Criminal Court (ICC), 2018, p. 4–5 [highlighted in original].
[1229] *Ibid*., p. 5.
[1230] *Ibid*., p. 6.

waiver of his immunities from Sudan. Matters of judicial cooperation have to follow the framework established by the Rome Statute, which includes article 98(1).[1231] She further posits that the very idea that the UNSC Resolution removed Al Bashir's immunities contradicts the text of article 98(1) of the Statute, "which allows only the relevant 'third state'—not other entities—to waive immunities."[1232] Article 98(1) is not about whether the Non-State Party in question is obliged to cooperate with the Court. It concerns the cooperation from such State to waive immunities. The imposition to Sudan by the UNSC of an obligation to cooperate with the ICC does not make the Court exempt from following the requirement of judicial cooperation imposed by article 98(1). Contrariwise would mean a modification by the UNSC referral of the Court's powers. Article 98(1) states that the Court has to first obtain the cooperation of the third State for the waiver of immunities.[1233] Professor Gaeta also contends that, even though the Rome Statute cannot be applied to Sudan in the condition of treaty law, inasmuch as Sudan is a State not party to the Statute, treaty rules that have gained the character of customary international law may be applied. Article 27(2) of the Rome Statute has gained the nature of customary international law. That being the case, Al Bashir's immunities do not constitute a bar to the exercise of jurisdiction against him. However, Gaeta's position differs from that of the first cluster of arguments in that, for her, the scope of application of article 27(2) is more narrow. The removal of Al Bashir's immunities before the Court by customary international law would not be extended to the matter of judicial cooperation. There is a clear distinction to be made between the jurisdiction to adjudicate and the jurisdiction to enforce. Article 27(2) is related to the former and, consequently, is not extended to the triangular relationship between the requested State Party and the Non-State Party.[1234] In matters of judicial cooperation of the Al Bashir Case, the relevant provision of the Statute is still article 98(1), which prevents the Court from obliging a State Party to execute an arrest warrant against Al Bashir without a waiver of immunities from Sudan.[1235] Professor Gaeta claimed that the very wording of article 98(1) supports this interpretation,

[1231] *Ibid*., p. 8–9.
[1232] *Ibid*., p. 7.
[1233] *Ibid*., p. 7–8.
[1234] *Ibid*., p. 10.
[1235] *Ibid*., p. 9–10.

since it posits that "this provision can only be disregarded if it is proven that has been derogated by the subsequent practice of State parties or has fallen into desuetude" and the practice of some States Parties to the Rome Statute have clearly indicated that this is not the case.[1236]

Similar to the argument developed by Gaeta, Professor Roger O'Keefe argued that because of article 98(1) of the Rome Statute, the ICC can only proceed with a request for the arrest and surrender of an individual whose State has waived their immunities. But he differs in that he contended that "no exception [under customary international law] exists in respect of allegation of international crimes" for the customary international law which accords immunity *ratione personae* to the Head of State.[1237] Article 98(1) is the applicable provision for this case, since it was "designed to obviate the possibility that a State Party, on receipt of a request from the Court, might be required to arrest and surrender to the Court a person of a non-party State in violation of the immunity from which the non-party State is entitled," barring the Court from proceeding with a request which would require the requested State Party to act inconsistently with its obligations under international law.[1238] The only scenario in which such request would be able to proceed is if the non-party State waived such immunities.[1239] In that sense, Professor O'Keefe posited that, in requesting Jordan to arrest and surrender Al Bashir to the ICC, the Chamber acted contrary to article 98(1) and, consequently, "exceeded its powers under the Statute," which renders the Court's request not only invalid, but void *ab initio*.[1240] Accordingly, the Chamber erred in finding the Jordan failed to comply and the request did not create any legal obligation for Jordan.[1241]

One *amicus curiae* submission was not grouped in these four clusters of arguments. Professor Michael A. Newton only engaged with the third ground of appeal. His submission sought to question whether the referral to the UNSC and the

[1236] *Ibid*., p. 10.
[1237] O'KEEFE, Roger, **Observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"' of 12 March 2018 (ICC-02/05-01/09-326)**, The Hague: International Criminal Court (ICC), 2018, para. 2.
[1238] *Ibid*., para. 8.
[1239] *Ibid*., para. 9.
[1240] *Ibid*., para. 2.
[1241] *Ibid*., para. 2.

ASP would make a difference using a research of Omar Al Bashir's travels to States Parties. Based on compiled data from 2009 to 2017, Professor Newton asserted that "when comparing the dates on which the ICC Pre-Trial Chamber has referred to the UNSC and ASP with President Al-Bashir's travels, referrals have made no appreciable difference."[1242] His conclusion was that the referral did not have a substantial impact on Al Bashir's subsequent travels.[1243]

The submission by the African Union, constructed by Ambassador Namira Negm and Professors Charles Jalloh and Dire Tladi, defended that neither UNSC Resolution 1593 (2005) or the 1948 Genocide Convention are able to waive Al Bashir's immunity. Consequently, the Sudanese Head of State's immunities are maintained both before the Court and third States, which means that under article 98 of the Rome Statute, Al Bashir's immunities pursuant to customary international law prevail. Their submission sustains, therefore, that Jordan had no duty to cooperate with the Court and the PTC majority erred in its interpretation of the applicable law.[1244] Meanwhile, the League of Arab States observations focused on the issue of immunities under the Pact of the League of Arab States and the Convention on the Privileges and Immunities of the League of Arab States. The submission agreed with the arguments presented by Jordan in its appeal and considered that all three grounds should be granted.[1245]

As to the denied *amici curiae* requests, there were two that defended that Al Bashir was not entitled to immunities because of UNSC Resolution 1593 (2005) and three submissions that substantiated Jordan's appeal. Professor Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC) held that, since a request from the ICC "is asking the state to *arrest* and not *to prosecute*" and

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[1242] NEWTON, Michael A., **Observations on the Merits of the Legal Questions Presented in the Appeal of The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir'"**, The Hague: International Criminal Court (ICC), 2018, para. 17.

[1243] *Ibid*., para. 17.

[1244] AFRICAN UNION COMMISSION, **The African Union's Submission in the "Hashemite Kingdom of Jordan's Appeal Against the 'Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jordan with the Request by the Court for the Arrest and Surrender [of] Omar Al-Bashir**, The Hague: International Criminal Court (ICC), 2018, para. 83.

[1245] LEAGUE OF ARAB STATES, **The League of Arab States' Observations on the Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non- compliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"**, The Hague: International Criminal Court (ICC), 2018, para. 45.

immunity *ratione materiae* only shields a Head of State from criminal prosecution in the domestic courts of another State, the requested State is not in violation of its obligations if it arrests "an individual and remove that person to another entity, such as the Court."[1246] Professor Meyersfeld and the SALC further pointed that "the referral would be an empty imprimatur if it did not also empower the Court to request its States Parties to arrest and surrender Al-Bashir notwithstanding his office." [1247] Even though the Resolution did not lift Al Bashir's immunities expressly, it is enough for the UNSC to order Sudan to cooperate.[1248] Professors Philippa Webb and Ben Juratowitch are of a similar mind, contending that, even though jurisdiction must be exercised in accordance with the Rome Statute, the UNSC referral do not apply the entire Statute to any State that is not party to it. The obligation to cooperate fully set out in paragraph 2 of Resolution 1593 (2005) attracts the application of the content of article 27 of the Statute to Sudan. As Jordan and Sudan are bound by article 25 of the UN Charter, they must accept Sudan's obligation to cooperate with the Court, which includes the application of article 27 of the Rome Statute.[1249] Professors Webb and Juratowitch further defend that, even if this were not the case, Sudan and Jordan would be obliged to comply with the ICC's arrest warrants against Al Bashir once both are parties to the 1948 Genocide Convention, which "requires punishment of persons committing genocide irrespective of 'whether they are constitutionally responsible rulers.'"[1250] For them, in any case, Jordan would not be entitled to argue that the Court's request contravened article 98 of the Statute.[1251]

Arguing in defence of Jordan's appeal, Professors Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst argued that, if the UNSC decided to remove Al

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[1246] MEYERSFELD, Bonita; SOUTHERN AFRICA LITIGATION CENTRE (SALC), **Request by Professor Bonita Meyersfeld and the Southern Africa Litigation Centre (SALC) for leave to submit observations on the merits of the legal questions in: The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87 (7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and Surrender [of] Omar Al-Bashir" lodged on 12 March 2018**, The Hague: International Criminal Court (ICC), 2018, para. 9.
[1247] *Ibid*., para. 10.
[1248] *Ibid*., para. 12.
[1249] WEBB, Philippa; JURATOWITCH, Ben, **Expression of interest to make submissions as amicus curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)**, The Hague: International Criminal Court (ICC), 2018, paras. 3 et seq.
[1250] *Ibid*., para. 8.
[1251] *Ibid*., para. 11.

Bashir's immunities, it would have to do so expressly. The only effect of Resolution 1593 (2005) ordering Sudan to cooperate fully is creating for Sudan the obligation to surrender any individual requested by the Court or waive this person's immunities in a way to enable a third State to do so.[1252] Professors du Plessis, Nouwen and Wilmshurst are of the opinion that if the ICC proceeds with the request to arrest and surrender Al Bashir, the States Parties would be in a position of conflicting obligations, that under the Statute to each other and the Court and that under customary international law to States not parties. Considering the text of article 98(1) of the Rome Statute, such request would mean that the Court was exercising a power outside the ones contained in the Statute.[1253] Also defending that Jordan was under no legal obligation to arrest Al Bashir, Professor Asad Kiyani affirmed that there was no exception to the customary international law of immunities because a Head of State is accused of international crimes.[1254] Since the Court had not obtained a waiver of immunities from Sudan, customary international law obligated Jordan to accord Al Bashir immunity. He further posited that the request for Jordan's cooperation issued by Court was *ultra vires* because it violated article 98(1).[1255] Professor Dov Jacobs posited that the language of article 98 is not a *right for States* with an existing international obligation can invoke not to comply with a request made by the Court. Contrariwise, it creates an *obligation for the ICC* not to proceed with any request that would require a State to act inconsistently with its international obligations.[1256] This means that the analysis that should be carried out is not whether Jordan was in violation of an obligation to cooperate with the Court, but whether the Court acted in violation of article 98 with its request for the

