The International Criminal Court at the mercy of powerful states: How the Rome Statute promotes legal neo-colonialism

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How the Rome Statute Promotes Legal Neo-Colonialism

Res Jorge Schuerch
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How the Rome Statute Promotes Legal Neo-Colonialism

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The dissertation was finalised in October 2015. Legal developments have been taken account of, to the best of my knowledge, up to that point.
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<tr>
<td>AU</td>
<td>African Union</td>
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<tr>
<td>AMIS</td>
<td>African Union Mission in Sudan</td>
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<td>Berlin</td>
<td>Berlin West Africa Conference 1884/5</td>
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<td>CAR</td>
<td>Central African Republic</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>EU/AU Expert Group</td>
<td>Technical Ad hoc Expert Group constituted by the African Union and European Union</td>
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<tr>
<td>GA</td>
<td>General Assembly of the United Nations</td>
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<td>HRC</td>
<td>United Nations Human Rights Council</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICID</td>
<td>International Commission of Inquiry on Darfur</td>
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<td>ICIL</td>
<td>International Commission of Inquiry on Libya</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICL</td>
<td>International Criminal Law</td>
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<td>ICTR</td>
<td>International Criminal Tribunals for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunals for the Former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>IMT</td>
<td>International Military Tribunal at Nuremberg</td>
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<tr>
<td>IMTFE</td>
<td>International Military Tribunal for the Far East</td>
</tr>
<tr>
<td>LMG</td>
<td>Group of Like-Minded States</td>
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<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>NAM</td>
<td>Non-Aligned Movement</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>NGO(s)</td>
<td>Non-governmental Organisation(s)</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<tr>
<td>OTP</td>
<td>Office of the Prosecutor of the International Criminal Court</td>
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<td>P-5</td>
<td>Permanent Members of the United Nations Security Council (United States, United Kingdom, China, Russia, France)</td>
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<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice (PCIJ)</td>
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<td>PrepCom</td>
<td>Preparatory Committee on the Establishment of an International Criminal Court</td>
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<tr>
<td>PSC</td>
<td>African Union Peace and Security Council</td>
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<tr>
<td>PTC</td>
<td>Pre-Trial Chamber of the International Criminal Court</td>
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<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<td>RS</td>
<td>Rome Statute of the International Criminal Court</td>
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<td>SADC</td>
<td>Southern African Development Community</td>
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<tr>
<td>SC</td>
<td>United Nations Security Council</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SLA</td>
<td>Sudan Liberation Army</td>
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<td>SOFAs</td>
<td>Status of Forces Agreements</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNC</td>
<td>Charter of the United Nations</td>
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<td>UNMIBH</td>
<td>United Nations Mission in Bosnia and Herzegovina</td>
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Chapter 1

Introduction: The International Criminal Court – Old Wine in a New Bottle?

We have not forgotten that the law was never the same for the white and the black, that it was lenient to the ones, and cruel and inhuman to the others.

Patrice Lumumba, 30 June 1960

A comprehensive understanding of the politics of the tribunals involves not only an analysis of the role of the winners and losers but also of the powerful and weak.

Victor Peskin, 16 August 2006

1.1. The allegation of neo-colonialism

On 17 July 1998, the constituent assembly of states voted into existence the International Criminal Court (ICC) at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (Rome Conference). This historic vote finally translated into reality what had been asked for by international lawyers for decades: a permanent criminal tribunal which is based on the voluntary transfer of criminal competences of sovereign states and not unilaterally dictated by an alliance of powerful states, as was the case after the Second World War and in the context of the Former Yugoslavia and Rwanda. The creation of the ICC was welcomed with great enthusiasm by important international constituencies such as states, international and non-governmental organisations. With the accomplishment of the ICC, it seemed that International Criminal Law (ICL) had finally overcome the shadowy existence to which it had been doomed for decades prior to the nineteen-nineties. However, despite much praise in advance,

3 In the wake of the Second World War, the Allied Powers established two International Military Tribunals, in Nuremberg (IMT) and Tokyo (IMTFE) respectively. In 1993 and 1994, the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) were brought into being on the initiative of the Security Council (SC). On these tribunals, see infra Chapter 4, section 4.2., and infra Chapter 6, section 6.2.3.
4 An introduction to the negotiation process is provided in infra Chapter 4, section 4.4.1.
5 On the development of the discipline of ICL, see infra Chapter 4, section 4.2.
the Court, which became operational on 1 July 2002, soon faced headwinds from various directions.

One of the most intriguing critiques was that the ICC was a project of powerful states exercising twenty-first century neo-colonialism. Allegations of that kind became particularly widespread after the ICC had issued an arrest warrant in March 2009 against the ruling Sudanese President Omar Al-Bashir over alleged criminal conduct in the Darfur conflict. At the time these allegations against the ICC started growing, it had formally opened investigations in four situations, all of which were in African countries. In response to these developments, the Rwandan President Paul Kagame has provocatively commented: ‘[W]ith ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. The ICC is made for Africans and poor countries’. In the same vein, Mahmood Mamdani, a respected Ugandan scholar of anthropology and political science, has labelled the ICC ‘a Western court to try African crimes against humanity’ and claimed that ‘the ICC’s “responsibility to protect” is being turned into an assertion of neocolonial domination’. With a view to the growing discontent among African stakeholders towards the ICC, Charles Jalloh summarised African apprehensions at that time in the following terms: ‘[T]he growing perception is that Africans have become the sacrificial lambs in the ICC’s struggle for global legitimation’. Bearing in mind the unmistakable universalistic rhetoric which accompanied the establishment of the ICC

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7 The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 04 March 2009.  
at the Rome Conference in July 1998\textsuperscript{12}, this change of mood indeed marks a significant departure from the enthusiasm that prevailed after the adoption of the Rome Statute of the International Criminal Court (RS)\textsuperscript{13}.

It is quite obvious that most of these allegations of neo-colonialism are a response to the one-sided focus of the ICC on African situations and cases while the Court, at the same time, seems to turn a blind eye on crimes committed in other parts of the world.\textsuperscript{14} Another aspect that appears to have contributed to the neo-colonialism claim is that the indictment against Al-Bashir, whose country has not acceded to the ICC treaty, was arguably ill-timed and undermined efforts of the African Union (AU) to broker peace in the context of the Darfur conflict.\textsuperscript{15} A similar line of argument was later used by the AU to demand the deferral of proceedings under Article 16 RS against the President and Deputy President of Kenya, a request that was rejected by the Security Council.\textsuperscript{16} According to some commentators, the selective targeting of African leaders by the ICC shows that Western States have a vested interest in the destabilisation of African states ‘to keep African countries compliant to the dictates of the West and its allies’.\textsuperscript{17}

However, the argument of neo-colonialism did not find much support among international scholars. It is argued that many of the African situations under ICC

\begin{itemize}
\item \textsuperscript{12} The universal nature of the ICC was pointedly emphasised by M.C. Bassiouni at the Ceremony for the Opening for Signature of the Rome Statute at the Rome Conference on 18 July 1998: ‘The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph for all peoples of the world’ (M. C. Bassiouni, \textit{The Statute of the International Criminal Court: A Documentary History} (Transnational Publishers New York, 1998) at xxi).
\item \textsuperscript{13} Rome Statute of the International Criminal Court (17 July 1998, 2187 UNTS 3, Entry into Force 1 July 2002) [hereinafter Rome Statute/ RS]. At the time of writing, there are 123 countries States Parties to the Rome Statute.
\item \textsuperscript{14} At the time of writing, the Office of the Prosecutor (OTP) is investigating situations in eight countries, all of which are in Africa: Uganda, Democratic Republic of Congo, Sudan (Darfur), Central African Republic, Kenya, Libya, Côte d’Ivoire and Mali (on the status of investigations and prosecutions in these situations see http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx).
\item \textsuperscript{16} See \textit{infra} Chapter 8, section 8.5.3.
\item \textsuperscript{17} F. Kuvirimirwa. ‘ICC agent of neo-colonialism’ \textit{The Herald} (29 May 2014) <http://www.herald.co.zw/icc-agent-of-neo-colonialism/> accessed 9 June 2015. In a similar vein, Rice, \textit{supra} note 9.
\end{itemize}
scrutiny were voluntarily referred to the Court by the governments of these states. Others generally contend that claims of neo-colonialism would exaggerate the strength of the ICC. In addition, it is emphasised by Douglas Smith that the Court’s selections are not informed by nefarious intentions. Rather they are indicative of its shrewd political calculus. The ICC does not have the legitimacy or backing at this point to go to politically sensitive places—places where a major power might object.

In assessing the ‘African bias’ claim, it should also be noted that the Office of the Prosecutor of the ICC (OTP) is conducting parallel preliminary investigations on an ongoing basis in a number of other countries, some of which are outside of Africa.

Analysing neo-colonialism allegations in the context of the ICC, it is apparent that many commentators remain rather vague about how the concept of neo-colonialism relates to the jurisdiction of the Court. This does not come as a surprise to the present author. Having had the privilege to visit a number of African countries and discuss the involvement of the ICC in Africa with locals interested in the matter, the author gained the impression that the reference to the term neo-colonialism is often based less on rational arguments but on the feeling that traditional inequalities are reproduced within the system of the ICC. Put in a different way, the notion of neo-colonialism revitalises the demons of colonial inequality in a contemporary African context. At the same time, it is noteworthy that these Africans, often highly critical of their own governments, were almost unanimous in their opinion that those responsible for the commission of international crimes should be brought to justice.

Taken together, although the notion of neo-colonialism is used as a means to express dissatisfaction with the ICC, the vague and ambiguous way it is employed suggests that the notion is subject to different interpretations and ultimately, lies in

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19 See P. Clark. ‘The ICC is only a small piece in the justice puzzle of Africa’s conflicts’ The East African (11 April 2011) <http://www.theeastafrican.co.ke/news/-/2558/1141438/-/o3vyj7z/-/index.html> accessed 9 June 2015. In a similar vein, Jalloh, supra note 11, at 463.
21 At the time of writing, the OTP conducts preliminary investigations in the following countries: Colombia, Georgia, Guinea, Honduras, Iraq, Nigeria, Palestine and Ukraine (on the status of these investigations, see http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx).
22 This is also confirmed by a number of other authors who argue that the allegations are not sufficiently supported by facts (see Fritz, supra note 18, and Jalloh, supra note 11, at 463).
the eye of the beholder. However, from a scientific perspective, the diversity of perceptions on how neo-colonialism transpires in the context of the ICC does certainly not help to contribute to a better understanding of the term in the field of ICL. In this sense, Steve Odero is surely right in noting that ‘the neo-colonial argument can easily be relegated to the realm of conspiracy theories if not well-posted by its proponents’.23 It is exactly this indeterminacy and vagueness of the neo-colonialism claim that initially caught the author’s attention and motivated him to assess allegations of neo-colonialism in the context of the ICC. In this respect, the present analysis is an attempt to translate the feeling of (neo-) colonial inequality into a legal vocabulary with a particular view to the ICC.

1.2. The label ‘neo-colonialism’ in political discourse

The term ‘neo-colonialism’, as will be shown in more detail in Chapter 2, was originally used to describe the lasting influence of former colonial powers on their former African possessions on the basis of continuing political and economic ties. Today, it appears that the notion of neo-colonialism has transcended the historical context of post-colonial dependencies and is used to describe all kinds of policies allegedly leading to political subordination and economic exploitation of states in the post-colonial era. In this sense, the intention of China to offer cheap monetary assistance to bedraggled European countries in the aftermath of the financial meltdown in 2008 gave rise to fuel fears of neo-colonial dependence24 and some commentators even suggest that Southern European countries are being dealt with in a neo-colonialist fashion by the European Union (EU).25 Moreover, Western states and China frequently accuse each other of neo-colonialism with regard to their political strategies concerning the African continent. As such the U.S., with a view to China’s investment policy, warned of ‘a creeping "new colonialism" in Africa from foreign investors and governments interested only in extracting natural resources to

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enrich themselves’.  

At the same time, China pillories the West’s top-down approach to economy and development in Africa and the Western states’ political and military interference in African political affairs as a form of neo-colonialism.  

The inflationary (and reciprocal) use of the term in contemporary political and media discourse suggests that the notion of neo-colonialism is seen by politicians as a rhetorical weapon for delegitimising the policies of political adversaries and, as a corollary, as a means to avoid taking responsibility for negative effects linked to their own policies. A similar phenomenon, according to some commentators, can be observed in relation to post-colonial African governments. More specifically, it is argued that the notion of neo-colonialism is (mis-)used by post-independence African politicians as an excuse for their own failure to run their governments in a responsible way for the benefit of their own people. According to these authors, reliance on the term neo-colonialism implies that the root causes for many problems in African states are unjustifiably attributed to factors external to the African continent, an understanding that has wide-ranging consequences for the development of these states. As Tunde Obadina notes, ‘[t]he fatalistic view that Africa is caught in a neo-colonial straitjacket has hampered the growth of popular political movements for social and economic change in the continent’.  

However, assessing the soundness of the above uses of the term neo-colonialism would be an endeavour that would clearly extend beyond the scope of the present study. Rather, the examples given primarily serve to illustrate the rhetorical force which is inherent in the notion of neo-colonialism. They also show that the term is used in multiple contexts and subject to different perceptions today. Regardless of their validity in their respective contexts, what all these accusations have in common is that the notion of neo-colonialism is used as an instrument to emotionalise political discussions by (sometimes misguidedly) historicising specific topics.

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1.3. The broader objective of the study

The present study assesses how far one could claim that ICL in general and the Rome Statute in particular promote a form of neo-colonialism. It is important to emphasise at the outset that the present analysis posits in no way that allegations of neo-colonialism are a valid excuse for the failure of governments to conduct a policy of accountability furthering the well-being of their own populations. Rather, the author aims to approach the issue of neo-colonialism objectively without relying on preconceptions about neo-colonialism in the context of structural dependencies in post-colonial African states. Because of its manifold usages in present-day political discourse, the term ‘neo-colonialism’ must thus be carefully defined for the purposes of this study. More specifically, the author aims to deconstruct the traditional concepts of colonialism and neo-colonialism by identifying their characteristic elements in order to re-conceptualise the notion of neo-colonialism from an international criminal law perspective. The resulting understanding of legal neo-colonialism should therefore be considered as a definition *sui generis*, which takes into account the historical and structural context of colonialism and neo-colonialism, as well as the peculiarities and challenges of contemporary ICL.

That being said, the broader objective of placing the ICC under critical scrutiny lies in the fact that any perceived bias of the ICC severely threatens the legitimacy and credibility of this institute. The antipathy with which the Court is confronted in large parts of the African political establishment is damaging the legitimacy of the Court, which is greatly based on a universalistic rhetoric. Although the notion of universal justice in the context of the ICC, due to structural peculiarities and limited resources and capacities available\(^{30}\), needs to be defined in its own terms, any *unjustified* selectivity in the enforcement regime jeopardises the very foundation of the Court. However, as will be outlined in Chapter 6 of this study, the escape of some violators from effective law enforcement is intrinsic to criminal processes in general and the system of the ICC in particular due to system related imperfections.\(^{31}\) Nevertheless, the inequalities produced should be based on rational and objective arguments and not on the status of certain states within the international system.\(^{32}\) It is in this sense that the present study aims at assessing whether the system of the ICC fosters a

\(^{30}\) See *infra* Chapter 6, section 6.1.4.

\(^{31}\) Ibid.

\(^{32}\) On the structural dimension of the field of ICL, see *infra* Chapter 6, section 6.2.
neo-colonial dimension and if so, how far a legal neo-colonialism would be
attributable to the Court itself. In abstract terms, thus, this study assesses the classic
colonial and neo-colonial dichotomy between powerful and weak states in the context
of the prosecution of perpetrators of international crimes.

1.4. The scope of the study

The goal described above, to assess the allegation of neo-colonialism objectively,
requires recourse, in a first step, to the historical concepts of colonialism and neo-
colonialism. Chapter 2, Part I therefore establishes the characteristic features of
these concepts. It will become clear that the concepts of colonialism and neo-
colonialism are transformative concepts which are applicable to a variety of situations
and historical contexts and which existed and still exist in various forms and
manifestations. What these concepts have in common is that they describe formal or
informal influence exercised by a number of powerful states over other parts of the
world.33 In view of the fact that the notion of neo-colonialism is traditionally not
associated with legal implications34, reference to the law and order administration of
European colonial powers in their African colonial possessions will provide the reader
with an understanding of the legal dimension of (neo-) colonial relationships in
Chapter 3. In light of the French and the British predominance in colonial Africa, this
chapter places a particular focus on the French policy of assimilation and the British
indirect rule, both of which strategies provided a structural framework for the exercise
of French and British colonial rule.

Part II of the study turns to the domain of ICL and examines the extent to which
this discipline is susceptible to the allegation that Western laws and values,
comparable to the law and order administration during European colonial rule, are
imposed upon the states concerned without their prior approval. Chapter 4 therefore
includes an assessment how far the core values underlying the system of ICL – the
core crimes – have emancipated themselves from their Western origin. In view of the
importance of the concept of sovereignty in the context of traditional neo-colonial
dependencies, Chapter 5 then discusses the relationship between these values and
the sovereign self-determination of states in the prosecution of international crimes.

33 See infra Chapter 2, sections 2.1. and 2.2.
34 See J. A. Kämmerer, ‘Colonialism’ in R. Wolfrum (ed), Max Planck Encyclopedia of Public
In other words, this chapter scrutinises how a purportedly universal law defeats the principle of national sovereignty in the context of ICL and the ICC in particular.

The third Part of the study transmits to the field of ICL the understanding of neo-colonialism gained in the first two Parts. Chapter 6 marks the starting point by re-inventing the concept of neo-colonialism from an international criminal law perspective. This section not only reconsiders the pervasive concept of asymmetry but at the same time provides for an understanding of the fundamental structural conditions which were established after the Second World War, with the creation of the United Nations Charter (UNC)\(^\text{35}\) and the concomitant establishment of the United Nations Security Council (SC). Chapters 7 to 9, finally, assess the extent to which the system of the RS fosters a neo-colonial dimension. These chapters focus on mechanisms inherent to the RS which are potentially subject to manipulation by powerful states. In particular, they comprise analyses of Articles 13 (b), 16 and 98 (2) RS.