[1252] DU PLESSIS, Max; NOUWEN, Sarah; WILMSHURST, Elizabeth, **Request by Max du Plessis, Sarah Nouwen and Elizabeth Wilmshurst for leave to submit observations on the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non- compliance by Jordan with the request by the Court for the arrest and surrender o[f] Omar Al-Bashir"' of 12 March 2018 (ICC-02/05-01/09-326) in accordance with the Order of the Appeals Chamber dated 29 March 2018 (ICC-02/05-01/09 OA2)**, The Hague: International Criminal Court (ICC), 2018, paras. 6 and 7.
[1253] *Ibid*., para. 8.
[1254] KIYANI, Asad, **Request by Dr. Kiyani for Leave to Submit Observations**, The Hague: International Criminal Court (ICC), 2018, para. 4.
[1255] *Ibid*., para. 5.
[1256] JACOBS, Dov, **Request for leave to submit an Amicus Curiae brief in the proceedings relating to The Hashemite Kingdom of Jordan's appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender" of Omar Al-Bashir issued on the 11 December 2017 (ICC-02/05-01/09-309)**, The Hague: International Criminal Court (ICC), 2018, para. 3.

arrest and surrender of Omar Al Bashir, considering that such action would require the requested State to act inconsistently with its obligations under international law.[1257] Professor Jacobs further sustains that, from the perspective of the Rome Statute, there is nothing that creates the notion that a referral is able to automatically remove any immunity since there is no provision under the Statute to that effect.[1258] Neither there is any provision that posits that the cooperation obligation under paragraph 2 of Resolution 1593 (2005) is under the Rome Statute. If Sudan does not cooperate with the Court, it is not acting in violation of the Statute but possibly in violation of the UN Charter, which is not under the ICC's authority to rule upon.[1259] Professor Jacobs concluded that, in relation to Jordan, AL Bashir "would still benefit from immunity *ratione personae* under general international law until such time as Sudan waives it."[1260]

After the *amici curiae* submissions were received by the Court and both the OTP and the Jordanian authorities had the opportunity to respond to the observations, the AC extended the hearings to five days to take place in September 2018.[1261] The Chamber invited the parties and the *amici curiae* to address certain questions in the hearing that related to: (1) the applicable law and its interpretation and Head of State immunity under customary international law; (2) UNSC referrals under article 13(b) of the Rome Statute and Resolution 1593 (2005); and (3) articles 86, 87(7), 97 and 98(2) of the Rome Statute.[1262]

> The result was dozens of legal opinions and a week of spectacular hearings, streamed online, in which in addition to the strong teams representing Jordan, the African Union, and the League of Arab States, 16 law professors, including the crème de la crème of the field, gave their (widely diverging) views on the questions presented to them.[1263]

[1257] *Ibid*., para. 4.
[1258] *Ibid*., para. 10.
[1259] *Ibid*., para. 13.
[1260] *Ibid*., para. 16.
[1261] APPEALS CHAMBER, **Revised order on the conduct of the hearing before the Appeals Chamber in the Jordan Referral re Al-Bashir Appeal**, The Hague: International Criminal Court (ICC), 2018, para. 1.
[1262] APPEALS CHAMBER, **Order on the conduct of the hearing before the Appeals Chamber in the Jordan Referral re Al-Bashir Appeal**, The Hague: International Criminal Court (ICC), 2018.
[1263] NOUWEN, Sarah M.H., RETURN TO SENDER: LET THE INTERNATIONAL COURT OF JUSTICE JUSTIFY OR QUALIFY INTERNATIONAL-CRIMINAL-COURT

On 6 May 2019, the AC, under Judges Chile Eboe-Osuji, Howard Morrison, Piotr Hofmański, Luz del Carmen Ibáñez Carranza and Solomy Balungi Bossa, delivered its decision on Jordan's appeal. Through a line of reasoning that surprised many observers of the Court, the AC gave its final statement on the issue of Jordan's non-compliance with the ICC's arrest warrants by returning to the arguments sustained in the Malawi and DRC non-compliance decisions. The Chamber was unanimous in asserting that "Jordan had failed to comply with its obligations under the Statute by not executing the Court's request for the arrest of Mr Al-Bashir and his surrender to the Court while he was on Jordanian territory."[1264] The AC further found, with Judge Ibáñez and Judge Bossa dissenting, that the PTC II "erroneously exercised its discretion" to refer Jordan to the ASP and the UNSC and decided to reverse that part of the PTC II's appealed decision.[1265] On the matter of the position of Sudan before the ICC, the Chamber considered that UN Security Council Resolution left the country in an analogous condition to that of a state party,[1266] sticking to the idea of the horizontal effect of the Security Council referral and dropping the argument of the implicit waiver of immunity. The AC concluded that "[t]here is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court." The Chamber affirmed that there never existed a customary international law that established that such immunities would serve as an impediment to the exercise of jurisdiction of an international court. [1267] Furthermore, the AC added that this finding also serves the purpose of covering the horizontal relationship between states when the request to arrest and surrender is made by an international court,[1268] which leaves no margin for interpreting Article 27(2) in a way that allows a state party to invoke immunities "in the horizontal

EXCEPTIONALISM REGARDING PERSONAL IMMUNITIES, **The Cambridge Law Journal**, v. 78, n. 3, p. 596–611, 2019, p. 603–604.

The footage of the hearings is available on the ICC's YouTube page: https://www.youtube.com/c/intlcriminalcourt/videos

[1264] APPEALS CHAMBER, **Judgment in the Jordan Referral re Al-Bashir Appeal**, para. 215.

[1265] *Ibid*., para. 2.

[1266] MUDUKUTI, Angela, Prosecutor v. Omar Hassan Ahmad Al-Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, **American Journal of International Law**, v. 114, n. 1, p. 103–109, 2020, p. 105.

[1267] APPEALS CHAMBER, **Judgment in the Jordan Referral re Al-Bashir Appeal**, para. 1.

[1268] *Ibid*., para. 2.

relationship if the Court were to ask for the arrest and surrender of the Head of State by making a request to that effect to another State Party."[1269]

Judge Ibáñez and Judge Bossa appended a partly dissenting opinion. The Judges disagreed with the finding that the PTC II abused its discretion when it decided to refer Jordan to the ASP and the UNSC under article 87(7) of the Statute. The Judges claimed to be convinced that the PTC "did not err when it referred Jordan to the ASP and the UNSC because of the State's failure to comply with the request to cooperate in the arrest and surrender of Mr Al-Bashir."[1270] Judges Ibáñez and Bossa list three reasons for their disagreement: Jordan "effectively frustrated the objectives of the warrants of arrest" and thus prevented the Court from exercising its functions and powers; the PTC had "ample, objective factual and legal reasons pursuant to the clear terms of article 87(7) of the Statute"; and other important factual and legal reasons warranted a referral of Jordan's failure to cooperate with the Court.[1271] The Judges claimed that the referral to the UNSC and ASP would be a "call for action," not only for Jordan, but also for the members of the ASP and the international community "with the aim of fostering cooperation with the Court and enabling the effective realization of the high values and objectives enshrined in the Rome Statute."[1272] In addition to Judges Ibáñez and Bossa's partly dissenting opinion, Judge Eboe-Osuji, Judge Morrison, Judge Hofmański and Judge Bossa appended to the AC judgment a joint concurring opinion. The Judges contended that the importance and circumstance of the matter asked for a further analysis that would further substantiate the "correctness of the Appeals Chamber's judgment on that subject." [1273] In that sense, the Joint Concurrent Opinion is a 190-page document that further scrutinizes the line of reasoning adopted by the AC to arrive at its conclusion that Jordan had failed with its obligations with the Court by not arresting and surrendering Omar Al Bashir.

[1269] *Ibid*., para. 4.
[1270] APPEALS CHAMBER, **Joint Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza and Judge Solomy Balungi Bossa**, The Hague: International Criminal Court (ICC), 2019, p. 4.
[1271] *Ibid*.
[1272] *Ibid*., p. 5.
[1273] APPEALS CHAMBER, **Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa**, The Hague: International Criminal Court (ICC), 2019, para. 1.

Regardless of the very open approach of receiving outside submissions to improve the debate and help in finding a solution for the matter at hand before reaching a decision, the AC ruling faced severe criticism for repeating the previous position of the PTC I,[1274] for continuously dismissing member states' arguments, and, mostly, for its somewhat incoherent treatment of customary international law.[1275]

In the days following the AC's ruling on Jordan's non-compliance. Given the amount of scrutiny and disapproving comments regarding this decision, it was posted on the ICC's website a Q&A on the AC's 6 May 2019 Judgement that besides repeating the Chamber's arguments (and making a confusion regarding some points while doing so), launches an attack on the critics of the "blogosphere," which we might add is a group composed by some of the most esteemed international criminal law professors.[1276] The text read:

> In the era of social media, it is hoped that observers would properly study the Court's judgments and decisions before rushing to comment on them. Hastily made comments, particularly when made before the commentator has even read the judgment in question, will fail to appreciate the totality and nuances of the Court's reasoning, and may wholly misrepresent the decision or judgment. At the same time, those first comments appearing on social media frequently tend to dominate the ensuing discussion as they are tweeted and retweeted, regardless of their accuracy.
> Lawyers engaging in public commentary should exercise particular caution and remain mindful of the cardinal principles that guide the conduct of lawyers, including that of honesty, integrity and fairness. This principle adequately covers the need to be fair when criticising courts and judges. Notably, the rules of professional ethics in most legal systems impose special caution on criticism of judges and courts, not because it is wrong to criticise them, but because they are generally not in a position to respond to specific criticisms. It does not mean that judges and courts

[1274] For the critiques on the AC's decision of 6 May 2019, see AKANDE, Dapo, **ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals**, EJIL: Talk!. Available at: <https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/>. Accessed: 19 oct. 2020; JACOBS, Dov, **You have just entered Narnia: ICC Appeals Chamber adopts the worst possible solution on immunities in the Bashir case**, Spreading the Jam. Available at: <https://dovjacobs.com/2019/05/06/you-have-just-entered-narnia-icc-appeals-chamber-adopts-the-worst-possible-solution-on-immunities-in-the-bashir-case/>. Accessed: 19 oct. 2020; BATROS, Ben, **A Confusing ICC Appeals Judgment on Head of State Immunity**, Just Security. Available at: <https://www.justsecurity.org/63962/a-confusing-icc-appeals-judgment-on-head-of-state-immunity/>. Accessed: 19 oct. 2020.

[1275] KJELDGAARD-PEDERSEN, Is the Quality of the ICC's Legal Reasoning an Obstacle to Its Ability to Deter International Crimes?, p. 944.

[1276] In its discussion, the Q&A comes back to the argument that the ICJ's *Arrest Warrant Case* is a defining pronouncement on the inexistence of immunities before international criminal courts. An interpretation that has been repeatedly reaffirmed by scholars in the field to be misleading. On these confusions furthered by the Q&A, see NOUWEN, RETURN TO SENDER, p. 609.

> may not be criticised. It only means that they be criticised fairly. There is an ethical obligation to reflect facts and circumstances accurately and fairly. It is not enough to engage in convenient repeat of the commentaries of others, who may not have been fair to begin with.[1277]

This very defensive reaction of the Court in this anonymous Q&A further opened the vault to criticism regarding the posture of the Court. Commentators contended that the Court was seeing itself as the authority into what counts as good criticism. It was also pointed that there is a "lack of self-reflection" by the Court "coupled with a disdain for those who disagreed with the decision," phrasing it in a way that almost stated that whoever did not agree with the decision did so because of lack of understanding of the matter.[1278]

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[1277] **Question and Answers - Q&A REGARDING APPEALS CHAMBER'S 6 MAY 2019 JUDGMENT IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL**, International Criminal Court (ICC). Available at: <https://www.icc-cpi.int/itemsDocuments/190515-al-bashir-qa-eng.pdf>.

[1278] JACOBS, Dov, **Q&A regarding the "Q&A REGARDING APPEALS CHAMBER'S 6 MAY 2019 JUDGMENT IN THE JORDAN REFERRAL RE AL-BASHIR APPEAL"**, Spreading the Jam. Available at: <https://dovjacobs.com/2019/05/17/qa-regarding-the-qa-regarding-appeals-chambers-6-may-2019-judgment-in-the-jordan-referral-re-al-bashir-appeal/>. Accessed: 19 oct. 2020.

5.
The many (in)justices of international (criminal) law: the politics of the Al Bashir Case

The process of Jordan's appeal to the non-compliance decision issued by the PTC II explored in Interlude No. 5 carries a lot of meaning in relation to the practice of international law. The event, despite not a part of the African contestation in relation to the Al Bashir Case, not only represented the culmination inside the courtroom of the dispute in relation to the matter of Al Bashir's immunity, but also captured many of the problems that were brought to light in the impasse between Court and African States. The biggest novelty of Jordan's appeal process was the gesture of the AC of inviting legal scholars, States, and regional organisations to participate as *amici curiae* in the proceedings. Inviting international legal scholars to submit amicus curiae briefs to assist the Chambers in reaching a decision was a common practice in the *ad hoc* tribunals. Some scholars and practitioners have understood this move by the Court as an attempt to improve its credibility and legitimacy.[1279] This was "the first time the ICC invited on its initiative so many amicus curiae submissions by legal scholars," a gesture that was very welcome for marking a new chapter in the saga of the Al Bashir Case.[1280] It symbolised an effort by the Court of taking the position of the African States (now also joined by Jordan) seriously and actually reaching out to international criminal law scholars and interested States as to draw the legal conundrum to a close that not only satisfies the Court but all the parties involved. As soon as the process started, however, the inequalities of the practice of international (criminal) law began to come into sight. The order that invited the participation as *amici curiae* only allowed to request leave to submit observations to the three categories of actors: professors of international law; interested States; and named regional and international organisations, the AU, the League of Arab States, the Organization of American States, the European Union, and the UN. The Chamber excluded the possibility of having NGOs and other international actors participating in the proceedings.[1281] Further excluded, as

[1279] MAO, The Function of Amicus Curiae Participation by Legal Scholars, p. 396.
[1280] *Ibid*., p. 393–394.
[1281] APPEALS CHAMBER, **Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)**.

the response to the requests of leave to submit observations demonstrated, were associate and assistant professors of international law, as the AC's narrow interpretation of what entailed the invitation to professors of international law only included full professors.[1282] The most problematic representational aspect was the geographical distribution of the submissions. All 11 *amici curiae* briefs came from professors based at institutions in the global north.[1283] Amongst the denied requests for leave there was one professor from a university located in global south.[1284] The lack of regard in relation to which voices are represented in the debate demonstrates an "unapologetic deference to the traditional sources of international political power" in the practice of the ICC.[1285]

> The silencing of subjects and forms of knowledge reflects an inherent problem in the international legal order, which is "international law's own colonial entanglement." International law is treated under the false pretense of universalism, which consequently denies any recollection of the epistemic, structural and physical forms of violence that soil its history and present. This claim of universalism conceals the order of knowledge that sustains the international legal order. It renders law independent from its epistemological foundations without questioning its politics of knowledge. However, the very indication that a norm "has culturally specific and historically contingent foundations provides [a] good reason to doubt its

[1282] APPEALS CHAMBER, **Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, the request for leave to reply and further processes in the appeal**.

[1283] (1) Annalisa Ciampi, Verona University, Italy; (2) Paola Gaeta, Graduate Institute of International and Development Studies, Switzerland; (3) Yolanda Gamarra, University of Zaragoza, Spain; (4) Claus Kreß, University of Cologne, Germany; (5) Flavia Lattanzi, LUISS Guido Carli University, Italy; (6) Konstantinos D. Magliveras, University of the Aegean, Greece; (7) Michael A. Newton, Vanderbilt Law School, USA; (8) Roger O'Keefe, University College London, UK; (9) Darryl Robinson, Queen's University, Canada; Robert Cryer, Birmingham Law School, UK; Margaret deGuzman, Temple University's Beasley School of Law, USA; Fannie Lafontaine, Université Laval, Canada; Valerie Oosterveld, Western University, Faculty of Law, Canada; Carsten Stahn, Leiden University, Netherlands; (10) Nicholas Tsagourias, University of Sheffield, UK; (11) Andreas Zimmermann, University of Potsdam, Germany.

[1284] Max du Plessis, Associate Fellow at Chatham House, UK; Sarah Nouwen, Senior Lecturer in Law at the University of Cambridge, UK; Ms Elizabeth Wilmshurst, Distinguished Fellow at Chatham House, UK; Dov Jacobs, Assistant Professor, Leiden University; Asad Kiyani, Assistant Professor, University of Victoria, Canada; Bonita Meyersfeld, Associate Professor, University of Witwatersrand, South Africa; Philippa Webb, Associate Professor, King's College London, UK; Ben Juratowitch, Lecturer, University of Paris V; Sergey Michail Vagias (excluded from Tsagourias' submission), Senior Lecturer, The Hague University of Applied Sciences, Netherlands; Vasiliev (excluded from Robinson et al's submission), Assistant Professor, Leiden University, Netherlands; Oliver Windridge (excluded from Newton's submission), director of the Mapping Bashir research Project.

[1285] KIYANI, Asad, **Afghanistan & the Surrender of International Criminal Justice**, TWAILR: Reflections #10/2019. Available at: <https://twailr.com/afghanistan-the-surrender-of-international-criminal-justice/>. Accessed: 7 jan. 2021.

> universality." The result is an international legal order that presents itself as universal but defers to particular voices.[1286]

The absence of voices in the Jordan's appeal process can be understood through two layers. The first is the exclusion of NGOs and scholars that are not from the field of international law, which conveys the Court's legalist bias as the previous chapter explored, for the question to be answered by the *amici* was 'purely' legal. The second and most striking is the absenteeism of scholars from the global south, in particular from Africa, which did not even request their leave to submit. Such absence says a lot about the way the Court is already seen. The ICC's "universality is a figment that conceals the many injustices at play."[1287]

Throughout the examination of the argumentative practices of States and Court the reference to an idea of justice and the particular forms to attain it was a constant presence in those vocabularies. "[J]ustice is both the most abstract and obscure and also the most important" of languages in international legal practice.[1288] As to draw the analysis of this thesis to a close, this chapter, through the exploration of the meanings of justice that is being defended by the different parties in the process of contestation of the Al Bashir Case, investigates the kind of international legal order that is being defended in these argumentative practices. In order to do so, this chapter makes the analysis in two parts. The first works through this idea that, even though justice is an open concept, it still is an important element to the examination of international legal practices. Most practices of international law tend to justify their choices in the name of justice. In that sense, this first section of the chapter is dedicated to an assessment of the ideals in regard to doing international justice that are involved in each position concerning Head of State immunity. It evaluates the way international justice is constructed as either achieving accountability or as guaranteeing the equality of international political entities. While the former is justified in universalist and utopic terms, the latter is

[1286] GIANNINI, Luisa, Non-protection in the Name of International Law: The Principle of Self-Determination and the Situation in Palestine at the International Criminal Court, **The Palestine Yearbook of International Law**, v. 23, 2022, forthcoming.
[1287] *Ibid*.
[1288] KOSKENNIEMI, Martti, Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and Then Some, *in*: HANDMAKER, Jeff; ARTS, Karin (Eds.), **Mobilising International Law for "Global Justice"**, Cambridge; New York: Cambridge University Press, 2018, p. 22.

based on a need for a recognition of the States' condition as a postcolonial autonomous entity. This section is closed by a reflection of what these readings means for the practice of international justice. It analyses in particular the fact that both sides find in the Rome Statute reaching a state of universality the solution to the injustices they fight. The second part of the chapter contemplates what the practices analysed in throughout the thesis means for the more fundamental dimension of international practice. It examines the meanings that are veiled within the categories of international (criminal) law used throughout the Al Bashir Case in response to the African contestation. It further examines the way these meanings are sustaining the inequalities of the international legal order through practices of normalisation. It further argues that, in the Al Bashir Case, the irrelevance of the customary international law of Head of State immunity was coerced into the practices of African States. Lastly, this section addresses the question that was the main driver of this thesis reflecting on whether the practices of contestation of African States are accounted for in international (criminal) law.

5.1. Doing justice to immunities: the never-ending saga of sovereignty versus human rights

> While superficially sometimes portrayed as a battle of law versus dirty politics, the question of the limits of immunity is more about a prioritisation of values within international law. Head of State immunity has traditionally been considered to protect at least two fundamental values in public international law: initially primarily the equality of states (also the rationale for state immunity) and later on more the importance of ensuring the effective performance of the head of state's functions (in its pragmatism more akin to the rationale for diplomatic immunity). The ascendance of international criminal law has represented the rise of another value in international law: criminal accountability for crimes under international law.[1289]

The positions in the dispute over the (in)applicability of Head of State immunity, highlighted in the passage above and present throughout the story of the Al Bashir Case accounted in the Interludes of this thesis, are about a choice. The parties formulate their positions in relation to this matter by privileging certain values over

[1289] NOUWEN, RETURN TO SENDER, p. 610.

others. In this sense, there is not correct or incontestable position. Once a stance is chosen, the actors evoke a series of principles that emphasise where they stand. In relation to the Al Bashir Case, on one side, there is the Court privileging the values of accountability, universal human rights, and justice. On the other side, certain African States speak about the principles of sovereign equality, peace, and justice. Regardless of the position chosen by each actor, it is interesting to note that there is one common value that is present on every argumentation, the ideal of justice. Doing justice to the situation for each one of these entities represents a different practice of international law. In this section, these different understandings of the meaning of international justice are explored as to allow us to grasp the way these notions are related to and privileged by the international legal system.