1.5. Limitations and definitions

Amongst international treaties, the underlying treaty of the ICC – the Rome Statute – is a fascinating product in many respects. It is intriguing to see how the Statute strikes a balance between the sovereign interests of states, parties and non-parties alike, and the interests of the international community in the prosecution of international crimes.\(^\text{36}\) However, the ambition to obtain the greatest possible acceptance at the Conference in Rome has at the same time meant that the Statute leaves room to states, again parties and non-parties alike, to exert influence on the way the ICC operates. An example which is commonly cited to illustrate the leverage of states parties to the RS relates to the dependency of the Court on the cooperation of these states which, among other things, is important for apprehending suspects and gathering evidence.\(^\text{37}\) Thus, it is maintained by some authors that notably the instrument of self-referral entails the risk that governments may try to use the Court to their own political ends, by ‘[using] the ICC to target political opponents while protecting themselves from prosecution’.\(^\text{38}\) According to Phil Clark, ‘[t]he ICC’s reliance on state co-operation leaves it open to these sorts of domestic political

\(^{35}\) Charter of the United Nations (26 June 1945, 3 Bevans 1153, Entry into Force 24 October 1945).

\(^{36}\) On the scope of (complementary) ICC jurisdiction, see infra Chapter 5, sections 5.2. and 5.3.

\(^{37}\) The cooperation between states and the ICC is ruled in Part 9 of the Rome Statute (International Cooperation and Judicial Assistance).

\(^{38}\) See Clark, supra note 19.
machinations’. Another alleged dimension of influence adopts an inverse perspective. This concerns the ability of powerful states to prevent the application of the RS against certain categories of nationals altogether. In other words, the latter kind of influence is not related to selectivity within a situation under the jurisdiction of the ICC but to the presumption that powerful states are in a position to shield their nationals from being subjected to the jurisdiction of the ICC. This form of selectivity, as we learned previously, allegedly implies that the system of the ICC is directed only against nationals of weak states. In what follows, the focus of this study exclusively lies on the latter dimension of selectivity. As should be clear from the preceding discussion, this is particularly because the historical concepts of colonialism and neo-colonialism are similarly based on the dichotomy between powerful and weak states. However, for the sake of completeness, it should be noted that the ICC selection pattern within single situations has similarly attracted allegations of one-sided and politicised prosecution.

In addition, in relation to the analysis of the ICC under the paradigm of neo-colonialism, it should be emphasised that the author exclusively examines whether the Rome Statute fosters a neo-colonial dimension. Accordingly, the following analysis is in so far incomplete as the performance of national jurisdictions, which have the primary responsibility for the prosecution of international crimes under the Rome Statute, is not taken into account. However, the argument advanced in the present study is not affected by this omission because the primacy of domestic jurisdictions applies to all cases which can be brought to the ICC. In other words, exercising jurisdiction at a national level does not defeat the structural inequalities which are inherent to the system of the RS. In the same context, it is noteworthy that the author, in Chapters 7 to 9, repeatedly makes use of the term immunity. The usage of this term should not be understood in the sense of general immunity from international crimes prosecution but rather as immunity from ICC prosecution only.

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39 Ibid.
40 See infra Chapters 7 to 9.
41 See Kezio-Musoke, supra note 9.
42 These allegations were raised with regard to the situations in Uganda, the Democratic Republic of Congo (DRC) and Ivory Coast. See, e.g., M. Kersten, 'In the ICC's Interest: Between "Pragmatism" and "Idealism"' (16 July 2013) <http://justiceinconflict.org/2013/07/16/in-the-iccs-interest-between-pragmatism-and-idealism/> accessed 15 June 2015; and Human Rights Watch, 'Unfinished Business: Closing Gaps in the Selection of ICC Cases' (September 2011).
43 The principle of complementarity is explained in infra Chapter 5, section 5.2.1.
Although the topic discussed obviously has a political underpinning, the author, by deconstructing the concepts of colonialism and neo-colonialism, primarily aims at understanding the structural dimension of these concepts. This is above all because the present study is keen to avoid being seen as a political manifesto. In this sense, the author, in particular in Chapters 7 and 8, also refrains from delving too deeply into country specific political discussions in the contexts of Chapter VII evaluations and the (non-) application of Articles 13 (b) and 16 RS.

From the preceding discussion, it should be clear that the present study makes use of the historical concepts of colonialism and neo-colonialism to receive an understanding of the definitional elements of these concepts in order to apply them to the field of ICL. The historical analysis thus serves setting the background within which the subsequent argument is developed. In this sense, the historical analyses, by merely presenting historical facts which are then transformed into an ICL environment, is only descriptive and not designed to contribute towards a new understanding of the historical concepts of colonialism and neo-colonialism.

1.6. Methodology

We have seen that the following analysis can roughly be divided into three different parts mainly comprising two different styles of analysis, historical and legal. Part I is concerned with the conceptual underpinnings of the notions of colonialism and neo-colonialism including an assessment of the law and order administration in the context of European colonialism on the African continent. This analysis was conducted by consulting historical sources in order to trace how the concepts of colonialism and neo-colonialism developed over time. In Part II of the study, the focus shifts to the field of ICL with analyses of the development and application of the regime of core crimes. In this section, the author consulted legislative sources, case law and legal literature. The assessment in Part III combines the historical approach with legal analysis, comprising elements of political analysis in the context of interstate patron-client relationships. The latter concept complements the structural analysis of this part, contained in Chapter 6, and is used as a general pattern to explain how the influence exercised by powerful states is extended to friendly states under the provisions assessed in Chapters 7 to 9. In other words, the reference to the concepts of structural power and international political cliency relationships helps explain some of the anomalies in the prosecution of international crimes and the
derogation from the rational power of the rule of law. A combination of the aforementioned sources was used to establish an understanding of contemporary legal neo-colonialism in the field of ICL. It is noteworthy that the author, in particular in Chapters 7 to 9, applies the practice of legal hermeneutics comprising historical, textual and systematic interpretation. In addition, in the course of the analysis of the negotiation history of these provisions, the author has consulted the minutes of the meetings which took place during the Rome Conference in June/July 1998.

Having taken the prosecutorial focus of the ICC on African situations and cases as a point of departure, it remains to be noticed that the author has focussed throughout the study on the African cause. Starting with the historical analysis of European colonialism on the African continent, the concepts of colonialism and neo-colonialism, with additional reference to the Latin American Teoría de la Dependencia, are elaborated in an African context. In keeping with the historical emphasis on the African continent, furthermore, the assessment on the development of a number of universal core crimes specifically focuses on the position of African political entities such as African states or the African Union.
Part I

The Historical Concepts of Colonialism and Neocolonialism
Introduction Part I

Having outlined in the introductory chapter how the term neo-colonialism is used in present-day political discourse, we turn now to the historical analyses of the traditional concepts of colonialism and neo-colonialism. More specifically, this section aims at identifying characteristic elements of these historical concepts to reflect on how these notions can later be used in a contemporary ICL context.

What both colonialism and neo-colonialism have in common is that they are used to describe formal or informal influence exercised by a number of powerful states in some other parts of the world. The literature on these concepts of domination, as will be shown in what follows, is extensive and authors, depending on the specific historical context, often rely on different labels to describe the dichotomy between the different actors involved in these processes of expansion and subordination. In the context of colonialism, the colonial powers themselves often relied on the difference between civilised and barbaric societies or between industrialised and backward states. A more modern description, which was used to describe Latin American dependency-relationships, relied on the difference between developed and underdeveloped countries.

More recently, the division of powerful and weak states is described as a division between the First and the Third World or the Global North and the Global South, although this description should not be understood in strictly geographical terms. In addition, current rhetoric in the context of expansionary policies, mostly in the context of U.S. foreign policy, emphasises the difference between democratic and rogue states. Although neither appropriate in strictly geographical terms, the most notorious description of the dissimilarity of the actors involved in processes of expansion and subordination is the famous division between 'the West and the rest'.

While there is some debate on whether one expression is more appropriate than the other, the present author is not interested in the...
terminological subtleties of these expressions. Rather, it is the study’s ambition to provide the reader, on the basis of the historical concepts of colonialism and neo-colonialism, with an understanding of how these notions can be conveyed in abstract terms detached from preconceived stereotypes.

In line with the focus of this work on African states, Chapter 2 starts with an introduction of European colonialism on the African continent. Subsequently, the focus is placed on the doctrine of neo-colonialism and the Latin American Teoría de la Dependencia. The chapter concludes with an assessment how the notion of structural power relates to these concepts of domination. On the basis of these analyses, it will be shown that the terminological boundaries of the notion of neo-colonialism allow a re-interpretation of the concept as a matter of international law. The convertibility of the concept of neo-colonialism to an ICL context is particularly owed to the fact that this doctrine is not strictly limited to a specific historical context. Robert Young, a theorist on post-colonial history, refers to the transformative character of neo-colonialism in the following terms: ‘We are talking, with neo-colonialism, about the legacies of history, not as a textual archive, but as the continued productivity of history in the present’.

In view of the fact that the idea of neo-colonialism, historically speaking, ‘is endowed with sociological and political rather than legal implications’ the present author will focus in Chapter 3 on the role of law in the establishment and preservation of colonial domination. The adopted approach enables the author to examine how law served the consolidation of colonial rule, which eventually leads to the establishment of common characteristics of legal colonialism by European states. This step reveals that law provided the structural framework for the exercise of European colonialism and the enforcement of European colonial objectives. As Martin Chanock has observed: ‘The law was the cutting edge of colonialism, an instrument of the power of an alien state and part of the process of coercion’.

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7 See infra Chapter 2, section 2.1.
8 See infra Chapter 2, section 2.2.
9 See infra Chapter 2, section 2.4.
12 See infra Chapter 3, section 3.3.
13 M. Chanock, Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia (Cambridge University Press, 1985) at 4. In a similar vein, W. J. Mommsen notes: ‘There can be no
Mindful of the importance of law in the creation and maintenance of institutional systems of rule, the historical analysis of the role of law during European colonial rule at the same time provides the reader with an understanding of how law can serve the establishment and preservation of traditional inequalities. The analysis of European legal rule, more specifically, comprises an assessment of the British indirect rule and the French system of assimilation, both of which were the dominant colonial strategies on the African continent during the nineteenth and twentieth centuries.

doubt that the imposition of European law and European legal procedures upon various peoples in the non-Western world was in the first place a means of establishing and extending imperial control, formal or informal' (W. J. Mommsen, 'Introduction' in W. J. Mommsen and J. A. De Moor (eds), *European Expansion and Law* (Berg, 1992) at 2.
Chapter 2

European Colonialism and Neo-colonialism

2.1. European colonialism

2.1.1. A classification of colonialism

Colonialism [...] is imperialism seen from below. It is that view of the controllers which is held by the controlled. It is a matter of attitude and latitude, altitude and angle: and what is being looked at is power. Power itself, not its use: the point about a benevolent despot is not that he is benevolent but that he is a despot. The European nations were powerful in the immediate past: the Americans and the Russians are seen to have inherited their power to-day. Being powerful, they have empires; and having empires, they will want them to extend. These will indeed not be called empires, for empire and any admittance of imperialism stand in a public pillory. But it does not matter, and it will not matter, what they are called, for imperialists have always been congenitally incapable of calling things by their right names. "Colonialism" is the definition of this state of affairs, pronounced from somewhere below, from the hearts of the non-powerful, from the patients not the agents, from the people whom other people move on the international chessboard, who have inherited a state of "cold war" whose history they do not know and whose point they do not see.1

This statement was made by Archibald Thornton, a British historian on imperialism, in 1962. It describes colonialism2 as a means of the ruled to express a sense of inferiority and powerlessness, as a notion to convey a model of rule which cannot be easily changed by the supressed and as a symbol of profound injustice. Although Thornton does not specify the characteristics of colonial rule in this statement, his definition captures well the subjective dimension of the term which was already identified in the introductory chapter of this study. At the same time, the statement reveals a dichotomy of perceptions about the basic intentions behind powerful nations’ expansionist policies. Thornton emphasises that colonial and imperial powers have constantly shied away from using the term ‘colonialism’, as it has an abusive and accusatory connotation. Instead, the physical expansion into remote

1 A. P. Thornton. 'Colonialism' (1962) 17(4) International Journal at 341f.
2 The term colonialism derives from the Latin word colonia, meaning ‘farm’ or ‘real estate’ (P. D. Curtin. ‘The Black Experience of Colonialism and Imperialism’ (1974) 103(2) Daedalus at 22).
regions of the world was preferably described by the colonial powers in altruistic or philanthropic terms by accentuating the benefits to the colonised society following from the exercise of colonial or imperial domination. Along these lines, colonialism was frequently labelled as a civilising mission, which was to the well-being of the local population. Following a famous poem by Rudyard Kipling, issued in the context of the colonisation of the Philippines by the U.S., the responsibility of (white) colonisers vis-à-vis the colonial societies was even described as the ‘white man’s burden’.

As soon as one devotes oneself to the history of colonialism, it becomes clear that there is no generally, let alone universally accepted definition of the term colonialism. This conceptual indeterminacy is mainly owed to the fact that colonialism existed in as many different forms as there were expansionist endeavours in the history of mankind. Since a consensual and overarching identification of the term colonialism across accounting periods does not exist, the author, for a classification of the term, relies on definitions provided by Philip Curtin, a historian on Africa and on Atlantic slave trade, and Jürgen Osterhammel, a German historian of colonialism and global history. As a starting point, the former accentuates the aspect of cultural difference between the people involved, describing colonialism as ‘a government by people of one culture over people of a different culture’. According to Curtin, in particular the Europeans interpreted the cultural dissimilarity between the peoples affected by colonial relationships in racial terms. Osterhammel, who himself relied on Curtin’s approach of cultural differentiation, provides a more narrow understanding of the term colonialism:

Colonialism is a relationship of domination between an indigenous (or forcibly imported) majority and a minority of foreign invaders. The fundamental decisions affecting the lives of the colonized people are made and implemented by the colonial rulers in pursuit of interests that are often defined in a distant metropolis.

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4 An electronic version of the poem is available at http://historymatters.gmu.edu/d/5478/.
6 Curtin, *supra* note 2, at 22.
7 Ibid., at 23.
Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule.\textsuperscript{8}

Osterhammel describes colonialism as a system of political domination which is based on the acquisition of foreign territory and whose inhabitants are ruled by a particular type of socio-political organization.\textsuperscript{9} Decisions affecting the lives of the indigenous majority are made by the distant metropolis in accordance with the interests of the colonial power. Osterhammel not only provides a description of the relationship between the minority of foreign invaders and the indigenous majority population. Rather, he explicitly mentions as a condition of colonial domination the colonisers’ belief in the primacy of their own culture over that of the controlled, a feature which has also been central to the imposition of European law upon their colonial possessions.\textsuperscript{10}

2.1.2. European colonisation of the African continent

Bearing in mind that colonialism and other types of expansion existed in myriad forms throughout human history, in particular modern European colonialism in regions all over the world has coloured the present-day (negative) understanding of the term ‘colonialism’. This historical process started with the Spanish conquest of much of South and Central America at the beginning of the sixteenth century.\textsuperscript{11} However, in view of the enormous richness and diversity of the topic of modern European colonialism, the present section will not deal with European colonial expansion worldwide. Instead, duly considering the present study’s focus on Africa, the following analysis will concentrate on European colonial rule on the African continent, which was most pervasive in the nineteenth and twentieth centuries.

Compared with other regions of the world, the Europeans entered the African continent relatively late. Among the first to gain a foothold on the continent were the Portuguese during the fifteenth century.\textsuperscript{12} Between 1500 and 1800, Portuguese influence gradually declined. In various parts in Africa, however, fragmentary influence, which mostly did not transcend the boundaries of formal colonial rule, was

\textsuperscript{8} Osterhammel, supra note 5, at 16f.
\textsuperscript{9} Ibid., at 4.
\textsuperscript{10} See infra Chapter 3, section 3.1.
\textsuperscript{11} For a detailed overview over European colonial expansion during this period, Osterhammel, supra note 5, at 29ff.
\textsuperscript{12} W. Menski, Comparative Law in a Global Context: The Legal Systems of Asia and Africa (Cambridge University Press, 2006) at 445ff.
exerted by the British, the Dutch and the French. Prior to the radical partition of the African continent towards the end of the nineteenth century, European influence in Africa largely concentrated on the coastline. The only countries extensively colonised by the Europeans were South Africa by the Dutch since 1652, Algeria and parts of Senegal by the French since 1830 and 1848 respectively. The interests of European states in Africa at that time largely concentrated on commercial matters including slave trade. European activity on the African continent significantly grew after the opening of the Suez Canal in 1869 and the decline of Muslim influence in the Mediterranean region. European claims over African territories eventually led to the formal partition of the continent at the Berlin West Africa Conference in 1884/5 (Berlin Conference), an event which will be addressed in more detail later in this chapter. This division of the African continent and the arbitrary determination of colonial boundaries paid little attention to ethnic concerns and local peculiarities, a fact which remains a legacy of colonialism until today as these artificially established boundaries in many cases still remain the same.

Despite the joint attempt of European states to establish a framework among Western states with regard to the management of non-European possessions at the Berlin Conference in 1884/5, unrelenting desire for economic, political, and military advantages among European rivals remained a driving force behind European colonial politics in the nineteenth and twentieth centuries. During the many years of colonial rule the geopolitical situation, the balance of power among European states, but also the interests of the European expansionists constantly changed. Accordingly, it was not unusual that colonial possessions were ruled by different

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13 Ibid., at 446.
15 See, e.g., Osterhammel, supra note 5, at 34; Menski, supra note 12, at 445ff.; and Crowder (1968), supra note 14, at 23ff.
16 See Menski, supra note 12, at 446; and Oliver and Atmore, supra note 14, at 43ff. For an analysis of African-Muslim imperialism on the African continent, Crowder (1968), supra note 14, at 31ff.
17 See infra section 2.4. A detailed analysis of the partition of Africa is provided Oliver and Atmore, supra note 14, at 118-160.
20 See Osterhammel, supra note 5, at 115; Roberts, supra note 14, at 18f.
Despite the fact that many different European states were involved in the struggle for Africa, Great Britain, occupying large parts of Southern and Eastern Africa and France, whose colonial activities extended to most parts of Western Africa and the Maghrib region, were the most influential European colonial powers on the African continent. Both states, throughout colonial rule, held numerous colonies and exercised control over a great diversity of ethnicities, societies and people.

A number of reasons were contributing to the decline of European colonial rule on the African continent in the mid-twentieth century. In the first place, the European colonial empires had to bear the consequences of two devastating world wars, the second of which in particular drastically diminished the enthusiasm of European colonial powers to continue bearing the costs for direct colonial rule. As David Birmingham notes: ‘The economic and strategic benefits of holding the colonies, it was thought, could be maintained without the political and financial cost of direct control’. This approach was later identified as neo-colonialism. Apart from economic considerations, the formation of liberation movements in the colonies and clientele policies conducted by the United States and the Soviet Union also had a major impact on the process of decolonisation. The liberation of the majority of African countries was gradually achieved in the years after the Second World War and the transfer of power was completed in most African states in the nineteen-sixties.

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21 An overview over the different regions and the prevailing colonial influences on the African continent is provided in Oliver and Atmore, supra note 14.
22 The development of colonial Africa illustrated through maps can be found at: http://etc.usf.edu/maps/galleries/africa/complete/index.php. Other European colonial powers with African colonial possessions were Portugal, Spain, Italy, Belgium and Germany. After the First World War, the German colonies were divided between Great Britain, France, Belgium and the Union of South Africa (see infra section 2.4.).
23 On the process of the decolonisation of African countries see, Oliver and Atmore, supra note 14, at 226ff.; and Birmingham, supra note 18.
24 See Osterhammel, supra note 5, at 115 and Oliver and Atmore, supra note 14, Ch. 16.
25 Birmingham, supra note 18, at 4.
26 See infra section 2.2.
27 Examples of patron-client relationships conducted by the U.S. and the Soviet Union are provided in C. Shoemaker and J. Spanier, Patron-Client State Relationships: Multilateral Crises in the Nuclear Age (Praeger Publishers, 1984).
28 See Osterhammel, supra note 5, at 115.
29 For an overview over the dates of independence of African states, Birmingham, supra note 18, at 67-74.
2.2. The notion of neo-colonialism

2.2.1. The historical concept of neo-colonialism

Much of the attraction of the study of colonialism lies in the safety of its politics of the past. Neocolonialism, on the other hand, is concerned with the more awkward effects of colonialism in the present. The means of administration may have often moved from coercive regiments to regimes supported by international aid and the banking system, the ‘white man’s burden’ may have been transformed by the wind of change into the TV appeal for famine in Africa. But the burden of neocolonialism remains for all those who suffer its effects; and responsibility cannot be ignored by those who find themselves part of those societies which enforce it.  

In this statement from 1991, Young emphasises the lasting effects of colonialism these days through the pervasive concept of neo-colonialism. Similarly to Thornton above, Young, noting that ‘the burden of neo-colonialism remains for all those who suffer its effects’, perceives the concept from a perspective from below. At the same time, he highlights the transformative character of the concept by identifying instruments such ‘international aid and the banking system’ as possible sources of neo-colonialist influence.

Despite the fact that the label ‘neo-colonialism’, as was shown in the introductory chapter of the study, frequently serves as a rhetorical weapon in these days of economic and political turmoil, the concept is not at all a recent phenomenon fabricated by the twenty-first century classe politique. Rather, the emergence of the notion of neo-colonialism reaches back to the dismantling of colonialism and is ideologically related to the African liberation struggle against European colonial domination. The doctrine of neo-colonialism was particularly inspired by the ideological leader of the Pan-African initiative, Kwame Nkrumah. In his landmark book ‘Neo-colonialism: The Last Stage of Imperialism’, Nkrumah conceptualised...
African perspectives on post-colonial dependencies from outside powers in the following way:

Neo-colonialism is based upon the principle of breaking up former large united colonial territories into a number of small non-viable States which are incapable of independent development and must rely upon the former imperial power for defence and even internal security. Their economic and financial systems are linked, as in colonial days, with those of the former colonial ruler.  

Analysing the dependency of the newly created African states from its former colonial powers, Nkrumah negates that African states are indeed fully independent: ‘The essence of neocolonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside’.  

Pointing out that the economic systems and the political policies of the theoretically independent states continued to be directed from outside after formal decolonisation, Nkrumah recognised that these entities remained firmly under the influence of their former colonial dominators. Klaus Knorr comments in a similar vein: ‘The term neocolonialism implies formal sovereignty to be in some sense ineffective, not to represent real sovereignty’. Neo-colonialism thus describes a form of informal control because influence on a foreign national policy is exercised without the forcible acquisition of the territory. Through the preservation of economic ties the colonial powers were capable to continue the exploitation of natural resources of their former colonies and the independence of these entities was de facto compromised by this influence. The unequal relationship between powerful states and former colonies thus effectuates an asymmetry which is to the benefit of former colonial powers. While in the case of direct administrative control over another territory this asymmetry was overt and direct, it is perpetuated in a more subtle fashion under the guise of neo-colonialism. Put in another way, formal asymmetries established through the regime of colonialism are consolidated in a more informal way under the guise of neo-colonialism.

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34 Nkrumah (1965), supra note 32, at xiii.
35 Ibid., at ix.
37 See ibid., at 252f. For a description of informal modes of rule, Osterhammel, supra note 5, at 18-21.
38 See Knorr, supra note 36, at 252ff.
Despite the fact that the notion of neo-colonialism is often defined in economic terms, it would be wrong to interpret neo-colonialism as a purely economic phenomenon. Rather, the historical concept of neo-colonialism is perceived to be wider in scope. In 1961, the third All African Peoples’ Conference, assembling political parties and other stakeholders from African states and elsewhere, defined neo-colonialism as ‘an indirect and subtle form of domination by political, economic, social, military or technical means’.\(^\text{40}\) In a similar vein, Nkrumah recognised that neo-colonialism is not only economic in nature but similarly may affect ‘political, religious, ideological and cultural spheres’.\(^\text{41}\) The interpretation that there are various forms of neo-colonialism similarly corresponds with the understanding that there existed and still exist many different kinds of colonialism, too.\(^\text{42}\) By taking into consideration the complexity of present-day interstate relationships affecting many different domains of interaction, the above enumeration of neo-colonialist methods should be considered non-exhaustive, in the author’s view. This flexible understanding of the term neo-colonialism is supported by the fact that patterns of informal rule for economic and political purposes predated both the emergence of the notion of neo-colonialism and formal European colonial rule in Africa.\(^\text{43}\) Pre-colonial informal relationships between Europeans and natives – as neo-colonialism likewise – restricted the sovereignty of the states involved and the dominant country often retained various guarantees and privileges most often by means of unequal treaties.\(^\text{44}\)

Informal dependencies, including the phenomenon of neo-colonialism, are not limited to specific geographical regions. Rather, countries all over the world can be negatively affected by informal modes of political and economic interference.\(^\text{45}\) Although the term neo-colonialism is often referred to with regard to relations between former colonial powers and its colonial possessions, it does not necessarily


\(^{41}\) Nkrumah (1965), supra note 32, at 239.

\(^{42}\) Spivak, supra note 31, at 224f. For an overview over the various existing forms of colonialism, Osterhammel, supra note 5.

\(^{43}\) See ibid, at 19; Knorr, supra note 36, at 253f.; and J. Woddis, An Introduction to Neo-colonialism (International Publishers, 1967) at 51.


\(^{45}\) See Nkrumah (1965), supra note 32, at xvii.
have to be this way.\textsuperscript{46} In particular the U.S., which has an impressive history in building informal relationships with developing countries in order to exert influence on them without exercising direct political rule, is nowadays seen by scholars as the leading power in conducting neo-colonial relationships.\textsuperscript{47} The U.S., which was itself colonised by the British, only ever possessed two formal colonies, the Philippines from 1898-1946 and Puerto Rico from 1898-1952.\textsuperscript{48} Accordingly, the U.S. is a good example to illustrate that the status quo of a state as a neo-colonial power is not always linked to former colonial activities. Thus, it is possible that countries without a colonial past are affected by neo-colonialist relations either in a beneficial or in an exploitative way.

The label ‘neo-colonialism’ is not only used in relation to states but also in conjunction with multinational corporations and international institutions. Embracing multinational capitalist companies into neo-colonialism critique does not come as a surprise, as much of the literature on neo-colonialism focuses on the impact of the world capitalist system on formerly colonised regions.\textsuperscript{49} The same holds true for neo-colonialism allegations of international financial institutions such as the World Bank and the International Monetary Fund, both of whom are said to exercise enormous influence on the economic policies of developing countries.\textsuperscript{50} The term neo-colonialism, as a consequence, should not exclusively be understood in relation to power exercised by states.

It follows from the above considerations that neo-colonialism indeed operates in isolation from specific historical experiences. In line with this understanding it appears reasonable to consider the notion of neo-colonialism in abstract terms detached from specific historical contexts. The following analyses of Latin American

\textsuperscript{46} See ibid., at x; and Spivak, \textit{supra} note 31, at 225.
\textsuperscript{47} See, among others, Nkrumah (1965), \textit{supra} note 32, at 239; Woddis, \textit{supra} note 43, at 46ff.,70; and Osterhammel, \textit{supra} note 5, at 19.
\textsuperscript{48} Osterhammel, \textit{supra} note 5, at 18.
\textsuperscript{49} Several authors have assessed the relationship between Western companies and underdevelopment in African states. See, among others, Nkrumah (1965), \textit{supra} note 32; S. Amin, \textit{Neo-colonialism in West Africa} (translated by F. McDonagh, Monthly Review Press, 1973); G. Lanning and M. Mueller, \textit{Africa Undermined: Mining Companies and the Underdevelopment of Africa} (Penguin, 1979).
dependency relationships and the system of patronage may further assist in this endeavour.

2.2.2. Dependency and asymmetry

While the terminology of neo-colonialism emanates from the African fight to break colonial fetters, the same phenomenon is addressed through the Theoría de la Dependencia which emerged in the Latin American context in the late 1960s. This doctrine is concerned with the root causes of underdevelopment in Latin American states. It links the underdevelopment of states and societies to global capitalism by reference to hierarchic metropolis-satellite relations. The concept insinuates that the wealth of the West is imperatively based on the economic exploitation of its peripheral colonies. André Gunder Frank, a leading scholar in the field, explains this phenomenon in the following terms:

[C]ontemporary underdevelopment is in large part the historical product of past and continuing economic and other relations between the satellite underdeveloped and the now-developed metropolitan countries. Furthermore, these relations are an essential part of the structure and development of the capitalist system on a world scale as a whole.

The underdevelopment of states, according to Frank, is couched in a broader historical context and based on the development of the capitalist system and the asymmetry of the world economic market. Frank thus identifies the world economic market as a structural condition for the exploitation of underdeveloped states over a long period of time. In this sense, the capitalist system imperatively promotes the existence of structural and systemic inequalities. Susanne Bodenheimer emphasises that forms of dependency vary according to systemic and country specific

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52 See Frank, supra note 51, at 4ff.
53 Ibid., at 6f.
54 Ibid., at 4.
55 Assessing the dependency of African states Walter Rodney similarly links the European expansion to economic objectives: ‘The concept of metropole and dependency automatically came into existence when parts of Africa were caught up in the web of international commerce. On the one hand, there were the European countries who decided on the role to be played by the African economy; and on the other hand, Africa formed an extension to the European capitalist market. As far as foreign trade was concerned, Africa was dependent on what Europeans were prepared to buy and sell.’ (W. Rodney, How Europe Underdeveloped Africa (reprint of revised edn 1981, Fahamu/Pambazuka, 2012) at 76.
parameters. This diversity of manifestations of dependency, a phenomenon that has already been observed with regard to the notion of colonialism, is also highlighted by Walter Rodney, a Guyanese historian, who considers the dependency of colonial and post-colonial African states as one of the evils of foreign rule on the continent.

The factor of dependency made its impact felt in every aspect of the life of the colonies, and it can be regarded as the crowning vice among the negative social, political and economic consequences of colonialism in Africa, being primarily responsible for the perpetuation of the colonial relationship into the epoch that is called neo-colonialism.

An important pillar in the system of dependency-relations, as will be shown in more detail in the following section on the concept of patronage, is that clientele classes exist that benefit from these unequal relationships of dependence. These clientele classes, so the argument goes, are a necessary requirement to foster underdevelopment in the context of inter-state dependencies. As a consequence, neo-colonial dependencies are characterised by the (inter-) dependency between a domestic ruling class and a dominant counterpart in the international system. Bodenheimer describes these clientele groups as a part of the ‘infrastructure of dependency’ and as an internal condition to the preservation of dependency relationships. It follows that the mere existence of either internal or external ties to another state alone does not automatically translate into a neo-colonial dependency between two states. Addressing this inter-dependency between the actors involved, Bodenheimer continues: ‘[I]f dependency is conceived as an internal structural condition, then the opposite of dependent development, autonomous development, in no way signifies the absence of all ties to other nations (even to more advanced

56 Bodenheimer, supra note 39, at 334f.
57 Rodney, supra note 55, at 236.
58 See, in particular, infra section 2.3. Also, Bodenheimer, supra note 39, at 337ff.
59 See ibid, at 337.
60 As Bodenheimer notes, ‘dependency does not simply mean external domination, unilaterally superimposed from abroad and unilaterally producing “internal consequences”. The internal dynamics of dependency are as much a function of penetration as of domination. It is in this way that dependency in Latin America differs from that of a formal colony: while the chains binding the latter to the mother country are overt and direct (administrative control), those of the former are subtler and are internal to the nation—and for that reason are much more difficult to break. In this sense, the infrastructure of dependency may be seen as the functional equivalent of a formal colonial apparatus—the principal difference being, perhaps, that since all classes and structures in Latin society have to a greater or lesser degree internalized and institutionalized the legacy of dependency, that legacy is much more difficult to overcome’ (ibid., 338f.).
nations). An example which corroborates this "dual causality" is Cuba, whose (largely autonomous) internal structural conditions are causal for the (partial) independence of the Cuban system from the world capitalist system.  

2.3. The concept of patronage

In contrast to the Latin American Teoría de la Dependencia, which essentially describes structural inequalities as part of the world economic system, we saw that colonial and neo-colonial patterns of rule are not limited to the socio-economic sphere but are descriptive of asymmetric patterns of rule in general, which transpire in various domains. Thus, formal or informal relationships between states of unequal power and capabilities perpetuate the influence of dominant states in subordinate countries. The preservation of structural inequalities, however, usually requires not only the existence of external structural conditions but similarly a corrupt client who is interested in the establishment of a relationship of (inter-) dependency with a dominant counterpart. Bodenheimer has characterised the phenomenon of clientele classes as follows:

Clientele classes are those which have a vested interest in the existing international system. These classes carry out certain functions on behalf of foreign interests; in return they enjoy a privileged and increasingly dominant and hegemonic position within their own societies, based largely on economic, political, or military support from abroad.

Colonial and neo-colonial relationships between dominant and subordinate states can thus also be described on the basis of patron-client relationships. With a view to the inclusion of African local institutions into the government of colonial possessions, Bruce Berman observed:

The most important political relationship in the colonial state was the alliance between European district administrators and the chiefs of administrative subdivisions and village headmen beneath them. The extensive autonomy and discretion that European administrators exercised in practice was applied primarily to working out an effective relationship with their local African collaborators, who supplied the actual day-to-day presence and muscle of colonial domination. Chiefs

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61 Ibid., at 339.
62 See ibid., at 339; and Obadina, supra note 50.
63 Bodenheimer, supra note 39, at 337.
and headmen were the essential linkage between the colonial state and African societies. This relationship typically took on a patron/client form.\textsuperscript{64}

The concept, as it is applied by Berman, is limited to personal relationships established by representatives of the colonial powers with African native authorities. This form of rule, to varying degrees, was typical for both the French and the British colonial system, as will be shown in more detail in the following chapter.

The concept of patronage, however, was not only used by the colonial powers as a means to administer colonial territories but similarly served the perpetuation of power at a domestic level.\textsuperscript{65} It is in particular claimed that long lasting authoritarian African political rule in the post-colonial era was (at least partly) based on patronage politics.\textsuperscript{66} In this sense, patronage, according to Nicolas van de Walle, ‘can be defined as the practice of using state resources to provide jobs and services for political clienteles. Patronage is designed to gain support for the patron that dispenses it’.\textsuperscript{67} Leonardo Arriola, however, not only ascribes the durability of some African regimes to the system of patronage, but at the same time identifies a possible source of internal conflict therein.\textsuperscript{68}

Besides the element of asymmetry, the relationship between a patron and a client is characterised by a certain degree of reciprocity.\textsuperscript{69} According to Allen Hicken, ‘[t]he delivery of a good or a service on the part of both the patron and client is in direct


\textsuperscript{66} See, exemplarily, Arriola, \textit{supra} note 65, at 1340f.

\textsuperscript{67} Van de Walle, \textit{supra} note 65, at 51.