5.1.1.
International justice as the universal promotion of human rights

In the narratives of the ICC officials, the idea of justice is always associated with the notion of accountability. The very way scholars and practitioners use interchangeably the names international criminal law and international criminal justice demonstrate how the idea of applying international legal standards and doing justice has been amalgamated into only one thing. In that sense, justice is realized through the establishment of a global rule of law which is "founded on the universal promotion and protection of human rights."[1290]

As argued in the previous chapter, the argumentative practices of the ICC's authorities demonstrate that its values are rooted on a legalist utopian view of international legal practice. International lawyers by guaranteeing that international law remains steadfast not bending to the pressure of States' policies. This amounts to doing justice because the practice of international law would be the only way of speaking truth to power. International law would constrain State power for it is exogenous to States' interests. The ICC officials' narratives on the purposes of the

[1290] KERSTEN, Mark, A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court, *in*: HANDMAKER, Jeff; ARTS, Karin (Eds.), **Mobilising International Law for "Global Justice"**, Cambridge; New York: Cambridge University Press, 2018, p. 143.

Court rely on a clear dichotomisation between normative ideas crystallised in international norms and political interests, prioritising the latter in relation to the former.

For international legal practice to be just, it must have a degree of autonomy in relation to State's interests. In that sense, this is an approach to justice that aims to displace sovereign power as the "primary moral referent of international politics and replace it with the rights-bearing individual."[1291] International law should not arise out of State's behaviour but "from the legal subjects themselves."[1292] This utopian idea of international law is rooted on the ideal of the individual as key moral actor in international law. This notion at the ICC unfolded in two ways. One is individual criminal responsibility, through which those individuals "bearing the greatest responsibility for war crimes, crimes against humanity, and genocide" are held accountable, defining, in this sense, guilt in individual terms.[1293] The other way of emphasising the role of the individual in international (criminal) law is through the idea that the ICC is a victim centred Court, which takes place through the participation of the victims in the international criminal proceedings. The latter feature of international criminal law's focus on the individual has been a key component of the articulation of its work and the realisation of international justice. By not supporting the work of the international criminal courts, any entity is automatically considered as siding with impunity, which, consequently, means neither allowing justice to reign nor doing right by the victims. One example is the speech of Fatou Bensouda at the 2017 ASP meeting in which the ICC Prosecutor, addressing the non-compliances, affirmed that these types of activities could not become business as usual "out of respect for the suffering of victims and their yearning for accountability, and greater enforcement of international justice."[1294]

The constitution of the ICC represented the ultimate realization of the utopian legalist idea of a universalist institution which promotes an international public order based on the rule of law, even though some might argue that many features of the Court's framework do not corroborate such idea. Nevertheless, through a

[1291] *Ibid*.
[1292] KOSKENNIEMI, **From Apology to Utopia: The Structure of International Legal Argument**, p. 21.
[1293] KERSTEN, A Fatal Attraction? The UN Security Council and the Relationship between R2P and the International Criminal Court, p. 145.
[1294] BENSOUDA, **Address at the First Plenary**, p. 6.

rationale that sees the work of the Court as the epitome of justice, the expansion of its jurisdiction through the ratifications of the Rome Statute and the use of the UNSC trigger mechanism is the way forward to assure that international justice is fulfilled.

5.1.2. International justice as the assurance of sovereign equality

While the ICC authorities advocate for a universal practice of international law based on the promotion of accountability as the realization of international justice, the African States have a different perception of the Court's operations. Although there are particular cases, in general the African bias narrative has risen precisely as a result of the African States' feeling of not being respected.[1295] And especially because it performs "a core function in the attempt to constitute a global community, international criminal law is a field where law and emotion often work in tandem."[1296] The idea of morality in the Courts iterations comes out of the prevalence of the rule of law in detriment of States' interests. However, for most postcolonial States, the way of seeing justice being done is in feeling recognized. Many scholarly portrayals of postcolonial States and their defence of their sovereignty fail to appreciate that "sovereign equality is for weak states a language of morality as well as power."[1297] This means that for these States the promulgation of sovereign equality is not the assurance of political power in the face of justice, but its opposite. "It is a different form of international justice, however, associated not with anti-impunity and individual accountability, but with participation in world affairs, respect for weak states and the absence of 'judicial and political bullying.'"[1298] The matter of sovereign equality was one of the major concerns of African States during the Rome Conference. These States worried that the Court's independence might be compromised by the UNSC involvement, which would give

[1295] BRETT; GISSEL, **Africa and the backlash against international courts**, p. 54; WERNER, Argumentation through Law: An Analysis of Decisions of the African Union, p. 216.
[1296] WERNER, Argumentation through Law: An Analysis of Decisions of the African Union, p. 208.
[1297] BRETT; GISSEL, **Africa and the backlash against international courts**, p. 54.
[1298] *Ibid*.

the five permanent members a possibility for insulating themselves in relation to the Court's exercise of jurisdiction. In their view, a better option would be "empowering the General Assembly to refer situations to the ICC," for it "represented an effort to mould a more egalitarian court."[1299] African States have been the strongest advocates of sovereign equality. The championing for the principle extrapolates the matter of immunities encompassing issues in the most diverse areas.[1300]

In light of such view of international justice, the values propagated by the ICC and many other international institutions are not understood as the moral reference for international practice. Instead, the principles upheld by the Court are reconceived as legal imperialism, neo-colonialism, and Western civilisation. Against such project, these States adhere to vocabularies such as equality, mutual recognition, and non-interference. Sovereignty is a sensitive matter and crucial for the true emancipation of these States. As a result, matters of sovereignty and the rights deriving from this principle become delicate subjects to international legal practice, especially in situations of adjudication. In this sense, debating whether customary international law allows a State Party to the Rome Statute arresting the sitting president of a non-State Party pursuant to a request by the ICC holds more significance than a simple matter of prevailing obligations. Some institutions understand the elements that are at play and prefer to not make a definitive stance on the matter. For example,

> The International Law Commission had around a decade to address the question while developing its draft articles on the immunity of State officials from foreign criminal jurisdiction. It didn't. The question would have then been squarely presented to the Sixth Committee of the United Nations General Assembly for discussion by a wide and representative group of States. It wasn't.
> […] The Security Council had at least a decade to resolve the question. It didn't.
> […] The Assembly of States Parties to the ICC Statute had at least a decade to resolve the question. It didn't.[1301]

[1299] GISSEL, A Different Kind of Court, p. 742.
[1300] See, for example, JALLOH, Charles C., A Classification of the Crimes in the Malabo Protocol, *in*: JALLOH, Charles C.; CLARKE, Kamari M.; NMEHIELLE, Vincent O. (Eds.), **The African Court of Justice and Human and Peoples' Rights in Context**, Cambridge; New York: Cambridge University Press, 2019, p. 245.
[1301] HAQUE, Adil Ahmad, **Head of State Immunity is Too Important for the International Court**, Just Security. Available at: <https://www.justsecurity.org/68801/head-of-state-immunity-is-too-important-for-the-international-court-of-justice/>. Accessed: 20 oct. 2020.

In the meantime, African States have sought to demonstrate their dissatisfaction, frustration, and disappointment with the positions adopted by the ICC officials in the Al Bashir Case through the reaffirmation of their dignity and respect mostly conveyed in the AU Decisions.[1302]

5.1.3.
Doing (in)justice through universality: the ICC and the (blind) politics of race

Many of the African arguments about the Court's bias posit that the ICC's "colonial positionality […] sees Africa as a problem to be solved using western benevolence and intelligence."[1303] Responding to these accusations, the ASP President made some remarks that seems to encapsulate the manner through which the ICC in general has dealt with the criticisms over the Court's, in particular the OTP's, selective politics. The Senegalese Ambassador and President of the ASP claimed not to "hold with theories based on race when it comes to justice," for he does "not believe that justice has a colour," preferring instead to "simply refer to justice" for being "deeply rooted in all human beings."[1304]

Such position says many things about the practice of international criminal law. In the many argumentative practices from the ICC officials examined in Interlude No. 4 and also the discourses of many African States, the solution to the ICC's problems related to the matter of selectivity would be solved through the realization of universality. In other words, the fact that the list of cases and situations under preliminary examinations, investigation, and trial at the ICC only reflect a small number of countries and almost all these situations and cases are third world States is a scenario that could be remedied by the ICC having jurisdiction over all States. In that sense, universal jurisdiction to these Court's and

[1302] Werner dedicates a chapter to analysing the way the AU Decisions express the African States' position while communicating their feelings. See WERNER, Argumentation through Law: An Analysis of Decisions of the African Union.
[1303] BENYERA, **The failure of the international criminal court in Africa: decolonising global justice**, p. 81.
[1304] ASSEMBLY OF STATES PARTIES, **Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records, Volume I: Closing remarks of the President of the Assembly at its 12th plenary meeting, on 26 November 2015**, para. 59.

States' authorities means having a state where all States are equal and, therefore, treated in the same manner.

A good parallel to make sense of this position is with the blindness of justice. The blindfolding of Justitia is a "thwarting of the gaze […] in the service of the disembodiment, disembeddedness, and decontextualization that a legalistic justice based on the reductive equivalence of the exchange principle requires." [1305] Similarly, the ASP President claims not to see colour, which means that he (and the Court) sees and treats every individual alike. The blinding, however, ends up a practice of subsumption, which suppresses the particularities and therefore do not see them when they need to be seen.