\textsuperscript{68} ‘Africa’s political instability is conventionally attributed to the manner in which leaders sustain themselves in power. Leaders across the region hold onto office by purchasing support through the distribution of state resources; as such, any conflict over their allocation is thought to degenerate into a struggle over control of the state. Violence erupts either because some elites crave a larger share of the spoils controlled by the leader or because those outside the leader’s patronage-based coalition want access to resources to which they have been denied’ (Arriola, \textit{supra} note 65, at 1339).

response to a delivery of a reciprocal benefit by the other party, or the credible promise of such a benefit. As we saw above, within a client state, clientele classes in particular are the recipients of these benefits. Essentially, through the establishment of a relationship with the client, the patron seeks to expand its control over the client. Depending on the specific objectives of the patron in the client state, such control is exercised in many forms and typically results in the surrender of some degree of autonomy to the patron. However, history has shown that attempts to exert control over another state have in the past often led to colonial or neo-colonial domination, a situation that the client typically seeks to avoid. Although it will sometimes be difficult to separate pure patron-client relationship from neo-colonial dependencies and vice versa in practice, there are some distinguishing elements between the two, as will be demonstrated in the following section.

2.4. The exercise of unequal power and structural conditions

Analysing patron-client relationships, dependency relationships, colonial and neo-colonial relationships, it becomes evident that all of these relationships involve an imbalance of power in which some states or actors exercise influence on other states or actors to make the latter act in compliance with the interests of the former. While we have so far analysed these relationships in their abstract form as existing between unequal actors, we now shift to the question how the notion of power relates to these concepts, a feature that was also identified by Thornton as a crucial element of colonial relationships. While there are a variety of understandings what power in international relations essentially means, the present study applies the typology of structural and relational power, a conception that was introduced by Susan Strange to describe the dynamics of the world economic market. This approach is consistent with the previous analysis of neo-colonial dependency relationships which, we recall, are based on the existence of external structural conditions, i.e. the world economic market.

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70 Hicken, supra note 69, at 291.
71 See Shoemaker and Spanier, supra note 27, at 17; and Carney, supra note 69, at 47.
72 Shoemaker and Spanier, supra note 27, at 17.
73 See Thornton, supra note 1, at 341f.
We saw in the previous section that pure patron-client relationships are characterised by a certain degree of reciprocity.\textsuperscript{75} In the neo-colonial case, however, the relationship tends to be more one-sided. In other words, the degree of influence the actors involved are able to exercise determines the conditions of the relationships and the degree of reciprocity.\textsuperscript{76} In both cases, thus, we speak of an exercise of relational power, which is power exercised in a relationship between two or more (unequal) actors.\textsuperscript{77} Relational power, according to Jan-Frederik Kremer and Andrej Pustovitovskij, ‘per definition focuses only on spatially and temporally limited relations between directly involved actors and does not offer a concept of structure beyond the mere sum of these relations’.\textsuperscript{78} In the case of pure patron-client relationships, therefore, one could refer to the term reciprocal relational power.

In contrast to pure patron-client relationships, power is exercised against the background of existing external structural conditions in the case of traditional neo-colonial dependencies. This understanding of relationships essentially depicts the notion of power in structural terms.\textsuperscript{79} Neo-colonial dependencies are typically systemic in so far as the relationship between a superior state and an inferior state is predefined by external structural, non-clientelist, conditions such as economic, social or, as we will see below, legal forces.\textsuperscript{80} By way of example, the present study has focused on the Latin American Dependency Theory which ascribes the underdevelopment of peripheral states to the structure of the world economic market. The contention of the existence of a neo-colonialism in the field of ICL, as will be shown in Chapter 6, relates to the power facilitated on the basis of structural conditions in the field of ICL which produce (and reproduce) patterns of inequality.

\textsuperscript{75} See supra section 2.3.
\textsuperscript{76} In a similar vein, R. Vengroff. ‘Neo-colonialism and policy outputs in Africa’ (1975) 8(2) Comparative Political Studies at 235.
\textsuperscript{77} This form of power is described by C.R. Beitz ‘as an actor’s capacity to cause other actors to act (or not act) in way in which they would not act (or would have acted) otherwise’ (C. R. Beitz, Political Theory and International Relations (reprint of original version from 1979, Princeton University Press, 1999) at 44). See also, Brown and Ainley, supra note 74, at 83ff.; S. Strange, ‘Towards a Theory of Transnational Empire’ in E. O. Czempiel and J. N. Rosenau (eds), Global Changes and Theoretical Challenges (Lexington Books, 1989) at 165; A. Pustovitovskij and J-F Kremer. ‘Structural Power and International Relations Analysis “Fill Your Basket, Get Your Preferences” (working paper)’ (2011) 191 Institut für Entwicklungsfororschung (IEE) at 3.
\textsuperscript{78} A. Pustovitovskij and J-F Kremer. ‘Towards a New Understanding of Structural Power’ (ECPR Graduate Conference, Bremen, Germany, 4-6 July 2012) at 3f.
\textsuperscript{80} See Carney, supra note 69, at 44; Kaufman, supra note 69, at 295; M. J. Gasiorowski. ‘Dependency and Cliency in Latin America’ (1986) 28(3) Journal of Interamerican Studies and World Affairs at 60f.
between the power exercising states and the states that are disadvantaged by the legal framework.

As for colonialism, while it too was to some extent supported by structural conditions\textsuperscript{81}, the establishment of colonial rule was not necessarily based on existing structural frameworks. Rather, other means of exercising power had a more direct impact on the acquisition of territories and the establishment of colonial rule. As such the acquisition of colonial territories typically took place in three different ways: through effective occupation under the concept of \textit{terra nullius}, military conquest or by means of cession.\textsuperscript{82} Whereas cession is a derivative mode of acquisition, occupation and conquest are original modes.\textsuperscript{83} An effective occupation of a territory under the concept of \textit{terra nullius} takes place when ‘the territory is uninhabited, or is inhabited only by a number of individuals who do not form a political society’.\textsuperscript{84} The acquisition of territory on the basis of conquest ‘assumes the absence of any formal transfer on the part of the previous sovereign […] and requires (1) the taking possession of the territory by force, coupled with (2) the intention and (3) ability to hold the territory as its sovereign’.\textsuperscript{85} Cession ‘is the transfer of sovereignty over state territory by the owner-state to another state’.\textsuperscript{86} In the context of European expansion on the African continent, the colonial powers extensively relied on the right of conquest\textsuperscript{87} and the conclusion of bilateral treaties to acquire control over African territory and people\textsuperscript{88}. However, none of the above named modes of acquisition require as a precondition the existence of external structural conditions, except that

\begin{footnotesize}
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\item \textsuperscript{81} See \textit{infra} Chapter 3.
\item \textsuperscript{82} L. Oppenheim, in total, has listed five different modes of acquiring a territory: cession, occupation, accretion, subjugation and prescription (R. Jennings and A. Watts (eds), \textit{Oppenheim’s International Law: Peace} (Vol.I, 9th edn Longman Group, 1992) at 679). However, not all of them were relevant in the context of colonialism.
\item \textsuperscript{83} Ibid., at 679.
\item \textsuperscript{84} M. F. Lindley, \textit{The Acquisition and Government of Backward Territory in International Law} (Longmans, Green and Co. LTD, 1926) at 45.
\item \textsuperscript{85} Ibid., at 160.
\item \textsuperscript{86} Jennings and Watts, \textit{supra} note 82, at 679.
\item \textsuperscript{87} For a comprehensive analysis of the right of conquest, S. Korman, \textit{The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice} (Clarendon Press, 1996).
\item \textsuperscript{88} On treaties between European and African states, Alexandrowicz, \textit{supra} note 44; Lindley, \textit{supra} note 84, at 169-177; M. Shaw, \textit{Title to Territory in Africa} (Clarendon Press, 1986) at 38-45; and Anghie, \textit{supra} note 3, at 67ff.
\end{itemize}
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international law does not contain a prohibition with respect to these titles to territory at the time of European colonial expansion.  

A notable exemption in which a structural framework was created to facilitate colonial expansion was the Berlin-West Africa Conference in 1884/5. At this conference, European states settled by agreement the framework conditions for the partition of the African continent and the exploitation of European colonial possessions. Although the conference had profound effects on the African continent, no African stakeholders were involved in the decision-making of the conference. Jörg Fisch therefore rightly notes that ‘Africa was not the subject but the object of the Conference.’ According to the final text of the conference, the participating states were particularly concerned with three different themes: the establishment of free trade in the basin of the Congo, the organization of free navigation for the Congo and Niger rivers and the introduction of rules with regard to future occupations on the coast of Africa. In particular, it is noticeable that any claim to African territory (‘new occupations’) required the exercise of effective authority and formal notification to the other signatories to the conference. Although it has been argued by some that the use of the term ‘new occupations’ in relation to the

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89 In this context, it is noteworthy that a number of authors have argued that international law has been structured by European states to facilitate colonialism and subordination of non-European peoples since the sixteenth century (see, e.g., Anghie, supra note 3).


91 The General Act of the Berlin Conference on West Africa was signed by the representatives of the United Kingdom, France, Germany, Austria, Belgium, Denmark, Spain, the United States of America, Italy, the Netherlands, Portugal, Russia, Sweden-Norway, and Turkey (Ottoman Empire) (see General Act of the Berlin Conference on West Africa (26 February 1885) <http://africanhistory.about.com/od/eracolonialism/l/bl-BerlinAct1885.htm> accessed 11 June 2015 [hereinafter Berlin Act]).


93 See preamble of the Berlin Act, supra note 91.

94 Chapter VI Berlin Act (Declaration relative to the essential conditions to be observed in order that new occupations on the coasts of the African continent may be held effective):

Article 34: ‘Any Power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.’

Article 35: ‘The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon’ (emphasis added) (Berlin Act, supra note 91).
acquisition of African territory by European states referred to the concept of occupation _terra nullius_\textsuperscript{95}, there is evidence that ‘the term was used with a broad meaning equivalent to "Acquisition" or "Appropriation", and was not confined to Occupation in the strict sense’.\textsuperscript{96}

Besides a focus on the regulation of commercial relations, the multilateral conference was seen as an instrument to avoid military confrontation between competing European colonial rivals in the future.\textsuperscript{97} Accordingly, the provisions of the final act were above all ‘concerned with the relations of the European powers _inter se_ and not with the direct acquisition of territory from the African sovereign’.\textsuperscript{98} This is confirmed by Fisch who notes that ‘[t]he Europeans had the power to annex Africa even without the provisions on occupation contained in the Berlin Act’.\textsuperscript{99}

Despite the fact that the Berlin Act also emphasised the ambition to ‘[further] the moral and material well-being of the native populations’ and ‘to help in suppressing slavery’\textsuperscript{100}, the drafting process has revealed efforts of the colonial powers to water down their own obligations and responsibilities in the context of colonial rule.\textsuperscript{101} In addition, although the final act was formally limited in geographical terms, the conference was used by the participating states to settle by (informal) agreement their claims on the African continent. As Ronald Robinson notes:

> [T]he interested powers settled their individual claims in the lobbies and divided the territories concerned among themselves. Hence while they decreed an international free trade regime in the treaty, in the bilateral settlements, they partitioned the area politically into exclusive spheres of influence which implied economic monopoly.\textsuperscript{102}

Summarising the ambitions of the leading powers with respect to that conference, Robinson comes to the conclusion that '[t]he leading powers who decided the issue were clearly intent on avoiding colonial liabilities, on averting a scramble for the

\textsuperscript{96} Lindley, _supra_ note 84, at 34. In the same vein, Shaw, _supra_ note 88, at 31-39; Fisch, _supra_ note 92, at 358f. The ICJ, in the Western Sahara Advisory Opinion, came to the same conclusion ( _Western Sahara_, Advisory Opinion, I.C.J. Rep. 1975, p. 12., at para.80).
\textsuperscript{97} See Fisch, _supra_ note 92, at 347; and; M. Koskenniemi, _The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960_ (Cambridge University Press, 2004) at 123.
\textsuperscript{98} Shaw, _supra_ note 88, at 38 (emphasis in the original).
\textsuperscript{99} Fisch, _supra_ note 92, at 348.
\textsuperscript{100} Article 6 Berlin Act, _supra_ note 91.
\textsuperscript{101} See Koskenniemi, _supra_ note 97, at 123ff.; and Anghie, _supra_ note 3, at 92ff.
\textsuperscript{102} Robinson, _supra_ note 90, at 1.
interior, and frustrating the supposed colonial ambitions of their rivals'. Despite the establishment of a framework between the colonial powers to steer the scramble in Africa into peaceful channels, it is thus important to bear in mind that the European colonial powers, throughout colonial rule, were primarily interested in their own well-being and that political and military disputes between the European rivals continued.

Another example of external structures contributing to the preservation of colonial rule was the Mandate System instituted after the First World War. Under this instrument, the colonial and annexed territories belonging to vanquished Germany and Turkey were (at least formally) placed under international tutelage of the newly created League of Nations. The former German territories in Central Africa were placed under the administration of the Mandatory States Great Britain (Tanganyika and the Western parts of Cameroun and Togo), France (the Eastern parts of Cameroun and Togo), Belgium (Ruanda-Urundi) and South Africa (South-West Africa). The Mandate System classified states according to the level of advancement of these territories and aimed at the promotion of 'the well-being and development' of the mandated countries. A permanent monitoring commission was established to exercise some measure of control over the mandatory states. However, the Mandate System, at least with regard to African mandate states, was not a system designed to facilitate decolonisation of colonial territories. Rather, it provided the legal basis for the administration of former German colonial possessions by the new mandatory states. As Mark Frank Lindley notes, the status of the mandated territories was 'in many respects, analogous to that of a protectorate in which the internal as well as the external sovereignty has passed to the protecting power'. From the perspective of the colony, thus, the most noticeable difference

103 Ibid., at 25.
104 An overview over disputed spheres of influence in colonial Africa is provided in Lindley, supra note 84, at 212ff.
106 See Lindley, supra note 84, at 251.
107 Article 22 (1) Covenant of the League of Nations (28 June 1919, 2 Bevans 48, Entry into Force 10 January 1920) [hereinafter Covenant].
108 Covenant, Article 22 (9). On the functions of the commission, Lindley, supra note 84, at 249f.
109 Covenant, Article 22 (5).
110 Lindley, supra note 84, at 267.
was that the administrator was a different one. In the case of South West Africa, it was even ruled that the territory should be ‘administered under the laws of the Mandatory as integral portions of its territory’.\textsuperscript{111} Taken together, the Mandate System, albeit under a different label, formally strengthened the existing system of colonial dependencies.\textsuperscript{112} Moreover, the colonial stereotype of superior and inferior cultures remained a characteristic element in the context of the Mandate System of the League of Nations.\textsuperscript{113}

The Mandate System was succeeded after the Second World War by the United Nations Trusteeship System which continued the system of international supervision of mandate territories, albeit under different conditions providing more effective international supervision.\textsuperscript{114} Again, a supervisory body was established (the Trusteeship Council) to monitor the administration of the colonial possessions.\textsuperscript{115} African states which were already subject to the Mandate System (with the exception of South West Africa whose subjugation to the Trusteeship System was boycotted by the Union of South Africa)\textsuperscript{116} were integrated as trust territories into this new system of international control.\textsuperscript{117} In contrast to the framework established in the Covenant of the League of Nations, self-government and independence became explicit objectives under the trusteeship system.\textsuperscript{118}

However, both the Mandate and the Trusteeship system, although providing a structural framework for the administration of (former) German colonial territories, only affected a small number of African states while many other states remained under colonial domination in the traditional sense. In this context, it is worth recalling that these systems of international monitoring were a direct consequence of the outcome of the First World War and therefore merely translated the historical reality of colonial dependency of these African states into a legal vocabulary, albeit without the colonial rhetoric. Therefore, it can be concluded that the Berlin Conference, although also limited in scope, was the most telling example in which the colonial powers, on a multilateral basis, established a comprehensive structural framework in

\textsuperscript{111} Covenant, Article 22 (6).
\textsuperscript{112} In a similar vein, Mutua, supra note 95, at 1138.
\textsuperscript{113} See Gordon, supra note 105, at 946.
\textsuperscript{114} See Chapters XII-XIII UNC. An introduction to the trusteeship system is provided in Gordon, supra note 105, at 946-954. For a more detailed assessment, Chowdhuri, supra note 105.
\textsuperscript{115} Chapter XIII UNC.
\textsuperscript{116} See Chowdhuri, supra note 105, at 112-117.
\textsuperscript{117} See Gordon, supra note 105, at 948, n.227.
\textsuperscript{118} Article 76 (b) UNC.
the context of European colonialism on the African continent. However, despite the fact that the Berlin conference contributed to the consolidation of European colonial rule in Africa, the rules established, as indicated previously, primarily concerned ‘the relations of the European powers inter se’.

However, the absence of a comprehensive structural framework dealing with European colonialism at a multilateral basis does not mean that structural conditions were absent at every level of colonial interaction. Rather, as will be shown in the next chapter of the study, the internal relationship between the colonial power and the colonised society was greatly based on the existence of a legal framework regulating the administration of colonial territories. The imposition of European law and legal principles on the colonial possessions was central to the introduction of a law and order administration in the colonies. The legal frameworks introduced by the Europeans in their colonies thus provided the structural conditions for the exercise of colonial domination. In other words, military and political power of European states, which served the establishment of colonial rule, turned into structural power in the context of the administration of single colonial territories. As will become clear in the following discussion, these frameworks differed from colonial power to colonial power and from colony to colony, depending on the European colonial powers’ preferences on how colonial rule was best implemented.

2.5. Conclusion

The conclusion can be drawn that the notion of neo-colonialism describes an informal relationship between states of unequal power and capabilities which aims at the perpetuation of influence of the powerful state in the subordinate country. The above characterisation of neo-colonialism particularly emphasises the continuing economic domination and political interference of the West in their former colonial possessions. It refers to a means by which the colonial powers were able to retain economic and strategic benefits without having to shoulder the financial burden of direct administration. Neo-colonialism, at its core, harbours the concept of asymmetry. Attributes describing the colonial relationship, with the exception of direct control of the territory of the colony, by and large remain valid for the notion of neo-colonialism.

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119 Shaw, supra note 88, at 38.
120 See infra Chapter 3, section 3.1.
121 See infra Chapter 3, section 3.2.
122 See supra section 2.2.
This is because the political, legal and economic structures introduced during colonial rule were crucial for post-colonial neo-colonialist influence of the Western world on their former possessions. In the context of the Latin American *Theoría de la Dependencia*, we saw that the world capitalist market functions as an external structural condition and helps to preserve neo-colonial patterns of inequality after the formal end of colonialism. In contrast to neo-colonial dependencies, the existence of over-arching structural conditions should not be overrated in the case of traditional colonial relationships. Rather, structural frameworks established in the course of colonialism were predominantly a reflection of the historical reality of European (military and political) supremacy on the African continent. Neo-colonial ties and dependencies, after all, are not only contingent upon external structural conditions, but similarly require the existence of internal elements, such as domestic clients, to perpetuate unequal relationships. The notion of neo-colonialism furthermore implies that the sovereignty of a state is imperfect with respect to certain specific domains. Although neo-colonialist relationships are most often associated with economic objectives, they may likewise exist in other domains. In addition, the initiator of neo-colonialist conduct is not necessarily a state. Rather, international institutions and transnational companies are also capable of establishing and maintaining neo-colonial dependency relations. In sum, it follows from the above analysis that the concept of neo-colonialism is a transformative concept which can be defined in abstract terms and which is not bound to a specific historical context.

123 A. Anghie, for example, has made the bold claim that international monetary institutions, in terms of structure and influence, strongly resemble the League of Nations Mandate system: "The technologies devised in the Mandate System to manage relations between the colonizer and the colonized continue to play a profoundly important role in managing relations between their successors, the developed and undeveloped/developing. In strictly legal terms, the Mandate System was succeeded by the Trusteeship System. But in terms of technologies of management, it is the Bretton Woods Institutions (BWI) -- the World Bank and the International Monetary Fund (IMF) -- that are the contemporary successors of the Mandate System" (Anghie, *supra* note 3, at 191 (in a similar vein, at 288); see also, Rodney, *supra* note 55, at 236; and Anghie, *supra* note 50).
124 See *supra* section 2.2.2.
125 See *supra* sections 2.2. and 2.3.
126 See *supra* section 2.2.
Chapter 3

Legal Colonialism by European States

3.1. Law as a structural prerequisite for colonialism

Colonialism was characterised by Osterhammel in the previous chapter as a system of domination that is exercised through a ruling minority of foreign invaders over an indigenous majority and which is based the physical appropriation of another territory. According to Osterhammel’s definition, we recall, the exercise of colonial rule is inherently linked to a belief of cultural superiority on the part of the dominant party\(^1\), a belief that has also served as a justification of colonial expansion.\(^2\) At the same time, the establishment of control over a culturally distinct society ‘typically involved the large-scale transfer of laws and legal institutions from one society to another’.\(^3\) John Schmidhauser explains the correlation between physical and legal expansion in the following terms:

In each major colonial conquest, military power created the opportunity for imposition of the law of the conqueror. Each major colonial nation developed a legal rationalization for the replacement of indigenous law with conqueror’s law, each embraced another rationalization for the imposition of law – one form or another of a doctrine of conqueror’s superiority and the alleged inferiority of the conquered. Legal imperialism universally imposed law where civil stability and order were at stake, where economic penetration, whether land tenure or modern trade and commercial development was at issue, and most importantly, the authority and power of the conqueror might be threatened by invocation of indigenous law.\(^4\)

This statement, from the perspective of the colonial powers, shows that the imposition of law on their colonial possessions was a necessity in order to bring life in the colonies in conformity with Western standards and values.\(^5\) The anchoring of European law in African colonial possessions allowed the colonial powers to

introduce a Western legal understanding in their colonial dominions and organise the societies according to Western perceptions. The local tradition, by contrast, was largely considered inappropriate to regulate social life and business according to these requirements. The following statement by James Bryce, excerpted from his analysis of British colonial rule in India, is indicative of the European attitude towards indigenous law:

The conquerors have given their law to the conquered. When the conquered had a law of their own which this legislation has effaced, the law of the conquerors was better. Where they had one too imperfect to suffice for a growing civilization, the law of the conquerors was inevitable.

Thus, European legal cultures were generally considered more sophisticated than legal traditions in other parts of the world and, accordingly, it was only natural to the Europeans to claim superiority over alien, arguably inferior, legal cultures. In Africa, the imposition of European law was facilitated by the fact that rules and legal concepts in African indigenous societies relied to a great extent on oral tradition rather than on written documentation.

In analysing the transfer of law to European colonies in Africa, one should keep in mind that legal interaction between Europeans and Africans, particularly in domains affecting issues of trade and settlement, predated formal colonial rule. However, pre-colonial legal relationships between Europeans and Africans were not a consequence of a comprehensive state policy but rather linked to specific situations which required a common level of interaction for commercial purposes. The introduction of a comprehensive law-and-order-administration in African territories

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11 See Mann and Roberts, supra note 8, at 9ff.
coincided with the great European expansion on the African continent following the Berlin Conference in 1884/5. At that point, both existing domestic legal systems and pre-colonial civilising structures which were introduced previously by the Europeans were replaced. Although the expansion of European law to colonial territories was considered essential to upholding colonial domination, it was not the principle motive of colonialism, in Africa or elsewhere. As Jörg Fisch notes, ‘law […] was a means and not an end in this process’. Rather, colonial expansion, as we saw previously, primarily served political, economic and geo-strategic objectives.

The admission of indigenous law within the colonial system thus remained at the discretion of the superior colonial power. As Barry Hooker notes: ‘[T]he legal system of the dominant political culture possesses absolute and unqualified power on its own terms to admit, alter, or suppress any existing indigenous law’. The replacement of indigenous law with the law of the colonial powers was undertaken in compliance with what Schmidhauser above described as the conqueror’s ‘rationalization for the imposition of law’. This rationalisation was a legal strategy defined by the political authorities of the European metropolis determining the techniques and principles of how the colonial possessions were administered. At the same time, it served to implement and enforce the core interests of the colonial power. The colonial doctrine was typically coupled to the legal tradition and the corresponding value system in which a European state was couched.

As noted above, (among) the most influential colonial powers on the African continent, in geographical and ideological terms, were Great Britain and France. As a consequence, two particular types of policies prevailed in colonial Africa, the French

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12 \text{ Menski, } \textit{supra} \text{ note 6, at 444ff. For an examination of pre-colonial legal interaction between the Europeans and the Africans, Mann and Roberts, } \textit{supra} \text{ note 8, at 9-19.}
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13 \text{ Fisch, } \textit{supra} \text{ note 10, at 15.}
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14 \text{ Ibid, at 15. See also, J. A. Kämmerer, } \textit{Colonialism} \text{ in R. Wolfrum (ed), } \textit{Max Planck Encyclopedia of Public International Law (Vol.II, Oxford University Press, 2012)} \text{ at 335, para.8.}
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15 \text{ M. B. Hooker, } \textit{Legal pluralism: An Introduction to Colonial and Neo-colonial Laws} \text{ (Oxford University Press, 1975) at 56. See also, Mommsen, } \textit{supra} \text{ note 2, at 7. In a similar vein, Schmidhauser has noted: ‘With the imposition of the conqueror’s law inevitably came replacement of indigenous legal and judicial elites with those of the conqueror, at least until a subservient indigenous elite was trained and screened’ (Schmidhauser, } \textit{supra} \text{ note 4, at 344).}
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16 \text{ Schmidhauser, } \textit{supra} \text{ note 4, at 344.}
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17 \text{ With regard to the French domain, Hooker, } \textit{supra} \text{ note 15, at 201. With regard to the British domain M. Deflem, } \textit{Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast and Kenya} \text{ (1994) } 17(1) \text{ Police Studies: International Review of Police Development at 46-7.}
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18 \text{ See S. Joireman, } \textit{Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy} \text{ (2001) 39(4) Journal of Modern African Studies 571-96; and David and Brierley, } \textit{supra} \text{ note 5, at 559.}
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system of assimilation and British indirect rule.\textsuperscript{19} Both types of policies reflect the merits of their respective legal traditions, the civil law and common law legal system. At the same time they revealed the most blatant discrepancies among the various colonial doctrines of the European colonial powers in an African context. While the common law system is intrinsic to the British legal tradition, most legal traditions of continental Europe are based on civil law systems.\textsuperscript{20} Both traditions feature particular theories and concepts about the nature of law and harbour different perceptions with regard to the administration of native law.\textsuperscript{21} In view of the predominance of the French system of assimilation and the British indirect rule in the context of colonial administration in Africa, the present analysis of legal colonialism by European states will place particular emphasis on those two fundamental strategies of colonial rule.

The analysis of the imposition of European law on the colonial possessions reveals another important aspect which had a lasting impact on the post-colonial African legal order. Institutional and legal structures introduced during the period of European colonial rule were not only beneficial to the colonial powers but similarly proved profitable for a small African élite which ‘had a vested interest in seeing them continue’ after the dismantling of colonialism.\textsuperscript{22} This is because the European powers, as will become clear in the discussion to follow, included local authorities in the administration of their colonies.\textsuperscript{23} As a consequence, the dynamics of legal colonialism have fostered the establishment of an indigenous ruling class, which also had a particular interest in the continuation of the structures established during colonial rule and in the preservation of neo-colonial ties in the aftermath of decolonisation.\textsuperscript{24} The phenomenon of such ‘clientele classes’ was described in the previous chapter as an internal structural condition to the exercise of colonialism or neo-colonialism.

\begin{itemize}
\item \textsuperscript{19} See, among others, David and Brierley, supra note 5, at 555f.; and Crowder, supra note 8, at 165ff.
\item \textsuperscript{20} For an assessment on the characteristic of the civil and common law tradition, Glenn, supra note 8, at 133ff., and 237ff.
\item \textsuperscript{21} An overview over the most telling differences between these traditions with respect to the administration of colonial possessions is provided in Hooker, supra note 15, at 190-195; and Joireman, supra note 18, at 573ff.
\item \textsuperscript{22} Joireman, supra note 18, at 577. In a similar vein, Menski, supra note 6, at 460; and Schmidhauser, supra note 4, at 344.
\item \textsuperscript{23} See infra section 3.2.
\end{itemize}
3.2. French and British colonial strategies

3.2.1. Colonial laws sui generis

Although both the French and the British defined over-arching strategies for how their colonial possessions should be administered in principle, these were not implemented in a consistent fashion throughout the French and British colonial sphere of influence. Rather, the laws established to administer the colonial territories were to varying degrees customised to the respective local environments. Relevant factors which influenced how law and order were adapted to local conditions were the degree of Western settlement and the region’s economic significance. These variables were subject to change as were the colonial laws themselves. Kristin Mann and Richard Roberts have described the transformative character of colonial law in the following terms: ‘In Africa, as elsewhere in the world, laws reflected the imperatives of changing economic, political and social circumstances and were both transforming and transformed over long stretches of time’. In addition, considerations of practicability and growing experience on the part of the European powers concerning the administration of colonial possessions also influenced the adaption of colonial strategies on the ground.

By taking into consideration the wide range of factors which guided the imposition of European law, one realises that laws applied in colonial territories were not identical to the laws applied in European states but rather were European colonial laws sui generis. Mindful of the complexity and plurality of the legal landscape in colonial Africa, thus, it would extend beyond the scope of this study to provide a country-by-county assessment of the administration of the respective French and British colonial possessions. Instead, the author focuses on the identification of similar patterns of rule in the French and British colonial territories and compares how

26 An extensive assessment of the different colonial laws in the European possessions is provided in Hooker, supra note 15; K. Mann and R. Roberts (eds), Law in Colonial Africa (Heinemann, 1991); and W. J. Mommsen and J. A. De Moor (eds), European Expansion and Law (Berg, 1992).
27 Mann and Roberts, supra note 8, at 4.
28 During the period of colonial rule the French, in most of their possessions, turned towards a system of association (instead of assimilation) and the British, in part, adopted a policy of paternalism (instead of indirect rule) (see infra sections 3.2.2. and 3.2.3.).
29 See, among others, Mommsen, supra note 2, at 9f.; and M. Chanock, ‘The Law Market: British East and Central Africa’ in W. J. Mommsen and J. A. De Moor (eds), European Expansion and Law (Berg, 1992) at 280. In this context, it is also worthwhile to refer to the evolution of customary law which was achieved in cooperation of native and colonial elements (see Mann and Roberts, supra note 8, at 4; and Mommsen, supra note 2, at 3).
law was used as a tool to enforce colonial objectives. Specific emphasis is therefore placed on the main similarities between the French and British colonial doctrines with regard to the role of law in the implementation of the respective colonial concepts.

It remains to add that, although European colonial laws to some extent took account of local conditions and changing realities, legal colonialism by European states significantly and permanently changed the legal environment in Africa.\(^{30}\)

### 3.2.2. The French strategy of assimilation

The strategy of assimilation\(^{31}\), which was generally attributed to the French occupying forces, had its source in the civil law tradition and was based on a high degree of centralisation.\(^{32}\) It relied on the notion of equality of all individuals and hence regarded the African people under French domination at least as culturally adaptable to the French mode de vie.\(^{33}\) In principle, the theory of assimilation implied the wholesale transfer of the French model to their colonial possessions including the ‘assimilation of the natives to French citizens, assimilation of colonial economic organization to that of France, and [...] assimilation of political organization to that of a French département’.\(^{34}\) Although the doctrine of assimilation was not consistently applied throughout French colonial rule and was exerted to a variable extent in the different French dominions, it had a considerable impact on how French possessions in colonial Africa were administered.\(^{35}\)

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\(^{30}\) Mann and Roberts have accordingly concluded: ‘Colonialism changed African law – its rules, institutions, procedures, and meanings. It affected as well the way African peoples perceived and understood law’ (Mann and Roberts, \textit{supra} note 8, at 5).

\(^{31}\) The \textit{International Encyclopedia of the Social and Behavioral Sciences} provides a general understanding of the term assimilation: ‘Assimilation is a multidimensional process of boundary reduction that blurs an ethnic or racial distinction and the social and cultural differences and identities associated with it. At its end point, formerly distinguishable ethnocultural groups become effectively blended into one. At the group level, assimilation may involve the absorption of one or more minority groups into the majority, or the merging of minority groups. At the individual level, assimilation denotes the cumulative changes that make individuals of one ethnic group more acculturated, integrated, and identified with the members of another.’ (R. G. Rumbaut, ‘Assimilation of Immigrants’ in N. J. Smelser and P. B. Baltes (eds), \textit{The International Encyclopedia of the Social & Behavioral Sciences} (Elsevier Ltd, 2001) at 845.

\(^{32}\) The Spanish and the Portuguese also followed a policy of assimilation in their colonial possessions. For an assessment of the French policy of assimilation, see Hooker, \textit{supra} note 15, at 196-203; Crowder, \textit{supra} note 8, at 167f.; David and Brierley, \textit{supra} note 5, at 555f.; and S. H. Roberts, \textit{The History of French Colonial Policy} (new impr., Frank Cass & Co. Ltd., 1963) at 65ff.

\(^{33}\) See David and Brierley, \textit{supra} note 5, at 555; and Crowder, \textit{supra} note 8, at 167f.

\(^{34}\) Roberts, \textit{supra} note 32, at 27 (emphasis in the original).

From a legal perspective, the concept implied in theory that native law was altogether replaced by the metropolitan laws of France and that legislative powers remained within the competence of the French parliament, unless decided otherwise. More specifically, it envisaged that ‘the administrative and legal model of the French executive be followed in all cases’. The policy of assimilation therefore implied that ‘those assimilated would have access to the same rights as those by whom they were assimilated’. However, because of economic, cultural and practical obstacles, the policy of assimilation and its concomitant requirements were practically never realised in their entirety. Instead, French colonial administration in practice adopted an approach which partially took account of the local environment. To some extent, this departure from wholesale assimilation has led towards the decentralisation of authority and to the inclusion of local institutions into the government of the native population. Stephen Roberts, a theorist on French colonialism, described this shift in strategy in the following terms:

The new theory in all, therefore, had to be a blend of assimilation and autonomy, partaking of the nature of the first to some degree, yet tending towards some form of suitable self-government, to a potential autonomy. It was between the two and yet distinct from either, compatible with the French instinct of administration but at the same time capable of being adapted to a developing colony.

As a consequence, native law gradually regained a certain degree of relevance in the course of French colonial rule on the African continent. This change in terms of management of colonial possessions was commonly referred to as association or paternalism, the dominant form of rule in French African colonies after 1910. Again, it is important to bear in mind that the decentralisation of French rule was achieved to

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38 Crowder, *supra* note 8, at 169f.
39 A notable exception was the so-called *Quatre Communes* in Senegal where the French thoroughly applied the policy of assimilation. However, according to Roland Oliver and Anthony Atmore, ‘[i]n 1936, apart from the four coastal *communes* of the Senegal with their 80,000 black *citoyens* (citizens with full political rights), only about 2,000 out of 14 million French West Africans had received French citizenship’ (R. Oliver and A. Atmore, *Africa Since 1800* (5th edn Cambridge University Press, 2005) at 177 (emphasis in the original)). See also, Crowder, *supra* note 35, at 3-7.
43 See ibid., at 72ff.
varying degrees in the different French possessions and that the implementation of these policies into colonial administration differed from colony to colony. However, the partial integration of local elements such as local chiefs and native laws into French colonial strategy did not affect the superior position of the remote metropolis. This included that instructions from the French colonial authorities in any case superseded law and order adaptations on the spot. The retention of this prerogative, above all, served the protection of French national interests throughout the period of colonial rule. Roberts accordingly observed:

Whatever the accepted theory of colonial relationships for the moment, it was the idea of colonial subordination that was always in the ascendant. [...] National interests had to have the first consideration: hence, any purely colonial theory was limited by this necessity of subordination and by the maintenance of all effective power in the hands of the central officials.