> What is needed, [...] is a creative tension between the two, a justice that can temper the rigor of conceptual subsumption, or more precisely, several such subsumptions, with a sensitivity to individual particularity.
> […]
> Perhaps it is best, therefore, to imagine the Goddess Justitia neither as fully sighted nor as blindfolded, but rather […] as a goddess with not one face, but two. The first has eyes that are wide open, able to discern difference, alterity, and non-identity, looking in the direction of the hand that wields her sword, while the second, facing the other hand with the calculating scales of rule-governed impartiality, has eyes that are veiled […]. For only the image of a two-faced deity, a hybrid, monstrous creature which we can in fact see, an allegory that resists subsumption under a general concept, only such an image can do, as it were, justice to the negative, even perhaps aporetic, dialectic that entangles law and justice itself.[1306]

The same goes to the blindness in relation to colour. Colour-blindness is often used as a discourse to justify inaction.[1307] This argumentative practice is frequently the counter argument to accusations of racism, positing that the racial inequalities are caused by the very fragmentation of society into racialized groupings. For the African relationship with the Court, such argumentative strategy purports the notion that African States themselves are causing the racial rift and using it as a tactic to safeguard their leaders, consequently maintaining the culture of impunity. The way forward would be leaving these racial distinctions behind and letting the rule of law govern with impartiality. Such proposition, however, entails the neglect of centuries

[1305] JAY, Martin, Must Justice Be Blind? The Challenge of Images to the Law, **Filozofski vestnik**, v. 17, n. 2, p. 65–81, 1996, p. 72.
[1306] *Ibid*., p. 79–81.
[1307] BONILLA-SILVA, Eduardo, **Racism without racists: color-blind racism and the persistence of racial inequality in the United States**, 2. ed. Lanham: Rowman & Littlefield Publishers, 2006.

of colonial history. The fight of these African States for sovereign equality is a demand for recognition, which involves the acknowledgement of their postcolonial condition. The practices of contestation enacted by African States analysed throughout this thesis convey a message and "address questions that go to the heart of international criminal law, as they concern the constitution of the international society as well as the recognition and dignity of its members."[1308]

Even though law is never able to actually be just, we have to exert a "certain measure of blindness," otherwise "we will have lost not only justice but also law."[1309] This involves accepting "the fact that even the most comprehensive notion of justice contains within it a pluralism of distinct logics that may sometimes be in conflict."[1310] The problem lies in the discourses that purport to realize a universal justice. Every conception of justice is necessarily excluding for by giving voice to certain voices, it diminishes or silences others. The importance of scrutinising these argumentative practices is precisely to grasp the exercises of dominance and resistance that are taking place and the voices that are being marginalised in the process. The next section reflects on the power relations that are exerted in the dynamics of the Al Bashir Case.

5.2.
International legal worldmaking: the subtlety of power in the practices of the ICC

Besides the immediate effects to the limits of legal contestation, the Al Bashir Case also provides a unique insight into the more fundamental dynamics of international law. The politics of the ICC are able to manoeuvre through the potential of international legal practice that "lies in how attractive it is as an invitation to worldmaking."[1311] The practices of the ICC officials analysed in this study emphasise the use of particular vocabularies like the fight against impunity and universal justice. This language not only serves to make sense of the practices

[1308] WERNER, Argumentation through Law: An Analysis of Decisions of the African Union, p. 215.
[1309] Jelica Šumić-Riha, Fictions of Justice, 1994, p. 80 apud JAY, Must Justice Be Blind? The Challenge of Images to the Law, p. 79.
[1310] *Ibid*., p. 78.
[1311] KOSKENNIEMI, Law, Teleology and International Relations, p. 23.

of international actors but also works in the maintenance of certain structures of power. There is a subtle post-colonial treatment of Africa through the categories and politics of international criminal justice that reinforce this structure. In this sense, the way sovereignty is enacted in the practices of the ICC is as much about international justice as it is about international order.[1312] This means that through the analysis of the contestation events of the Al Bashir Case there is also something to be said in relation to the macro logic of (neo)colonial relations.

The colonial treatment afforded to African States is immediately spotted in many of the practices examined in this thesis. One example is the explanation given by the Registrar of the ICC to the necessity of a field office of the Court at the AU headquarters, which was framed in terms of helping African States to better understand that the AU's Constitutive Act is compatible with the Rome Statute. The Court's officials arrogate to themselves the position of explaining to these States that their very own regional charter is reconcilable with the ICC's Statute, which places the authorities of the ICC in the position of the ones who understand better and makes their interpretation of the relationship between documents as the one that should prevail and therefore be reproduced. But practices such as these are only allowed room to take place because there is a set of larger and more fundamental features present in the international legal order. All the elements of international legal practice analysed in the chapters of this thesis – the legalism of international legal practitioners, the structural bias of the field, and the formalisms mobilised by international actors – all "converge at defending the social status quo, a particular order that is not naturally established but socially constructed and legally justified."[1313]

The examination of the meanings veiled in the practice of international (criminal) law is one important element that alongside the investigation of the access to contestation forms the 'principled approach' proposed in the Introduction of this thesis. This section analyses the ways through which the teleology of international (criminal) legal practice, that point towards a *jus gentium* that unites "individuals (and not states) across the globe, giving expression to 'the needs and

[1312] BULL, Hedley, Order vs. Justice in International Society, **Political Studies**, v. 19, n. 3, p. 269–283, 1971.
[1313] BIANCHI, Andrea, Choice and (the Awareness of) its Consequences: The ICJ's "Structural Bias" Strikes Again in the *Marshall Islands* Case, **AJIL Unbound**, v. 111, p. 81–87, 2017.

aspirations of humankind,'" covers forms of international power.[1314] International law is not something that simply exists. Rather, as worked through in Chapter 2, international law is in constant movement. It is, however, not just any movement, it is performed with a direction and purpose. The ends that international legal practice strives for are not only legal but also moral. The ICC "sees its mandate as ending impunity," an ethical commitment to what it perceives as a solution to humankind and "tries to employ whatever argument it can fins to defeat immunity."[1315] The project of the fight against impunity carries with itself an image of what the international realm *ought to be*. The endeavour of making a global law that can guarantee the 'community values' and bring the awareness to humanity that it is one gained traction with 'globalisation.' Justice in this project operates as to bring these perennially chaotic States from a state of brutality and violence, as seen in the discourse of the Prosecutor of the SCSL in the last chapter. The work of international criminal courts from this point of view would be helping humanity "to confront massive violence" through its "global commitment to end impunity."[1316] The translation of the language of fighting impunity into the practice of international criminal law in general creates the figment that those who criticize it in any way are taking a stance against it. African leaders are fraught with subterfuge attempting to exonerate themselves from accountability and consequently fostering more chaos into the continent. This is a move of worldmaking which creates a certain image and purports to have a way to address the issues identified in it. Former Prosecutor Luis Moreno-Ocampo demonstrates the way this position is articulated as an argumentative practice as follows:

> The African bias discussion is covering up firstly that there are currently African heads of states planning or committing massive atrocities to retain power; secondly that the ICC is currently the only institution designed to be effective at preventing and punishing international crimes; and thirdly that the international legal order is going backwards.
> […] And just like Bashir, there are many African leaders who are using systematic violence to stay in power.

[1314] KOSKENNIEMI, Law, Teleology and International Relations, p. 4.
[1315] NOUWEN, RETURN TO SENDER, p. 610–611.
[1316] MORENO-OCAMPO, Luis, **Working with Africa: the view from the ICC Prosecutor's Office**, Cape Winelands: ISS Symposium on "The ICC that Africa wants", 2009, p. 2.

> […] without the ICC, who will protect the African victims when African governments attack them?[1317]

Arguments from this nature makes third world States "legitimate theatre[s] of the ICC to develop its jurisprudence."[1318] The moral purpose of the international (legal) system involves particular forms of power. The process of having the vocabularies developed within the specialized fields of practices general enough as to be able to influence general practice of international law is also a move towards the normalization of these specialized languages. Once accepted into the general practice it becomes an ideal norm of conduct which comes to occupy the place of the (authoritative) conduct that shapes the 'collective' and 'shared' values of the international community. The way the notion of ending impunity was accepted and incapsulated into the human rights discourses represents the capacity of this vocabulary of creating the perception of its efficiency. Even the ICJ, in the *Arrest Warrant* Judgment, demonstrated the power of this conceptual creation. Although the Court decided against the issuance of an arrest warrant by Belgium, made sure to state that such decision did not mean allowing for impunity to reign.[1319] The fight against impunity was already taken as normal and essential and consequently the Judges on the ICJ bench felt the need to reassure that their decision was in no way against this project.

The perception of the need to fight impunity in the international realm came to be widely accepted in the international sphere. States have massively joined the Rome Statute of the ICC upon its creation. The openness in the notion of what this mission entailed led many African States in the decade that follow the establishment of the Court to claim to be wrong in their hopes for the ICC. Despite some drawbacks, the ICC has managed to have international legal practitioners, norms, and institutions conform with the conduct that claims to be fighting impunity. As the Foucauldian explanation of the power of normalization entailed, the adhesion of (a large) part of international community was not enough. Ending impunity is a project that can only be successful in its purpose of ending the Hobbesian chaos

[1317] MORENO-OCAMPO, **From Brexit to African ICC Exit: A Dangerous Trend**.
[1318] BENYERA, **The failure of the international criminal court in Africa: decolonising global justice**, p. 81.
[1319] INTERNATIONAL COURT OF JUSTICE, **Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)**, paras. 48 and 60.

through universal accession to the Rome Statute, once it implies conferring jurisdiction to the Court to act over any part of the globe. As is well-known, many States hesitated to join the Court for a set of reasons the most common being the reluctance of giving up sovereignty over such delicate matters. For the States that did not voluntarily accept the mission of the ICC as the natural and necessary progress of international legal system, there was a need for a set of techniques to have these States conform with the 'new normal.' The device developed to compel these States acceptance of the essentiality of this project was the Security Council referral, which bypasses the temporality of the State and push these States into the fight against impunity. Consequently, the realization of the international community's project of ending the culture of impunity has been a process of dominance and resistance as the Al Bashir Case exemplifies. The process through which the 'new normal' force its way into the practice of international law is not smooth or peaceful. Every authoritative interpretation or standard is somehow a coerced language which involves silencings and exclusions.

5.2.1.
The politics of the ICC: do African States' practices make international (criminal) law?

The contestation practices enacted by the African States in relation to the Al Bashir Case testifies to the graininess of the normalisation of international law amongst international actors. States resist attempts of crystallising new legal developments for a set of reasons that goes from the mere distaste for the norm or interpretation to understandings that it might be harmful for the principles the State stands for. Regardless of the motivations, the unwillingness of these States is faced with incisive authorities that for knowing better make decisions over their best interest. In the African practices of contestation, the resistance that these States showed to the attempts of the Court of having them arrest and surrender Al Bashir to the Court indicated that they were not conforming to the normalised practice of disregarding Heads of State immunity in favour of joining the fight against impunity. The practices of the Chambers were constantly reinforcing the

inapplicability of immunities in situations of international crimes as the current normalised practice of international (criminal) law. In light of the resistance of these States to accept that normalised understanding in regard to the law of immunities, the Chambers through the mechanisms available coerced the acceptance of these States by issuing decisions which conveyed that these States were under the obligation to comply with the normalised practice. As the previous chapters have argued and exemplified, in international legal practice any position can be justified insofar as this justification is competently performed. And this includes arguing in favour of a new normalised practice. The PTCs mobilised the necessary legal instruments and practices to make their case against immunities and reason that these African States had to conform to the practice of fighting impunity rather than safeguarding sovereign immunities.