3.2.3. The British indirect rule

The British, influenced by the system of common law, adopted an entirely different approach to managing their vast colonial possessions, resorting to the concept of indirect rule which is described by Michael Crowder in the following terms:

Both with regard to the status of the individual African and with regard to the relationship of the colony to the Metropolitan power, Indirect Rule was the antithesis of assimilation. Indirect Rule was inspired by the belief that the European and the African were culturally distinct though not necessarily unequal, and that the institutions of government most suited to the latter were those which he had devised for himself.

Indirect rule was generally considered a more pragmatic approach because the British neither intended to transplant their entire value system on the acquired territories nor to assimilate the native population into their culture. Instead, the strategy of indirect rule in theory envisaged that native rules and rulers were included in the government of colonial possessions. Frederick Lugard, a former colonial administrator and colonial theorist, emphasised this aspect of duality in the context of

45 Crowder, supra note 8, at 165.
46 See, exemplarily, Hooker, supra note 15, at 197,201,223.
47 Roberts, supra note 32, at 64.
48 Crowder, supra note 8, at 168ff.
49 See Oliver and Atmore, supra note 39, at 171ff.; and Mann and Roberts, supra note 8, at 19ff.
British colonial rule in his path-breaking study ‘The Dual Mandate in British Tropical Africa’ of 1922:

The essential feature of the system [...] is that the native chiefs are constituted as an integral part of the machinery of the administration. There are not two sets of rulers – British and native – working either separately or in co-operation, but a single Government in which the native chiefs have well-defined duties and an acknowledged status equally with British officials.  

Thus, the concept of duality envisaged that local institutions and local law remained crucial for the exercise of authority over the native population at least in areas where no colonial interests were at stake. Accordingly, as opposed to the French strategy of assimilation, the British indirect rule was designed altogether differently and, from the outset, took account of the local environment. However, the admission of the indigenous system of rule was not unconditional and native law had often been subject to modification or dismissal when it was considered ‘repugnant’ to British perceptions or colonial objectives. Sandra Joireman describes this inconsistency in law enforcement in the following way: ‘Though in theory the application of the common law systems should be flexible and evolve to accommodate the local environment, in practice the need for control of the colonies took precedence over the flexible application of law’. Under indirect rule, comparable to the French policy of assimilation, the recognition of local laws and authorities in practice was thus secondary once overarching colonial interests were at stake. As Crowder notes:

[W]here African society did not lend itself well to application of this policy, there was a tendency to adopt a policy of paternalism very similar to that of the French. At no stage in this period did Britain pursue a policy of assimilation though her rule had strong assimilationist features in the form of missionary education and the legal systems of the colonies as distinct from protectorates.

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50 F. D. Lugard, The Dual Mandate in British Tropical Africa (William Blackwood and Sons, 1922) at 203.
51 See David and Brierley, supra note 5, at 555; Hooker, supra note 15, at 129f.; and Killingray, supra note 25, at 413. See also, infra section 3.3.2.
52 See Crowder, supra note 8, at 169; Deflem, supra note 17, at 46f.
53 Joireman, supra note 18, at 578.
54 Crowder, supra note 8, at 171. In a similar vein, Deflem, supra note 17, at 46f.
3.3. Common characteristics of European colonial rule

3.3.1. Imposition of laws and Western values

Colonial laws, again to varying degrees in different colonial environments, primarily regulated issues that were of importance for the colonial endeavour altogether, in particular, the establishment of a viable market economy and the regulation of life in colonial centres. In pursuing these interests, existing local legal traditions and laws were typically considered unsuitable for dealing with the needs of a civilised and capitalist society and fostering economic development according to European standards. Colonial regulations in both the French and British domains thus included laws relating to issues of taxation, the annexation of land and property, labour and security matters. The focus of colonial legislation, we recall, was summarised in the previous statement issued by Schmidhauser in the following terms:

Legal imperialism universally imposed law where civil stability and order were at stake, where economic penetration, whether land tenure or modern trade and commercial development was at issue, and most importantly, the authority and power of the conqueror might be threatened by invocation of indigenous law.

In both the French and British spheres of influence, the protection of the interests of the colonial power throughout the period of colonial rule occupied a central position in considerations how the colonies were administered. In the first place, this required the establishment of a secure environment ‘as the maintenance of peace and order was the basic requirement for all other aspects of colonial rule.’ The general emphasis on the need to regulate economic and security matters was also apparent in the Preamble of the 1885 Berlin Act. This includes the statement that the colonial powers shall ‘regulate the conditions most favourable to the development of trade

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55 See, among others, Crowder, supra note 8, at 206; Fisch, supra note 10, at 32f.; David and Brierley, supra note 5, at 557; Schmidhauser, supra note 4, at 344; and A. Christelow, Muslim Law Courts and the French Colonial State in Algeria (Princeton University Press, 1985) at 3.
56 See David and Brierley, supra note 5, at 556f.; and Menski, supra note 6, at 444f.
57 See Mommsen, supra note 2, at 9; Fisch, supra note 10, at 31f.; Chanock, supra note 29, at 284ff.; Crowder, supra note 8, at 198,206ff.,223; Mann and Roberts, supra note 8, at 23ff.; and Deflem, supra note 17, at 47.
58 Schmidhauser, supra note 4, at 344.
59 Chanock, supra note 29, at 284f.; Hooker, supra note 15, at 220; Crowder, supra note 8, at 169.
60 Fisch, supra note 10, at 32.
and civilization in certain regions of Africa’.\(^{61}\) In addition, the final agreement in Article 5 (2) contained the requirement to provide protection for European elements in African colonial territories: ‘Foreigners, without distinction, shall enjoy protection of their persons and property, as well as the right of acquiring and transferring movable and immovable possessions’.

In particular, legal control aimed at the protection of European lives and property, notably the economic infrastructure, on the African continent.\(^{62}\) New crimes were introduced which addressed infractions against ‘the imposed structure of colonial management’.\(^{63}\) In the French domain, this protection of colonial rule was enforced under the French indigénat, an instrument that was directed against the native people and provided colonial administrators with the power to ‘discipline summarily all violations of colonial regulations’.\(^{64}\)

Although native law continued to be of importance during the period of colonial rule in both the French and British colonies, we saw that the French and British colonial administrators always retained the power to declare void traditional law when it was considered unacceptable by the colonial authorities.\(^{65}\) In the case of British dominions, local custom was restricted by applying the ‘repugnancy clause’, which provided that African law be applicable to cases between Africans where it was not ‘repugnant to justice and morality’ and it provided also that ‘substantial justice without due regard to technicalities of procedure and without undue delay’ should be done.\(^{66}\)

The French, likewise, could restrict any native custom when it was ‘contrary to the principles of French civilization’.\(^{67}\) Both concepts were basically similar in terms of effects on native law and were, ‘in essence, a means for the promulgation of judicial


\(^{62}\) See, among others, Mommsen, supra note 2, at 3; Fisch, supra note 10, at 16.21ff.; Deflem, supra note 17, at 52.55. In a similar context, David Killingray observed: ‘Settler colonies, such as Kenya and Southern Rhodesia, tended to be more heavily policed than most other colonies and with a substantial European police presence (Killingray, supra note 25, at 414f.).

\(^{63}\) Killingray, supra note 25, at 413.

\(^{64}\) Mann and Roberts, supra note 8, at 17f. See also, Crowder, supra note 8, at 192f.

\(^{65}\) See, e.g., Deflem, supra note 17, at 47; Fisch, supra note 10, at 31; Hooker, supra note 15, at 130ff, 223; Crowder, supra note 8, at 169; Mann and Roberts, supra note 8, at 33; and M. Chanock, Law, Custom, and Social Order: The Colonial Experience in Malawi and Zambia (Cambridge University Press, 1985) at 72f.

\(^{66}\) In this statement, Chanock refers to Section 20 of the ‘Order of Council of British Central Africa of 1902’ (ibid., at 72).

\(^{67}\) See Hooker, supra note 15, at 223.
opinion’. In both cases, the scope of the concepts was not clearly defined and, as a consequence, these clauses were frequently used to refuse the application of traditional law whenever the law applied was considered unsatisfactory by the colonial judges.

3.3.2. Asymmetry in the enforcement of colonial laws

Virtually the entire African continent had been carved up between the European colonial powers in the aftermath of the Berlin West Africa Conference in 1884/5. Notwithstanding this fact, vast areas of African territory, while on paper belonging to the sphere of European powers, remained untouched by the European colonial administration and its settlers and hence beyond the control and influence of European colonial rule. In other words, ‘the greater part of the received metropolitan law remained inapplicable to the bulk of the population’. The degree of colonial administration was mostly defined by economic and practical considerations, such as access to resources or personal mobility, but also by the fact that colonial personnel were sparse on the ground. As Wolfgang Mommsen notes: ‘there was no straight transfer of European law onto the periphery; rather, special colonial and state law were created whenever and wherever considered necessary’. The enforcement of the law imposed, accordingly, was primarily limited to areas where European administration had to be upheld and lives and properties of Europeans, including the economic infrastructure of European companies, had to be protected. In more general terms, it can be claimed that the reception of metropolitan law was of greater importance in economically attractive regions with a large share of Europeans. However, as soon as areas previously ignored by European colonial powers were

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68 Ibid, at 223.
69 See ibid., at 130,133,223.
70 See, e.g., ibid., at 220; Killingray, supra note 25, at 413; Menski, supra note 6, at 444; Crowder, supra note 8, at 7,335,342; and Crowder, supra note 35, at 4f.
71 Hooker, supra note 15, at 220.
72 See, Chanock, supra note 29, at 283; and Killingray, supra note 25, at 413. In Nigeria, according to Crowder, there were only 200 British administrators for an estimated population of 20 million in 1925. In French West Africa, there were 526 French administrators for an estimated population of 15 million in 1922 (Crowder, supra note 8, at 198f. On migration in French West Africa see ibid., at 335-342).
73 Mommsen, supra note 2, at 10.
74 See, among others, Crowder, supra note 8, at 335; Deflem, supra note 17; Fisch, supra note 10, at 21ff.; Killingray, supra note 25, at 413ff.; Mann and Roberts, supra note 8, at 31; and Benton, supra note 9, at 564.
considered a threat to the security of colonial administration or perceived expedient for some other reason, colonial control was also extended to these remote areas.\textsuperscript{75}

A geographical limitation of law enforcement at the same time meant that law enforcement was limited at a personal level. Thus, colonial laws in European possessions mainly affected people, Africans and Europeans alike, who lived in proximity to colonial hubs where colonial economy and/or Western settlement were present. Legal procedures involving European elements typically followed the law of the metropolis and thus subjected natives affected by those proceedings to colonial laws.\textsuperscript{76} This practice was born out of the understanding that pre-existing mechanisms of conflict resolution were considered primitive and thus appropriate for natives only.\textsuperscript{77} A location-dependent limitation of colonial legal activities, albeit to different extents, was typical for both French and British colonial rule.\textsuperscript{78}

The issue of asymmetry in the enforcement of law may also be perceived from a different angle, by taking into account the colonial doctrines of the French and the British on the African continent. The British indirect rule/paternalism and the French system of assimilation/association facilitated the coexistence of both European colonial and traditional laws within the very same geographical unit. However, in assessing this kind of asymmetry, one should bear in mind that the respective reasons for the inclusion of local institutions had different backgrounds. The British have considered local laws and institutions a necessary instrument to administer their territories from the outset. The British indirect rule, we saw, provided for a dual system of laws

to use for purposes of the administration of the country the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances. [...] The courts which have been established by the British

\textsuperscript{75} Mommsen, supra note 2, at 10; Fisch, supra note 10, at 31f.; Chanock, supra note 29, at 283f.; and Killingray, supra note 25, at 413,419,426.
\textsuperscript{76} See Mommsen, supra note 2, at 5; Fisch, supra note 10, at 21ff.; and Mann and Roberts, supra note 8, at 12f.
\textsuperscript{77} See Joireman, supra note 18, at 571.
\textsuperscript{78} For the French domain, Hooker, supra note 15, at 220; Crowder, supra note 35, at 5; and J. L. Miège, 'Legal Developments in the Magrib, 1830-1930.' in W. J. Mommsen and J. A. De Moor (eds), \textit{European Expansion and Law} (Berg, 1992) at 103f. For the British domain, Killingray, supra note 25; and Deflem, supra note 17.
government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land.\footnote{This is a statement by Lord Wright in \textit{Oke Lanipekun Laoye and ors. v. Amao Ojetunde} (this quote can be found in Hooker, supra note 15, at 129f. (see also, at 136f.)). In a similar vein, Killingray, supra, note 25, at 413. On the British dual-system approach, see supra section 3.2.3.}

Although the dual system of laws, as the above statement shows, was also subject to modification, indirect rule was from the outset designed in a manner that allowed local institutions to co-exist with colonial administrative units.\footnote{See ibid.}

While this type of law enforcement was part of the official judicial policy in the British colonies, the French turned towards a more inclusive approach during colonial rule as the implementation of the policy of assimilation proved to be impossible to translate into reality.\footnote{With respect to the French dominion, Mann and Roberts link the selective enforcement of the rule of law to competing models of colonialism (Mann and Roberts, supra note 8, at 35).} Thus, throughout the period of colonial rule, the French, although in an inconsistent fashion, grouped and subjected the people to law according to their personal status, by according them either a French civil status (\textit{statut civil français}) or an ordinary customary status (\textit{statut coutumier}).\footnote{See, e.g., Hooker, supra note 15, at 212,221f.; Crowder, supra note 8, at 165,192f.} The former were French citizens while the latter were subjected to native law.\footnote{Hooker, supra note 15, at 221.}

Fisch, to conclude with, provides a general understanding of the issue of selectivity in the context of legal colonialism by European states:

Europeans were under European law, natives were under indigenous law […]. This differentiation between Europeans and natives made it possible to maintain important inequalities or even to introduce new ones. There were special punishments for natives, special regimes for native land tenure […], and special systems of taxes or obligations to work which did not exist for Europeans. The discrepancies were even more obvious with political rights, which as a rule were reserved for Europeans.\footnote{Fisch, supra note 10, at 32.}

3.4. Conclusion

Despite the fact that both the French and the British colonial powers rationalised colonial rule on the basis of different philosophical and legal concepts, we saw that the practical implementation of both theoretically very distinct approaches turned out
to be similar in many respects.\textsuperscript{85} Law, as a structural pre-condition to the exercise of colonial rule, proved to be a definitional element for the management of colonial territories and the enforcement of national interests in both the French and British cases. The French system of assimilation/association as well as the British approach of indirect rule/paternalism were interpreted to the benefit of the colonial power and the adjustment of the colonial strategy typically served the better implementation of colonial objectives. The colonial administrations at all times retained the power to revise local laws and decisions whenever they were not considered conducive to the objectives of the metropolis.

The above assessment, in other words, illustrates the way in which the colonial powers exercised control over their colonial possessions. The most important aspects, in the view of the present author, were summarised in the previous two subsections. This is, on the one hand, that European law and Western values were imposed on the colonies without the approval of the societies concerned. This aspect of legal colonialism, as we saw in this chapter, is obviously linked to the belief of European cultural supremacy. Law was specifically imposed in domains which were considered of importance to the enforcement of the colonial powers’ objectives. The enforcement of Western values was further ensured through the prerogative of the colonial powers to revise what was perceived as ‘repugnant’ native law, whenever it was considered to stand in conflict with Western beliefs. Mommsen refers to this cultural aspect of colonial rule in the following terms:

\begin{quote}
One of the justifications of colonial expansion and rule always had been that the colonial power had a cultural mission; civilization and its values ought to be brought to the peoples in these distant, undeveloped regions […] whereas superstition and inhumane practices had to be eliminated.\textsuperscript{86}
\end{quote}

On the other hand, law as a tool of control was used to further the interests of the colonial power. This meant, among other things, that colonial law was applied inconsistently and selectively to the population. Law, accordingly, not primarily served to ensure legal certainty for all people – natives and settlers alike – but primarily was applied ‘whenever and wherever considered necessary’.\textsuperscript{87} As Mann and Roberts

\textsuperscript{85} See supra section 3.3. A brief overview over the French and British colonial policies is provided in M. Crowder. ‘Indirect rule: French and British style’ (1964) 34(3) Africa: Journal of the International African Institute 197-205.
\textsuperscript{86} Mommsen, supra note 2, at 8.
\textsuperscript{87} Ibid., at 10.
note: ‘The practice of the rule of law certainly did not prevail in colonial Africa. All colonial legal systems developed forms of legal jurisdiction divided by race or "nationality"’.\textsuperscript{88}

The above analysis leads the author to conclude that the claim of legal (neo-) colonialism requires as a prerequisite the imposition of laws and values without the approval of the societies concerned. Moreover, it is necessary that the law is enforced in an asymmetric manner and does not equally apply to all of its subjects. In this sense, the powers to impose a legal framework and to enforce law in a discretionary fashion to one’s benefit are considered in structural terms. The colonial powers, accordingly, exercised structural power to impose and enforce colonial laws so as to establish colonial domination and to selectively enforce their objectives.

\textsuperscript{88} Mann and Roberts, supra note 8, at 35.
Part II

Imposition of Laws and Western Values in the Field of International Criminal Law
Introduction Part II

Since the nineteen-sixties and the process of decolonisation the structure of the international order changed considerably. The number of sovereign states composing the international community has increased significantly, as former colonies were integrated into the overarching international system. At the same time, both the international legal framework and moral standards have witnessed a considerable transition over the past sixty years, of which the ascendancy of the discipline of ICL is a reflection. In light of these changing parameters, it is necessary to test how far the previously elaborated understanding of (legal) neo-colonialism can be used to describe inequalities in the context of ICL. This understanding, as we learned in Part I, implies that relationships between states of unequal power and capabilities are perpetuated by structural conditions that favour the interests of the dominant actor in these relationships. In legal terms, this phenomenon becomes manifest in case that 1) law is imposed without the approval of the societies concerned and 2) the law imposed is selectively enforced in the interests of the colonial or neo-colonial power. The present part, it should be emphasised, exclusively focuses on the first aspect of this definition. The selectivity and asymmetry claim, by contrast, is dealt with extensively in Part III of this study.

The analysis of legal colonialism by European states has first emphasised the importance of the role of law for the European expansionist policies in the nineteenth and twentieth centuries.\(^1\) It argued that the imposition of new law upon colonial possessions, to varying degrees in different colonial units, was a necessary condition in establishing European colonial administration. The imposition of European law and legal principles by the colonial powers succeeded without the prior approval of the affected societies and primarily served the enforcement of the colonial objectives of the respective colonial powers. In most colonial units, we saw that specifically issues of taxation, the annexation of land and property, labour matters and the security of European settlers and economic infrastructure were subject to colonial regulation.\(^2\)

Turning to the field of ICL and the ICC in particular, the question arises whether a similar claim can be made with respect to the values underlying these fundamental

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\(^1\) See *supra* Chapter 3, section 3.1.

\(^2\) See *supra* Chapter 3, section 3.3.1.
concepts. In other words, to what extent are the conceptions of ICL and the ICC comparable to the introduction of a law-and-order administration during colonial rule in that these instruments can be categorised as neo-colonial instruments which impose a Western value system on non-Western states? In order to answer this question, it is important to focus on two distinct but interrelated issues. On the one hand, it is necessary to consider the evolutionary history of the values underlying the discipline of ICL. This includes an assessment as to what extent these values have been adopted by formerly subordinate non-Western societies after obtaining the status of independent states. On the other hand, it is important to understand how these values relate to the principle of sovereign self-determination.

It was already addressed in the introductory chapter to this study; the perception of the ICC, at least by some influential representatives and scholars from a number of African states, is that the law applied is a purely Western law which is imposed on African situations and cases without the approval of the state of the defendant’s nationality. A statement of the former Prime Minister of Rwanda, Bernard Makuza, commenting on the ICC indictment against the Sudanese President Al-Bashir in the aftermath of the AU summit in July 2009, stands exemplarily for African apprehensions in this respect: ‘We’re not promoting impunity, but we're saying that Westerners who don't understand anything about Africa should stop trying to import their solutions’. More recently, the former chairman of the AU, Hailemariam Desalegn, issued a statement during the closing ceremony for the 50th anniversary of the AU in May 2013 accusing the ICC overtly of racism:

The African Leaders have come to the consensus that the process the ICC is conducting in Africa has a flaw. The intention was to avoid any kind of impunity and ill governance and crime, but now the process has degenerated into some kind of race hunting.

Both statements are reminiscent of the language that was used to describe the imposition and effects of European legal rule in colonial Africa which were ‘divided by

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3 See the statements made by Paul Kagame and Mahmood Mamdani (supra Chapter 1, section 1.1., notes 9/10).
race or "nationality". In other words, it appears that the ICC is considered by these stakeholders as a tool for imposing Western values (in a discriminatory manner) upon African states without their consent. Although in particular the latter statement, by referring to racist motives, also includes allegations of selectivity, it remains to clarify whether the imposed law itself, as was the case during colonialism, is selective, or the application thereof by the competent authorities. Again, the former aspect pertains to the ‘Western value claim’ while the latter specifically addresses the problem of selective law enforcement, a topic that is dealt with in Part III of this study.

As will become clear from the discussion to follow in Chapter 4, the present study is predicated on the assumption that the field of ICL is based on a defined body of crimes which, in theory, ought to be applied to criminals irrespective of their nationality. This understanding of the existence and condemnation of a number of universal crimes is also evident in the context of the RS, for that it grants jurisdiction to the ICC only over ‘the most serious crimes of concern to the international community as a whole’. This universal approach, obviously, presumes the acceptance of these crimes by all states of the international community. Accordingly, any imposition of these values on the states without their consent would seriously undermine the legitimacy of the system of international criminal justice as a whole. The universal value debate directly affects the legitimacy question since the field of ICL provides a reverse approach to one of the cardinal principles of international law, that is to say, the principle of sovereignty. In other words, the commission of international core crimes provides a justification for the international community to pierce the sovereignty of states by means of international criminal law in cases where the national authorities fail to address these crimes by themselves. However, as a preliminary condition, such intervention is only legitimate when the underlying values are accepted by the state whose sovereignty is overruled.

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7 Assessing the AU position towards the ICC in the aftermath of the issuance of the arrest warrant against Al-Bashir, Dire Tladi noted in a similar vein: 'The attitude of the AU can be interpreted as questioning the validity of the new value-based system of international law which is reflected in the ICC Statute' (D. Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 South African Yearbook of International Law at 62).

8 This formulation can be found in the Preamble and in Articles 1 and 5 of the RS (emphasis added).

9 See infra Chapter 5.
The question of universal acceptance is particularly in need of clarification in view of the Western foundations of ICL.\textsuperscript{10} Analysing the origins of ICL as a discipline, one cannot escape from the fact that the system of core crimes is linked to developments that took place in the context of the Second World War, of which the International Military Tribunals at Nuremberg and Tokyo are particularly relevant.\textsuperscript{11} At that time, virtually the entire African continent was still partitioned among the European states and it goes without saying that the creation of international criminal law did not involve the colonised societies. Rather, the Allied Powers, as the victors of the war, justified the right to administer universal justice at Nuremberg and Tokyo by their claim to political and moral superiority.\textsuperscript{12} However, while the present study does not call into question these Western foundations of ICL, the question remains whether these values, or more precisely the core crimes, have acquired a universal status over time in the sense that these formerly Western values have now been accepted as trans-cultural values which have transcended their Western origins.

After briefly delineating the concept of ICL\textsuperscript{13}, Chapter 4 thus focuses on three different issues. First, a historical assessment of the international core crimes since the Second World War aims to provide a general outline of how these substantive values developed.\textsuperscript{14} In a second part, emphasis is placed on the principle of universal jurisdiction.\textsuperscript{15} Universal jurisdiction is the prime example of a value-based approach to international criminal justice because the application of the concept is based exclusively on the heinousness of criminal conduct and not related to traditional linking elements of criminal justice, such as territoriality, nationality or national interests.\textsuperscript{16} In a third step, focus is placed on the value system of the ICC.\textsuperscript{17}

Following the discussion of the value debate, Chapter 5 assesses whether the values underlying the discipline of ICL legitimately trump the sovereignty of states by reference to the over-arching system of international core crimes. This analysis is of importance since the claim to universality may only be sustained when the enforcement of these values is given priority over sovereign decisions of single states.

\textsuperscript{10} On the claim to universality in the field of ICL, Tladi, supra note 7.
\textsuperscript{11} See infra Chapter 4, section 4.2. and infra Chapter 6, section 6.2.3.1.
\textsuperscript{12} See ibid.
\textsuperscript{13} See infra Chapter 4, section 4.1.
\textsuperscript{14} See infra Chapter 4, section 4.2.
\textsuperscript{15} See infra Chapter 4, section 4.3.
\textsuperscript{16} See infra Chapter 4, section 4.3.1.
\textsuperscript{17} See infra Chapter 4, section 4.4.
to abstain from the initiation of criminal prosecution in the context of the perpetration of international crimes. Chapter 5, more specifically, illustrates how the sovereignty of states, which is an important concept in both the context of post-colonial neo-colonial dependencies and in the field of general international law\(^{18}\), relates to the principle of universal jurisdiction and the system of the ICC. In a first step, therefore, the relationship between sovereign self-determination and ICL will be assessed by juxtaposing the concepts of universal jurisdiction and national amnesties.\(^{19}\) While the theory of universal jurisdiction allows states a means to enforce ICL on behalf of the international community, the promulgation of amnesties is in the first place attributed to the very sphere of sovereign self-determination.\(^{20}\) Emphasis is specifically placed on the question whether international law is prioritising one conception over the other. The comparison of these two conceptions, both pertaining to the realm of criminal law, is perfectly suited to assess the status of the sovereignty of states within the domain of ICL because these instruments promote diametrically conflicting interests and are inherently opposite to each other. Thereafter, the focus is placed on the system of the ICC.\(^{21}\) As a matter of treaty law, the relationship between the sovereignty of signatories to the RS and the ICC is less problematic, as these states have voluntarily transferred inherent jurisdictional power to the ICC.\(^{22}\) However, the imposition claim is more acute in relation to states which have not accepted the jurisdiction of the Court.\(^{23}\)

With a view to the understanding of legal neo-colonialism, thus, Part II aims at assessing whether the imposition of Western values and the thereto related violation of the sovereignty of a state are definitional elements of legal neo-colonialism in the context of contemporary ICL. In case the following assessment reflects a de-valourisation of the notion of sovereignty due to the primacy of a number of (universal) crimes, then the concept of neo-colonialism must be reframed and customised accordingly, in order to comply with the challenges in the field of ICL. These final considerations are included in the conclusion to Chapter 5.\(^{24}\)

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18 See Articles 2(1) and 2(7) UNC.
19 See infra Chapter 5, section 5.1.
20 See infra Chapter 5, section 5.1.2.
21 See infra Chapter 5, section 5.2.
22 Accordingly, Article 12 (1) RS rules that ‘[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5’.
23 See infra Chapter 5, section 5.2.3.
24 See infra Chapter 5, section 5.3.
In terms of methodology, it is important to emphasise that the present author, in Chapter 4, does not assess the underlying value system in the field of the ICL – the core crimes – as a by-product of the human nature. Doing so would require an analysis of the human condition in general and extend into legal-philosophical and legal-anthropological terrain, fields in which the author does not claim expertise.

Rather, the following analysis is aimed at assessing whether or not these values are officially accepted by those political entities which call into doubt the universal underpinning of these values. Assessing the imperial foundations of international law, Emmanuelle Jouannet has principally conceded that it is possible to overcome the hegemony of a majority culture through the technique of *ex post* adoption (reappropriation) of values:

To say that international law is paradoxically torn between the two extremes, a priori indissociable, of universalism and imperialism, does not rule out the emergence of more subtle practices that are sensitive to the context of contemporary globalized society. This emerging form of international law is, perhaps, much more complex than we realize, as it represents not merely a set of formal rules, a toolbox, but also a cultural product that has been expanded to cover the whole planet. [...] In place of the total assimilation, the horrors and the degradation of the legal imperialism of classical colonialism, there is today perhaps something more subtle at work, which moves beyond both the primitive hegemony of the majority culture and the radical deconstruction of all notions of the universal; and which may include [...] examples of reappropriation of majority (Western) culture by minority (non-Western) cultures.

Along these lines, any affirmation or rejection of the ‘Western value claim’ has to be justified by reference to the same level at which the objections were raised, which is in our case the political level. This approach is consistent with the general approach that international law and legal principles are based on the recognition by states which are the primary subjects of this discipline. At the same time, the political authorities of states, at least in theory, are presumed to mirror the position of the societies they represent. In keeping with the over-all focus of the present study on the African context, the following assessment analyses the position of African political

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26 The present author first took notice of this approach in Dire Tladi’s inspiring contribution ‘The African Union and the International Criminal Court: The battle for the soul of international law’ (see *supra* note 7).

entities, such as African states or the African Union, which are most vocal in criticising the exercise of universal jurisdiction and the ICC.
Chapter 4

The Universalisation of Western Values since the Second World War

4.1. The concept of international criminal law

Before examining the issue of the universalisation of major crimes in the field of ICL, we have to define what ICL actually is. While the notion of ICL is nowadays typically associated with the exercise of jurisdiction by international criminal tribunals over major war criminals, one should bear in mind that the term ICL extends beyond this understanding. There are, however, different understandings when it comes to the precise scope of the concept of ICL. Broadly speaking, the notion of ICL describes ‘the convergence of international aspects of municipal criminal law and criminal aspects of international law’. In a first step, the international aspects of municipal criminal law will be addressed in brief. On the one hand, this understanding of ICL provides for a limitation of national legislations by setting the framework upon which the extra-territorial application of municipal law is based. The Permanent Court of International Justice (PCIJ), which is the precursor of the International Court of Justice (ICJ), decided in the famous Lotus Case that a state, in absence of any rule of international law ‘restricting the discretion of States as regards criminal legislation’, can also apply its laws to situations of extra-territorial character. The Lotus Case,
thus, leaves a wide measure of freedom to states in dealing with criminal issues. Principles of national criminal jurisdiction which have emerged within the framework of international law\(^6\) are territoriality, nationality, passive personality, the protective principle and universal jurisdiction.\(^7\) On the other hand, the international dimension of municipal criminal law is reflected in the international co-operation between states in criminal matters.\(^8\) This co-operation is commonly ‘governed by some basic principles of customary international law and a wide net of regional and bilateral international treaties’.\(^9\) This implies myriad forms of mutual assistance ranging, among other things, from extradition issues to the extraterritorial execution of sentences and the gathering of evidence abroad. Another dimension of ‘international aspects of municipal law’, which recently gained traction, specifically deals with treaty-based crimes of a transnational character, such as drug or human trafficking.\(^10\) This branch, known as transnational criminal law, ‘consists of (a) horizontal treaty obligations between states and (b) the vertical application of criminal law by those states to individuals in order to meet their treaty obligations’.\(^11\)

The criminal aspect of international law, by contrast, ‘consists of the establishment by custom or convention of an international prescription which criminalizes a certain type of conduct, irrespective of whether it is enforced internally or externally’.\(^12\) This approach to ICL, also known as international criminal law *stricto sensu*, understands

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\(^6\) Here, the author refers to international customary law (see A. J. Colangelo. 'The Legal Limits of Universal Jurisdiction' (2006) 47 Virginia Journal of International Law at 158f.).

\(^7\) Under the principle of territoriality, ‘States have the right to exercise jurisdiction over all events on their territory, this includes their airspace and territorial waters, and also includes ships and aeroplanes which are registered in those countries’. The nationality principle (sometimes referred to as ‘active personality’) devises that ‘States are entitled under international law to legislate with respect to the conduct of their nationals abroad’. The passive personality principle comprises the following situations: ‘Passive personality jurisdiction is jurisdiction exercised by a State over crimes committed against its nationals whilst they are abroad’. Under the protective principle, ‘[a] State is entitled to assert protective jurisdiction over extraterritorial activities that threaten the State security, such as the selling of a State’s secrets, spying or the counterfeiting of its currency or official seal’. On these principles, see Cryer and others, *supra* note 2, at 52-56. In addition, another, although controversial, type of extraterritorial jurisdiction is the so-called effects doctrine which applies to cases ‘where the [extraterritorial] offence is deemed to exert some deleterious effect within the territory of the prescribing state’ (R. O’Keefe. 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) Journal of International Criminal Justice at 739). For an assessment of the principle of universal jurisdiction, see *infra* section 4.3.


\(^9\) Kress, *supra* note 2, at 718, para.5.


\(^11\) Ibid., at 13.

\(^12\) Bassiouni, *supra* note 3, at 3.
It as 'a body of international rules designed both to proscribe certain categories of conduct [...] and to make those persons who engage in such conduct criminally liable'.\textsuperscript{13} In other words, it refers to a body of crimes that is 'rooted in general international law because of its inextricable connection with fundamental values of the international legal community as whole'.\textsuperscript{14} In contrast to international treaties dealing with transnational crimes whose ‘prohibition on individuals is entirely national’\textsuperscript{15}, these crimes are directly criminalised in international law and thus establish ‘individual criminal responsibility directly under international law’\textsuperscript{16}. Although the underlying values of international criminal law \textit{stricto sensu} may also be articulated in international treaties, they ‘involve a direct customary international law based obligation on individuals’.\textsuperscript{17} In the context of international treaties, as will be shown in detail below, such an international prescription is often linked to an obligation of states to either prosecute or extradite a person accused of having committed an international crime.\textsuperscript{18} At the same time, ICL \textit{stricto sensu} facilitates enforcement mechanisms through the establishment of international criminal tribunals.\textsuperscript{19} As far as international proceedings before international criminal tribunals are concerned, there likewise exists a procedural criminal law which ‘governs the action by prosecuting authorities and the various stages of international criminal tribunals’.\textsuperscript{20}

Within the domain of ICL, the term jurisdiction takes a central role in the description of competences in criminal matters both at a domestic and an international level. In general terms, ‘[j]urisdiction is the power of the State to regulate affairs pursuant to its laws’.\textsuperscript{21} The notion of jurisdiction is typically considered in three different forms: jurisdiction to prescribe, jurisdiction to enforce and jurisdiction to adjudicate.\textsuperscript{22} Jurisdiction to prescribe (or legislative jurisdiction) refers to the state’s

\begin{footnotesize}
\begin{enumerate}
\item See Kress, \textit{supra} note 2, at 719, para.11.
\item Boister, \textit{supra} note 10, at 18.
\item Kress, \textit{supra} note 2, at 719, para.10.
\item Boister, \textit{supra} note 10, at 18.
\item This obligation is commonly known as \textit{aut dedere aut judicare} (see, in particular, \textit{infra} Chapter 5, section 5.1.3).
\item See Kress, \textit{supra} note 2, at 721, para.17. On the various international criminal tribunals, see \textit{infra} section 4.2.
\item Cassese, \textit{supra} note 13, at 3.
\item Cryer and others, \textit{supra} note 2, at 49.
\item On these forms of jurisdiction, see ibid. at 49ff.; O’Keefe, \textit{supra} note 7, at 736ff.; and Colangelo, \textit{supra} note 6, at 157ff.
\end{enumerate}
\end{footnotesize}
authority to pass laws and criminalise a certain conduct.\textsuperscript{23} Delineating the states’ jurisdictional competences, the PCIJ noted in \textit{The Lotus Case} that ‘all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty’.\textsuperscript{24} As was indicated above, this may also include extraterritorial situations as long as no prohibitive rule of international law exists which negates the state’s claim to this type of jurisdiction.\textsuperscript{25} Jurisdiction to enforce (or executive jurisdiction), by contrast, describes the authority of a state to enforce the prescribed criminal law including prosecution, sentencing and detention.\textsuperscript{26} While prescribed criminal law in part also covers extra-territorial conduct, the enforcement of the law by states is exclusively territorial unless another state explicitly grants permission to take direct initiatives on its territory.\textsuperscript{27} Prescriptive jurisdiction and jurisdiction to enforce are thus not congruent in cases where the alleged perpetrator of the prohibited conduct is not present on the prescribing territory.\textsuperscript{28} Universal jurisdiction, the type of jurisdiction that is subsequently addressed, belongs to the category of prescriptive jurisdiction.\textsuperscript{29} The concept of jurisdiction to adjudicate, to conclude this discussion, specifically refers to ‘a municipal court’s competence under international law to adjudge certain matters’.\textsuperscript{30} Adjudicative jurisdiction, at least in a criminal context, is typically congruent with prescriptive jurisdiction because the ‘application of a state’s criminal law by its criminal courts is simply the exercise or actualization of prescription’.\textsuperscript{31}

Mindful of the diversity and complexity of the discipline of ICL, the present analysis does not deal with all of the above described aspects of ICL. Rather, the focus of this study, above all, is on ICL \textit{stricto sensu} and the international core crimes regime which constitutes the centrepiece of international crimes prosecution at both a

\textsuperscript{23} See Cryer and others, \textit{supra} note 2, at 49; and O’Keefe, \textit{supra} note 7, at 736.
\textsuperscript{24} \textit{The Lotus Case}, \textit{supra} note 4, at 19.
\textsuperscript{25} See ibid. at 19ff.
\textsuperscript{26} See Cryer and others, \textit{supra} note 2, at 50ff.; and O’Keefe, \textit{supra} note 7, at 736.
\textsuperscript{27} It was noted in \textit{The Lotus Case}: ‘Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial: it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention’ (\textit{The Lotus Case}, \textit{supra} note 4, at 18). See also, O’Keefe, \textit{supra} note 7, at 740.
\textsuperscript{28} See ibid., at 740.
\textsuperscript{29} See ibid., at 737.
\textsuperscript{30} Ibid., at 737.
\textsuperscript{31} Ibid., at 737.
national and international level. In other words, the following assessment will deal with matters that pertain to the body of substantive international criminal law and that are attributable to the realm ‘criminal aspects of international law’.