Returning to the process of Jordan's appeal to the PTC II non-compliance decision explored in Interlude No. 5, there is something in the practices of these Judges that speaks volumes about international actors coercing their way into making the normalised practice as such for other actors that do not voluntarily abide by the newly imposed status quo. In the AC decision of 6 May 2019, the Judges dedicated a section to the evaluation of the relationship between the statutory disposition that renders the immunities attached to the official capacity of a person irrelevant from the exercise of jurisdiction of the Court and customary international law. The Chamber conceded that Head of State immunity is "a manner of immunity […] accepted under customary international law."[1320] The AC, however, affirmed that such immunity is only valid in the context of relations between States, which means that Head of State immunity cannot under any circumstances be evoked before proceedings at the ICC, as was recognised by the ICJ in the *Arrest Warrant* Case. The AC's mobilisation of the customary law of immunities is problematic for reasons that are beyond the fact that it repeated a reading of the ICJ *Arrest Warrant* Judgment that was extremely controversial and considered by many renowned scholars of the field to be "wrong."[1321] The Chamber affirms in the decision that

[1320] APPEALS CHAMBER, **Judgment in the Jordan Referral re Al-Bashir Appeal**, para. 101.
[1321] AKANDE, Dapo, **ICC Issues Detailed Decision on Bashir's Immunity (...At long Last...) But Gets the Law Wrong**, EJIL: Talk!. Available at: <https://www.ejiltalk.org/icc-issues-detailed-decision-on-bashir's-immunity-at-long-last-but-gets-the-law-wrong/>. Accessed: 19 oct. 2020. See

the provision under article 27(2) of the Rome Statute which renders immunities irrelevant before the ICC has reached the status of customary international law. Furthermore, from paragraph 103 through 113, the AC also engages in an historical tour through the practices of previous international criminal courts from the IMT at Nuremberg to the *ad hoc* Tribunals and the SCSL and the very practice of the ICC's PTCs to affirm that "there is neither State practice nor *opinio juris* that would support the existence of Heads of State immunity under customary international law *vis-à-vis* an international court."[1322] Rather, the AC purports to have found that "such immunity has never been recognised in international law as a bar to the jurisdiction of an international court."[1323] The appreciation of the customary international law of immunities followed by the affirmation that the AC "accordingly rejects any contrary suggestion of the Pre-Trial Chamber in that regard, in both this case and in the case concerning South Africa."[1324]

The very necessity of the Chamber to affirm its rejection of any PTC decision that might contradict its position testifies to the contestedness of the matter. However, the issue that strikes the attention is that, in its endeavour to identify the customary international law on Head of State immunity and justify its position in favour of the irrelevance of Al Bashir's immunities in relation to the proceedings before the ICC, the Chamber relies exclusively on international judicial practice. Not at any point in the decision has the AC devoted its analysis to State practice. As international legal practice is a matter of choice, the Chamber mobilised the relevant elements that allowed it to justify the desired position. But the legal reasoning of the Chamber says more about the practice of the field of international criminal law than merely that it is a matter of choice. The politics of the ICC conveys a message about which and whose practices are accounted for in international criminal law.

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also JACOBS, Dov, **A Sad Hommage to Antonio Cassese: The ICC's confused pronouncements on State Compliance and Head of State Immunity**, Spreading the Jam. Available at: <https://dovjacobs.com/2011/12/15/a-sad-hommage-to-antonio-cassese-the-iccs-confused-pronouncements-on-state-compliance-and-head-of-state-immunity/?blogsub=confirming#blog_subscription-2>. Accessed: 19 oct. 2020.

[1322] APPEALS CHAMBER, **Judgment in the Jordan Referral re Al-Bashir Appeal**, para. 113.

[1323] *Ibid*., para. 113.

[1324] *Ibid*., para. 113.

As emphasized on Chapter 3, the practice of the ICC, besides conveniently choosing to look at international practices rather than singling out State practice in relation to the matter of Head of State immunity, only relied on the formal aspects. Such practice fails to analyse the kinds of bias that such structures are reinforcing and consequently joins these formalisms by deepening the roots of its bias in the practices of the field. Even though any international legal practice will never be able to do justice by the historical problems that are involved in all these events, it is not by chance that the State practice which was excluded from consideration happened to be of third world States. Their practice is not given adequate weight in the identification of customary international law and the AC decision only bears witness to that. The African States contestation practices are not enough for the legal operators of the field to speak customary international law.

5.3.
Normalising (in)justice: the fight against impunity and the complexity of the African practices of contestation

This chapter complements the previous in developing a 'principled approach' to the practices of contestation. The international legal practices of the Al Bashir Case conceived as argumentative practices reveal important issues that are related not only to the practice of international (criminal) law but also to the more fundamental dimension of the international legal structure. International legal practices perform an ordering function, which includes defining which actors have access to contestation, whose voices are indeed heard, which social and political order is being safeguarded by the principles and rules.

Through the ascribing to their positions the notion of the realization of international justice, both States' authorities and ICC officials have defended a different side of the dispute in relation to Al Bashir's immunity. For one, the Court argues that international justice is fulfilled through accountability. It defends the utopian position that it is through fighting impunity that international law is able to speak truth to power. On the other side is the African States positing that doing justice to this matter involves respecting the principle of sovereign equality which

is the reason for the laws of immunities to exist. For these States, international justice is materialised through a politics of recognition. Most of the representatives of both sides, however, unite in the belief that the Africa–ICC relationship will no longer have the current problems related to the accusations of selectivity and (neo)colonialism if the Rome Statute manages to reach universality. For the Court, universality would mean having jurisdiction over all States' territories without the impediment of the international legal standards that regulate relations outside the ICC framework. In the African States' view, in turn, universality would allow the Court to open investigations in relation to every State and the singling out of African cases because it is the largest regional representation in the Court would give space to a more diverse selection of cases.

These positions naively purport that the current situation of international criminal legal practice has to do with the state of adhesion to the Rome Statute. The politics of the ICC in general, which includes the practices in the Al Bashir Case analysed in this thesis, repeatedly demonstrate a deference to traditional sources of power, from its relationship with the UNSC to the handling of the cases. In that sense, even if the Court had equal jurisdiction over the territory of States, there still would be underlying issues that would impair the equal treatment of States, because the international legal structures and institutions work to maintain the status quo of the international social order. The susceptibility of international legal practice to power combined with its capacity for normalising norms accounts for structure in place that allows the Court's response to the practices of contestation enacted by the African States in relation to the legal developments of the Al Bashir Case.

Considering the analysis developed in this thesis in its entirety, it demonstrates that States are able to perform competent international legal practices. The African States have successfully engaged in a concerted strategy that sought to have their interests reflected in current international legal practice. Regardless of their successful performance, there are a set of factors that constrain these States' ability to transform international law. The argumentative practices launched by the ICC officials in response to the contestation practices performed by the African States in relation to the Al Bashir Case give evidence to the way the institutional actors make sense of contestation. Through the use of a language that reinforce dichotomies like accountability/impunity and law/politics, the Court's authorities

categorise the practices of these States as on the opposing side of the Court. Such practice consequently impairs the chance of a productive engagement between the Court and the African States. However, there are certain practices that function as the condition of possibility for such argumentative practices to take place. The process of making norms normal is a practice that the sovereigns of a certain field perform as to make new norms be incorporated and perceived as necessary. Those that do not voluntarily adhere to these ideals are coerced into acceptance. The ICC enact this practice through repeatedly reinforcing that the African States are under the obligation of arresting and surrendering Al Bashir to the Court because this is the current state of the customary practices on immunities. Even though State practice is a component in determining the customary international law on immunities, the AC made a final decision on the matter bypassing the recent practice of African States choosing instead to focus on international legal practices. This move attest that there are a set of barriers that prevent third world States to make their voices heard and engender change in international (criminal) law. However, their competent performances contesting the legal developments of the Al Bashir Case testify to their capability of speaking the language of international (criminal) law and presenting a potent source of resistance to the maintenance of the international legal status quo.

The complexity of the issue rests on the fact that the condemnation of the international legal system's neo-colonial agenda and reaffirmation of sovereignty as a tool for postcolonial emancipation also serve as covers for authoritarianism. The latter, however, cannot serve as a justification for the disregard of the former. The lasting power of arguments about the hierarchic, hegemonic, and heteronomous relations that are veiled in international legal practices serves to demonstrate that these contestation practices are not just attempts of escaping the reach of accountability. The contradiction lies in the necessity of these African States in relying on international legal categories like sovereign equality as a way to pursue their own interests and denounce oppression.

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Interlude No. 6: Omar Al Bashir is deposed. Is he finally headed to the Hague?

While proceedings for the Jordanian appeal took place, on 11 April 2019, Omar Al Bashir was ousted in a *coup d'état* by the Sudanese military. This event took place after a series of popular protests that demanded his removal from power. The news was initially received with much excitement but was soon followed by great disappointment once the details of the new government were announced. The GoS was replaced by a military-led transitional council, a coalition led by the Sudanese Defence Minister Awad Ibn Auf. During these events, Al Bashir was arrested and taken under military custody.[1325] Other high-ranking officials wanted by the ICC, like Hussein and Haroun, were also arrested by the coalition.[1326]

On the following day, the military coalition announced that they would not extradite Omar Al Bashir to stand trial at the Hague. Instead, he would be put on trial in Sudan. Protests continued in Khartoum in defiance of the impositions by the army, which requested a civilian-led transitional government to lead the process towards democratic reforms. As a result, Ibn Auf resigned and appointed another military leader as the new head of the transitional military council.[1327] On July

[1325] BURKE, Jason, **Sudan protesters reject army takeover after removal of president**, The Guardian. Available at: <https://www.theguardian.com/world/2019/apr/11/sudan-army-ousts-bashir-after-30-years-in-power>. Accessed: 18 aug. 2021; OSMAN, Muhammed; BEARAK, Max, **Sudan's Omar Hassan al-Bashir is ousted by military after 30 years in power**, The Washington Post. Available at: <https://www.washingtonpost.com/world/africa/sudans-military-expected-to-announce-overthrow-of-president-following-months-of-popular-protests/2019/04/11/bedcc28e-5c2b-11e9-842d-7d3ed7eb3957_story.html>. Accessed: 18 aug. 2021; **Sudan's military seizes power from President Omar al-Bashir**, Al Jazeera. Available at: <https://www.aljazeera.com/news/2019/4/11/sudans-military-seizes-power-from-president-omar-al-bashir>. Accessed: 18 aug. 2021; **Sudan crisis: Ex-President Omar al-Bashir moved to prison**, BBC News. Available at: <https://www.bbc.com/news/world-africa-47961424>. Accessed: 19 oct. 2020.

[1326] ELBAGIR, Nima, **As Bashir faces court, Sudan's protesters keep the music alive**, CNN. Available at: <https://edition.cnn.com/2019/04/15/africa/sudan-protest-music-nima-elbagir-intl/index.html>. Accessed: 18 aug. 2021.

[1327] GOLDSTEIN, Joseph; WALSH, Declan, **Sudan General Steps Down as Transitional Leader a Day After al-Bashir's Ouster**, The New York Times. Available at: <https://www.nytimes.com/2019/04/12/world/africa/sudan-al-bashir-extradition.html>. Accessed: 18 aug. 2021; SEVENZO, Farai; EL SIRGANY, Sarah; ELBAGIR, Nima, **Sudan will prosecute Bashir but won't hand him over, military says**, CNN. Available at: <https://edition.cnn.com/2019/04/12/africa/sudan-army-bashir-intl/index.html>. Accessed: 18 aug. 2021; **Sudan's Ibn Auf steps down as head of military council**, Al Jazeera. Available at: <https://www.aljazeera.com/news/2019/4/13/sudans-ibn-auf-steps-down-as-head-of-military-council>. Accessed: 18 aug. 2021.

2019, after negotiations between the coalition and opposition groups, a power-sharing agreement was reached under AU mediation and a joint military-civilian Sovereign Council was established.[1328]

In December 2019, it was reported that Al Bashir was found guilty in a court in Khartoum for corruption, illegal financial gains and possessing foreign currency and was sentenced to two years in detention in a reform facility due to his advanced age.[1329] On 1 April 2020, the Prosecutor's office at the court in Khartoum brought new charges against Al Bashir for violating the constitution during the 1989 coup d'état.[1330]

Almost a year after the coup, on 11 February 2020, it was widely announced in the media that, in the ongoing peace negotiations in Juba between the Sudanese Sovereign Council and Darfuri rebel groups, the Sovereign Council, agreeing to a longstanding rebel demand, announced in a public statement that it had agreed to let the ICC try those indicted in the situation in Darfur.[1331] This declaration was received as a clear affirmation that the Council intended an imminent transfer of Al Bashir to the Hague. However, it was later corrected that the Council did not

[1328] **Sudan crisis: Military and opposition agree power-sharing deal**, BBC News. Available at: <https://www.bbc.com/news/world-africa-48878009>. Accessed: 18 aug. 2021; ABDELAZIZ, Khalid, **Sudanese army and civilians seal interim power-sharing deal**, Reuters. Available at: <https://www.reuters.com/article/us-sudan-politics-idUSKCN1V70AC>. Accessed: 18 aug. 2021; **'Our revolution won': Sudan's opposition lauds deal with military**, Al Jazeera. Available at: <https://www.aljazeera.com/news/2019/7/5/our-revolution-won-sudans-opposition-lauds-deal-with-military>. Accessed: 18 aug. 2021; **Political agreement on establishing the structures and institutions of the transitional period between the Transitional Military Council and the Declaration of Freedom and Change Forces**, Khartoum: Sudan, 2019.

[1329] BURKE, Jason; SALIH, Zeinab Mohammed, **Ex-Sudan leader Omar al-Bashir sentenced to two years for corruption**, The Guardian. Available at: <https://www.theguardian.com/world/2019/dec/14/sudanese-court-sentences-omar-al-bashir-to-2-years-in-prison>. Accessed: 18 aug. 2021; **Sudan's Omar al-Bashir sentenced to two years for corruption**, Al Jazeera. Available at: <https://www.aljazeera.com/news/2019/12/14/sudans-omar-al-bashir-sentenced-to-two-years-for-corruption>. Accessed: 18 aug. 2021.

[1330] LENOIR, Gwenaëlle, **Sudan: Peace Before Justice?**, JusticeInfo.net. Available at: <https://www.justiceinfo.net/en/44074-sudan-peace-before-justice.html>. Accessed: 18 aug. 2021.

[1331] BURKE, Jason; SALIH, Zeinab Mohammed, **Sudan signals it may send former dictator Omar al-Bashir to ICC**, The Guardian. Available at: <https://www.theguardian.com/world/2020/feb/11/sudan-says-it-will-send-former-dictator-omar-al-bashir-to-icc>. Accessed: 18 aug. 2020; **Omar al-Bashir: Sudan agrees ex-president must face ICC**, BBC News. Available at: <https://www.bbc.com/news/world-africa-51462613>. Accessed: 18 aug. 2021; **Sudan agrees to transfer "those indicted by the ICC" to the Hague**, France 24. Available at: <https://www.france24.com/en/20200211-sudan-agrees-to-transfer-ex-president-bashir-to-icc-for-war-crimes>. Accessed: 18 aug. 2021; MAGDY, Samy, **Official: Sudan to hand over al-Bashir for genocide trial**, Associated Press. Available at: <https://apnews.com/article/trials-war-crimes-middle-east-africa-khartoum-c6698024bdd7f1cade89b9b4101d25c1>. Accessed: 18 aug. 2021.

considerate extraditing Omar Al Bashir. Yousra Elbagir, a Sudanese journalist who covered the unrest in Sudan that led to the ousting of President Al Bashir, interviewed a senior government official on the issue and reported on Twitter

> As it stands the Sudanese government has no intention of extraditing ex-President Omar Al-Bashir to the Hague to face the International Criminal Court.
> I spoke to a senior government official this morning who told me there have been two/three months of consultations over how they can corporate [sic] with the ICC - especially after demands from armed rebel groups during peace talks that Al-Bashir be sent to face trial in the Hague.
> But the official told me that there is consensus in the transitional government that a lot of problems will arise internally if he is tried outside of Sudan.
> So they are discussing ways for Al-Bashir to "appear" in front of the ICC, within the country's borders.
> Some options:
> 1) Al-Bashir and other indicted individuals to appear in front of an ICC delegation that is flown in.
> 2) Al-Bashir and other indicted individuals to appear in front of a hybrid ICC/local courtroom.
> Other options were discussed but all within Sudan's infrastructure.
> The official made some calls in front of me and made sure to accurately translate the word "مثول" so that there was no confusion. He settled on "appear in front of the ICC". He confirmed to me again, that this would not be at the Hague.
> This was before the [government's] statement.
> The ICC has not agreed to any of the above options presented by the Sudanese government.
> Consultations/talks continue...
> This information was confirmed shortly after this meeting (an hour or so before the statement) by a second senior Sudanese government official.
> In all of the government statements/quotes I've seen across media outlets today - all from Al-Taishi - I have not seen him mention the Hague or extradition once.
> Technically, their plan is to "hand" Al-Bashir & Co to ICC delegates - that they are hoping to convince to come here.[1332]

On 12 August 2021, it was once again signalled that the Council intended to "hand over wanted officials to the ICC,"[1333] after a visit by the ICC Prosecutor, Karim Kahn, to Khartoum.[1334] The new ICC Prosecutor, elected on 12 February

[1332] ELBAGIR, Yousra, **As it stands the Sudanese government has no intention of extraditing ex-President Omar Al-Bashir to the Hague to face the International Criminal Court**, Twitter. Available at: <https://twitter.com/YousraElbagir/status/1227320423706177539>. Accessed: 18 aug. 2021.
[1333] **ICC chief prosecutor visits Sudan, Bashir handover to war crimes court possible**, RFI. Available at: <https://www.rfi.fr/en/africa/20210812-icc-chief-prosecutor-visits-sudan-bashir-handover-to-war-crimes-court-possible>. Accessed: 17 aug. 2021.
[1334] OFFICE OF THE PROSECUTOR, **The Prosecutor of the International Criminal Court, Mr Karim A. A. Khan QC, concludes his first visit to Sudan with the signing of a new Memorandum of Understanding ensuring greater cooperation**, The Hague: International Criminal Court (ICC), 2021.

2021 and sworn in on 16 June, announced that he was hopeful that the GoS would turn over Al Bashir to face charges at the ICC.[1335] Sudanese journalist Yousra Elbagir once again corrected the reports, pointing to the amount of "mixed messaging" around the topic of having Al Bashir tried by the ICC.[1336] What seems to have changed in the Council's narrative is the fact that they now phrase this issue as a matter of sending these individuals to the Hague, an aspect that was not so clear in previous statements. The Council's idea seemed to be one that would not require any kind of extradition of these wanted individuals but a negotiation with the Court to have them tried locally. There is a possibility for the ICC to hold the trials in a place other than the Hague. According to rule 100(2) of the Rules of Procedure and Evidence,

> The Chamber, at any time after the initiation of an investigation, may *proprio motu* or at the request of the Prosecutor or the defence, decide to make a recommendation changing the place where the Chamber sits. The judges of the Chamber shall attempt to achieve unanimity in their recommendation, failing which the recommendation shall be made by a majority of the judges. Such a recommendation shall take account of the views of the parties, of the victims and an assessment prepared by the Registry and shall be addressed to the Presidency. It shall be made in writing and specify in which State the Chamber would sit. The assessment prepared by the Registry shall be annexed to the recommendation.[1337]

However, all the recommendations for *in situ* trials that were made in the past were rejected by Court's Judges, even in cases where there were recommendations by both Defence and Prosecution.[1338] In light of this, it is possible to ponder that the chances of having Al Bashir prosecuted by the ICC are very low, since both GoS and ICC have conditions that the other does not seem too keen on accepting. The possibility of seeing Al Bashir on his way to the Hague, however, became even

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[1335] DAHIR, Abdi Latif, **Sudan Inches Closer to Handing Over Ex-Dictator for Genocide Trial**, The New York Times. Available at: <https://www.nytimes.com/2021/08/12/world/africa/darfur-omar-al-bashir-sudan.html>. Accessed: 18 aug. 2021.

[1336] ELBAGIR, Yousra, **Sudan to hand Bashir, other wanted officials to ICC: Foreign Minister**, Twitter. Available at: <https://twitter.com/YousraElbagir/status/1425450945010409478>. Accessed: 18 aug. 2021.

[1337] Rules of Procedure and Evidence, rule 100(2).

[1338] PRESIDENCY, **Public redacted version of Decision on the recommendation to the Presidency on holding part of the trial in the State concerned**, The Hague: International Criminal Court (ICC), 2015, para. 27; TRIAL CHAMBER I, **Decision on the Gbagbo Defence Request to hold opening statements in Abidjan or Arusha**, The Hague: International Criminal Court (ICC), 2015, p. 9; TRIAL CHAMBER IX, **Decision Concerning the Requests to Recommend Holding Proceedings In Situ and to Conduct a Judicial Site Visit in Northern Uganda**, The Hague: International Criminal Court (ICC), 2016, p. 5.

more distant after, on 25 October 2021, the Sudanese military seized power in a new coup.[1339] Since then, Darfur has witnessed a resurgence of ethnic clashes once again marked by the presence of mercenary forces.[1340]

Possibly as a result of the events that took place in Sudan since April 2019, Ali Muhammad Ali Abd-Al-Rahman, or Ali Kushayb, allegedly the link between the GoS and the Janjaweed, on June 2020, voluntarily surrendered himself to ICC custody in the CAR on account of the ICC arrest warrant issued on 27 April 2007.[1341] The Case against Ali Kushayb was severed from the one against Ahmad Harun and, on 15 June 2020, Kushayb made his initial appearance before the Single Judge of the PTC II, where the accused requested that his case name bear the name Mr Abd-Al-Rahman, since 'Ali Kushayb' is not his name.[1342] The Single Judge, however, decided to refrain from amending the name of the case until the Chamber is in a position to make an informed decision on the matter.[1343] The confirmation of charges hearings happened before the PTC II between 24 and 26 May 2021. In this hearing the Chamber hear the oral submissions of the OTP, the Legal Representatives of the Victims and the Defence.[1344] By unanimity, the PTC II, under Judges Rosario Salvatore Aitala (Presiding judge), Antoine Kesia-Mbe Mindua and Tomoko Akane confirmed all the charges brought by the Prosecution against Abd-Al-Rahman, finding that there were substantial grounds to believe that Abd-Al-Rahman is responsible for 31 counts of crimes against humanity and war crimes. As a result, the Chamber committed Abd-Al-Rahman to trial before a Trial

[1339] SALIH, Zeinab Mohammed; BEAUMONT, Peter, **Sudan's army seizes power in coup and detains prime minister**, The Guardian. Available at: <https://www.theguardian.com/world/2021/oct/25/sudan-coup-fears-amid-claims-military-have-arrested-senior-government-officials>. Accessed: 14 dec. 2021.
[1340] HASHIM, Mohanad, **Sudan anger over racist slur caught on air at Bashir trial**, BBC News. Available at: <https://www.bbc.com/news/world-africa-61112459>. Accessed: 2 may 2022.
[1341] INTERNATIONAL CRIMINAL COURT, **Situation in Darfur (Sudan): Ali Kushayb is in ICC custody**, The Hague: International Criminal Court (ICC), 2020.
[1342] PRE-TRIAL CHAMBER II, **Decision severing the case against Mr Ali Kushayb**, The Hague: International Criminal Court (ICC), 2020, para. 9; PRE-TRIAL CHAMBER II, **Decision on the convening of a hearing for the initial appearance of Mr Ali Kushayb**, The Hague: International Criminal Court (ICC), 2020, para. 8; PRE-TRIAL CHAMBER II, **ICC-02/05-01/20-T-001-ENG ET WT 15-06-2020 1-24 SZ PT**, The Hague: International Criminal Court (ICC), 2020, p. 3.
[1343] PRE-TRIAL CHAMBER II, **Decision on the Defence request to amend the name of the case**, The Hague: International Criminal Court (ICC), 2020, p. 8.
[1344] INTERNATIONAL CRIMINAL COURT, **ICC concludes confirmation of charges hearing in Abd-Al-Rahman case**, The Hague: International Criminal Court (ICC), 2021.

Chamber.[1345] The Abd-Al-Rahman trial opened at the ICC on 5 April 2022 and hearings were scheduled to take place throughout June 2022.[1346]

The Case against Abd-Al-Rahman marks the first case in the situation in Darfur, Sudan, to be tried at the ICC, since all other individuals indicted by the Court remain at large with warrants of arrest pending execution.

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[1345] PRE-TRIAL CHAMBER II, **Decision on the confirmation of charges against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')**, The Hague: International Criminal Court (ICC), 2021.
[1346] INTERNATIONAL CRIMINAL COURT, **Abd-Al-Rahman trial opens at International Criminal Court**, The Hague: International Criminal Court (ICC), 2022.

Final considerations: on immunities, the African bias, and the future of the ICC

Three weeks before the AC issued the judgment on Jordan's appeal, as explored in Interlude No. 6, social uprisings coupled with a dissident military managed to remove Omar Al Bashir from power. The situation turned the matter of Al Bashir's immunity moot. It is important to note that whether Al Bashir is sent to the Hague for trial has no legal implication on the disputes that have taken place over the past years. With Al Bashir no longer in office, the issue that created most of the uproar surrounding the Case, mostly reflected in the African practices of contestation, is no longer open for discussion. The only matter that still lies ahead is Sudan's duty to cooperate with the ICC, which was covered by UNSC Resolution 1593(2005). The decision from the Sudanese government to cooperate with the Court also does not impact on the obligation of third states to arrest and surrender Al Bashir, since his removal from office changed his status and consequently which laws protect him from being arrested. Al Bashir's deposition also made the case against him at the ICC no longer a matter of contend between Court and African States, for their main concern was related to ICC indictments of sitting Heads of State. Regardless of his fate, the immunity issue under dispute in the Al Bashir Case remain unresolved. The issue of Head of State immunity became very much associated with the notion of impunity for Al Bashir before the ICC. Regardless of whether this case might be on its way for trial, the issues disputed are greater than one case at the ICC and very much not settled.[1347] This means that the AC ruling on Jordan's appeal should not be the last word on the matter of immunities before the ICC. Resolving the status of individuals nationals of non-States Parties to the Rome Statute in situations referred by the UNSC and, consequently, whether art. 98 is applicable for these situations are still relevant questions for future proceedings.

As Schabas has recognised, even though the Court is not to be blamed for some attacks on its existence, such as the one from the United States, "in its relationship with Africa, the situation is not so straightforward."[1348] The rocky

[1347] TLADI, **Sudan Agrees to Send Al Bashir to the ICC**.
[1348] SCHABAS, William A., **An Introduction to the International Criminal Court**, 5. ed. Cambridge: Cambridge University Press, 2017, p. 43.

relationship with African States was in a large degree a result of the ICC officials' position of not engaging with politics. Throughout the Al Bashir Case, the Court has demonstrated a dismissive posture in relation to the requests and arguments presented by States Parties. Believing to be solidifying its position as uncompromising in the face of political interests, the demeanour adopted by the ICC's authorities actually had a considerable negative impact in the way its legitimacy is perceived by States. The ICC has a long way to go in terms of establishing a productive engagement with States Parties, demonstrated especially by the tone adopted in the Q&A appraised in Interlude No. 5, which includes handling critiques and contestations. The practice of the ICC in relation to the Al Bashir Case fails to demonstrate the Court open to dialogue that some argumentative practices examined in this thesis have indicated. Accepting complexity is good way forward. It would allow the Court to acknowledge that in between the practices of contestation there are veiled interests as well as sincere manifestations of legal disagreements and address the productive engagements from States, rather than simply dismissing all contestation as States' political manipulations.

Although the practices of contestation enacted by the African States were not able to provoke any change in resolution of the Al Bashir Case at the ICC while he was still in office, it is undeniable that the actions of these States had an impact on the dynamics of the field of international criminal law. The practices of contestation were able to place emphasis on the contestedness of the matter of immunities, demonstrating that it is still not a settled issue; to foment a regional sentiment that underlines the importance of sovereign equality to the cause of third world States; to display a competent and tactical engagement with international legal mechanisms by political entities; and indicated to the practitioners of the field their unwillingness to have the fates of their region be decided by international agents. The African contestation in many ways paved the way for future States' engagements with international courts. In the overall picture, considering the many productive practices of contestation enacted by the African States, what stands out is the Court's missed opportunities to settle the matter for the time being. In the name of a utopian legalism, the ICC officials choose to shield their turf from the interference of politics. In the process, the contestation was dispersed in such a way

that ended up involving a wider range of actors and positions which were voice through many different channels and frequently expressed a perception that the practice of the ICC demonstrated an incapacity to deal with adversity, a recurrent occurrence when it comes to international criminal trials. The posture of denial regarding the relationship between law and politics from the two former Prosecutors had an alarming impact in its relationship with African States. The current Prosecutor, Karim Khan, seems to have taken the past experiences into account and has committed to "a new approach." In his remarks, he takes the 'fight against impunity' discourse down a notch and claims to get accountability "wherever possible."[1349] His experience as lead defence counsel for Charles Taylor at the SCSL and for Sudanese rebel leader Abu Garda, Deputy President of Kenya William Ruto, and Saif al-Islam Gaddafi at the ICC, might help the OTP to inaugurate a fresh take on the issues of law and politics. Even though such change is not enough to encompass all the problems identified in the journey this thesis embarked on, it is a step in the direction of having a more productive relationship with States Parties, in particular with third world States.

Individual criminal responsibility represents an important legal development of the past century. It brought the message that sovereigns are not free to do with their constituents as they see fit. However, accountability should not be seen as *the* solution to the complex and intricate dynamics of international (and domestic) politics. The messianisation of international (criminal) law can be deeply problematic not only for believing that legalisation bears the solution to the problems of international politics, but also for not allowing one to see that these legal formalisms are not devoid of faults themselves. In that sense, believing in the 'sanctity of the Rome Statute' can many times turn one blind to its flaws. The regime of international criminal law, while purporting *one* type of solution to *some* of the problems of the international, still falls short of addressing the more structural and systematic problems of international relations.

In that sense, the narrative of the ICC's African bias will not disappear because Omar Al Bashir was deposed and the Africa–ICC impasse about having a sitting Head of State indicted by the Court is no longer at play in any of the cases

[1349] KHAN, Karim A A, **Opening plenary**, The Hague: Assembly of States Parties to the Rome Statute of the International Criminal Court, 2021, paras. 25 and 21.

before the Court. First, in the near future, new Al Bashirs and Kenyattas are bound to appear and the issue of immunity will resurface. Second, and more importantly, the African bias is not about an indictment of a sitting Head of State or about the list of indicted individuals being only composed of Africans. It is about the teleologies, epistemologies, and ontologies that inform the treatment that the ICC and international (criminal) law in general afford to third world States, and in particular to African States. As long as international legal practice is still rooted on dichotomisation practices that uses colonial referents to make such distinctions, the narrative of the African bias will exist having more than enough reason to do so.

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