4.2. The universalisation of major crimes in the field of international criminal law

Although ICL has evolved as scientific discipline in its own right today, criminal matters, until recently, were exclusively allocated to the sphere of national sovereignty. It was not until the Second World War that the primacy of national sovereignty in criminal matters and the states’ exclusive prerogative to prosecute and punish criminal conduct were seriously challenged.\textsuperscript{32} Thus, the internationalisation of a number of criminal matters (which were of concern to the international community as a whole) and the introduction of the principle of individual accountability at a level transcending the sovereignty of single states are closely linked to the international community’s ambition to overcome the trauma of the Second World War.\textsuperscript{33} Despite the fact that different opinions existed among the Allied Nations about how Axis war criminals should be dealt with\textsuperscript{34}, the Allied Powers, under the lead of the U.S., eventually agreed to establish two joint criminal tribunals, in Nuremberg and Tokyo respectively, as a response to the atrocities committed during the war.\textsuperscript{35} The

\textsuperscript{32} The most prominent precedent dealing with war criminals on the basis of an international agreement prior to the Second World War and the International Military Tribunals at Nuremberg and Tokyo was the Leipzig Trial in the wake of the First World War. In attempting to establish individual accountability for war crimes committed during the First World War, the 1919 treaty of Versailles devised that German war criminals, including Kaiser Wilhelm, should not go unpunished for the crimes committed during the war and be prosecuted by military tribunals. However, the intention to punish those responsible for war crimes during WWI was not carried out with utter vehemence by the Allied Powers and corresponding provisions in the Versailles Treaty by and large remained dead letters. An overview over the early initiatives in the field of ICL can be found in: United Nations Secretary-General. 'Historical Survey of the Question of International Criminal Jurisdiction' (1949) UN Doc A/CN.4/7/Rev.1; T. L. H. McCormack. 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law’ (1996) 60 Albany Law Review at 684-714; M. C. Bassiouni. 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court' (1997) 10 Harvard Human Rights Journal at 13-21; M. C. Bassiouni. 'The Time Has Come for an International Criminal Court' (1991) 1 Indiana International & Comparative Law Review at 1ff.; and D. M. Segesser and M. Gessler. 'Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)' (2005) 7(4) Journal of Genocide Research 453-68.

\textsuperscript{33} See, e.g., Friedlander, supra note 2, at 20ff.; and Bassiouni (1997), supra note 32, at 21ff.

\textsuperscript{34} The British, for example, first plead for summary executions (see Bassiouni (1997), supra note 32, at 23). For a detailed description of the events, see, among others, T. Taylor, The Anatomy of the Nuremburg Trials: A Personal Memoir (Bloomsbury, 1993) at 29-32; and J. F. Murphy, ‘Norms of Criminal Procedure at the International Military Tribunal’ in G. Ginsburgs and V. N. Kudriavtsev (eds), The Nuremburg Trial and International Law (Martinus Nijhoff, 1990) at 62-67.

International Military Tribunal at Nuremberg (IMT) commenced in November 1945 and lasted until October 1946.\(^{36}\) These proceedings resulted in nineteen convictions, ranging from 10 years imprisonment up to life imprisonment and death by hanging.\(^{37}\) Three of the accused defendants were acquitted.\(^{38}\) The International Military Tribunal for the Far East (IMTFE), comprising 417 days of trial\(^{39}\), took place in Tokyo and lasted from 29 April 1946 until 12 November 1948. It found 25 defendants guilty on one or more counts.\(^{40}\)

The Military Tribunals established in the wake of the Second World War inspired the international alliance to break new ground and greatly contributed to the formation and consolidation of the discipline of ICL. However, one should keep in mind that these tribunals were not established through an act of universal legislation but instead were based on an agreement between the victorious powers of the war.\(^{41}\) This approach was justified prior to the adoption of the IMT-Statute by Robert H. Jackson, Chief of Counsel for the U.S. at the IMT, in the following terms: ‘I think it is entirely proper that these four powers [the United States, Great Britain, the Soviet Union and France], in view of the disputed state of the law of nations, should settle by agreement what the law is as the basis of this proceeding’.\(^{42}\) The Allied states, so to say, ‘monopolised’ the making of international criminal law, as they saw themselves in a position of political and moral superiority.

However, when discussing the legal foundation of these post-war tribunals, one should bear in mind that international cooperation in the field of ICL was a fairly new

\(^{34}\) On the allegations of selectivity in the context of these tribunals see infra Chapter 6, section 6.2.3.1.


\(^{37}\) Jackson, supra note 36, at xii-xiii.

\(^{38}\) Ibid., at xii-xiii. A detailed overview over the indictment and the judgment are provided in B. B. Ferencz, \textit{An International Criminal Court, a Step toward World Peace: A Documentary History and Analysis} (Vol.I, Oceana Publications, 1980) at 470-86.

\(^{39}\) Minear, supra note 1, at 5. On the IMTFE, see Cryer, supra note 36, at 42-48.

\(^{40}\) For more information on the judgment at the IMTFE, Ferencz, supra note 38, at 502-538; S. Horwitz, ‘The Tokyo Trial’ (1950) 28 International Conciliation 542ff. and 578ff.; and Minear, supra note 1, at 20-33.

\(^{41}\) For the IMT, see Bassiouni (1997), supra note 32, at 23ff. A description of the negotiations that took place at London, in the run-up to the IMT, is provided in Taylor, supra note 34, at 56ff.; and Murphy, supra note 34. For the IMTFE, Bassiouni (1997), supra note 32, at 31ff.

phenomenon at that time. In this sense, the Allied Powers' decision to try major war criminals before joint tribunals was rather progressive for its day.\textsuperscript{43} Besides, notwithstanding the fact that the law of the tribunals was not universal in character at the time of its creation, one may claim upon reasonable grounds that the universal legitimacy of the tribunals was established in retrospect through \textit{ex post} adoption of the Nuremberg Principles\textsuperscript{44} by the international community.\textsuperscript{45} These principles,

\begin{itemize}
    \item \textbf{Principle I}: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
    \item \textbf{Principle II}: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
    \item \textbf{Principle III}: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
    \item \textbf{Principle IV}: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
    \item \textbf{Principle V}: Any person charged with a crime under international law has the right to a fair trial on the facts and law.
    \item \textbf{Principle VI}: The crimes hereinafter set out are punishable as crimes under international law:
        \begin{itemize}
            \item \textbf{(a)} Crimes against peace:
                \begin{itemize}
                    \item Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
                    \item Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
                \end{itemize}
            \item \textbf{(b)} War crimes:
                Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
            \item \textbf{(c)} Crimes against humanity:
                Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.
        \end{itemize}
    \item \textbf{Principle VII}: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.
\end{itemize}

\textsuperscript{43} On the early initiatives in the field of ICL, see \textit{supra} note 32.

\textsuperscript{44} The 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal' were adopted by the International Law Commission in 1950 (see ILC. 'Text of the Nürnberg Principles Adopted by the International Law Commission' (1950) UN Doc A/CN.4/L.2).

\begin{itemize}
    \item \textbf{Principle I}: Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.
    \item \textbf{Principle II}: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.
    \item \textbf{Principle III}: The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.
    \item \textbf{Principle IV}: The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.
    \item \textbf{Principle V}: Any person charged with a crime under international law has the right to a fair trial on the facts and law.
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        \begin{itemize}
            \item \textbf{(a)} Crimes against peace:
                \begin{itemize}
                    \item Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;
                    \item Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).
                \end{itemize}
            \item \textbf{(b)} War crimes:
                Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.
            \item \textbf{(c)} Crimes against humanity:
                Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.
        \end{itemize}
    \item \textbf{Principle VII}: Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.
\end{itemize}

\textsuperscript{45} On 11 December 1946, the GA of the United Nations [affirmed] the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal' (GA Res 95 (I) (11 December 1946) UN Doc A/RES/1/95). On 21 November 1947, the GA assigned the newly created International Law Commission (ILC) the task to formulate the Principles and prepare a draft code of offences against the peace and security of mankind (GA Res 177 (II) (21 November 1947)). In 1950, the ILC adopted an elaborated version of the Nuremberg Principles (ILC. 'Text of the Nürnberg Principles Adopted by the International Law Commission' (1950) UN Doc A/CN.4/L.2). The universality of the Nuremberg principles has subsequently been confirmed by the European Court of Human Rights in \textit{Kolk and Kislyiy v. Estonia} (ECHR No. 23052/04 and 24018/04), Decision as to the Admissibility, 17 January 2006. On the recognition of the Nuremberg Principles by states and international criminal tribunals, see A. Cassese. 'Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal' \textit{United Nations Audiovisual Library of International Law} (2009) <http://legal.un.org/avl/ha/ga_95-l/ga_95-l.html> accessed 9 June 2015; G.
among other things, established individual accountability under international law (Principle I) and defined war crimes, crimes against humanity and crimes against peace as ‘crimes under international law’ (Principle VI). Today, the Nuremberg Principles form part of customary international law.46

Apart from the codification of the Nuremberg Principles, these tribunals also triggered the adoption of various international conventions in the domains of International Humanitarian Law and ICL in the years following the war.47 In addition, the successful accomplishment of the IMT and the IMTFE revitalised the idea of establishing a permanent international criminal court.48 The 1948 Genocide

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47 See Cassese, supra note 45, para.4B.

48 One of the early promoters of the vision to establish a permanent enforcement mechanism in the field of ICL was the International Association of Penal Law. This body proposed in 1926 that the Permanent Court of International Justice (PCIJ) should be given the power to deal with criminal matters. In 1937, a draft convention for the Prevention and Punishment of Terrorism and for the establishment of an International Criminal Court was elaborated, but not put into practice. On early initiatives to establish a permanent international criminal tribunal, see, among others, Friedlander, supra note 2, at 18f.; M. O. Hudson, 'The Proposed International Criminal Court' (1938) 32(3) The American Journal of International Law 549-54; D. McGoldrick, 'Criminal Trials before International Tribunals: Legality and Legitimacy' in D. McGoldrick, P. Rowe and E. Donnelly (eds), The Permanent International Criminal Court: Legal and Policy Issues (Hart Publishing, 2004) at 40f.; W. N. Gianaris, 'The New World Order and the Need for an International Criminal Court' (1992) 16(1) Fordham International Law Journal 88-119; and M. C. Bassiouni and C. L. Blakesley, 'The Need for an International Criminal Court in the New International World Order' (1992) 25(2) Vanderbilt Journal of Transnational Law 151-82.
Convention included in Article 6 that an international criminal tribunal may acquire jurisdiction over the crime of genocide if such a court was consented by the contracting parties. In addition to that, in 1951 and 1953 respectively, the UN launched initiatives to establish a permanent international criminal court. This process, however, was never finalised as considerations on this issue were repeatedly deferred. The Apartheid Convention of 1973, similarly to the Genocide Convention, contains in Article V the possibility that states set up an international tribunal to deal with the crimes of the convention. Be that as it may, none of the initiatives to establish a permanent criminal law enforcement agency was put into reality as states were not yet willing to curtail their sovereign rights in criminal matters on a permanent basis. A reason for the states’ unwillingness to transfer inherent criminal competences to a permanent criminal tribunal can be identified in the precarious geopolitical situation between the West and the East in the decades following the Second World War, which was caused by fundamentally different ideologies between the United States and the Soviet Union. As a consequence of this political deadlock, states opposed the idea to subordinate themselves to a sovereignty-transcending enforcement mechanism, thus giving effect to codifications that were launched under the auspices of the UN at that time. During this period, by implication, ‘domestic tribunals and individual countries remain[ed] the primary vehicles for the enforcement of the Nuremberg principles’. Only in the face of the conflicts in the Former Yugoslavia and Rwanda in the nineteen-nineties, the international community reintroduced the approach of international criminal tribunals. In 1993 and 1994 respectively, the Security Council set up the two ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). The statutes of these tribunals firmly relied on their famous predecessors

49 See supra note 47.
51 See supra note 47.
54 Sadat Wexler, supra note 45, at 315. In the same vein, Komarow, supra note 35; and Cassese, supra note 35.
and contain, although ‘in a slightly different and generally more elaborated manner’, all of Nuremberg Principles.\textsuperscript{58}

It was only in 1998 that the international community agreed to establish the ICC, the first ever international criminal instrument competent to deal with perpetrators of major international crimes on a permanent basis.\textsuperscript{59} As will be outlined in more detail below, the jurisdiction of the ICC is limited to the crimes of genocide, war crimes, crimes against humanity and aggression.\textsuperscript{60} In contrast to its famous predecessors, the ICC is founded on the basis of a multilateral treaty and not set up either by victorious powers as was the case after the Second World War, or the SC, which established the ICTY and the ICTR.\textsuperscript{61}

Other international criminal tribunals have come into existence since the founding of the ICC, all of them limited to a specific historical, geographical and temporal context and characterised ‘by a mix of national and international components’.\textsuperscript{62} Examples include the District Court of Dili in East Timor, the Regulation 64 Panels in the courts of Kosovo, the Special Tribunal for Lebanon, the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the courts of Cambodia.\textsuperscript{63} For reasons of methodology, we will not discuss the latter mentioned ‘hybrid’ tribunals, as their legal foundation would require an assessment of national elements (and crimes), an endeavour that stretches beyond the scope of this study. With that said, it remains to note that these hybrid courts, of course, may be susceptible to problems similar to those discussed in this study.

4.3. Universal jurisdiction: a value-based approach to international justice

4.3.1. The legal concept of universal jurisdiction

Universal jurisdiction is a separate type of jurisdiction which allows states to institute criminal proceedings against individuals of third states for the perpetration of a defined number of international crimes.\textsuperscript{64} It ‘refers to jurisdiction established over a

\textsuperscript{57} On these tribunals, see infra Chapter 6, section 6.2.3.2.
\textsuperscript{58} Cassese, supra note 45, para.4A.
\textsuperscript{59} On the negotiations of the Rome Statute, see infra section 4.4.1.
\textsuperscript{60} Article 5 RS. See also infra section 4.4.2.
\textsuperscript{61} On the ICC, see infra section 4.4.1.; on the ICTY and ICTR, see infra Chapter 6, section 6.2.3.2.
\textsuperscript{63} Some also refer to the Crimes Chamber in the Court of Bosnia and Herzegovina. For an introduction on these ‘hybrid’ courts, see ibid.
\textsuperscript{64} The crimes subject to universal jurisdiction are discussed below in this section.
crime without reference to the place of perpetration, the nationality of the suspect or
the victim or any other recognized linking point between the crime and the
prosecuting State'.\footnote{See Cryer and others, supra note 2, at 56f.}

In contrast to the protective principle and the principles of active
and passive personality which may also affect extraterritorial situations\footnote{On these types of jurisdiction, see supra note 7.}, the doctrine
of universal jurisdiction thus derives its legitimacy exclusively from the nature of the
crime. On the basis of this understanding, M. Cherif Bassiouni has observed that
'[t]he theory of universal jurisdiction is extraneous to the concept of national
sovereignty, which is the historical basis for national criminal jurisdiction. Universal
jurisdiction transcends national sovereignty'.\footnote{M. C. Bassiouni. 'Universal Jurisdiction for International Crimes: Historical Perspectives
and Contemporary Practice' (2001) 42(1) Virginia Journal of International Law at 96.}

This statement epitomises why the concept of universal jurisdiction is a good example to show how the field of ICL
differs from the traditional concepts of colonialism and neo-colonialism. Firstly, as
opposed to the imposition of Western values during colonial rule, the concept of
universal jurisdiction is not predicated on cultural dissimilarities between the actors
involved. Rather universal jurisdiction is a purely value-based approach that defines
itself on the basis of the nature of the crimes. Secondly, this value-oriented approach
is generally designed to function independently from sovereignty-concerns of single
states. While the latter aspect of universal jurisdiction will be dealt with in the
following chapter, the present section will concentrate on the substantive scope of
universal jurisdiction. However, prior to doing so, a few words remain to be said on
the contested nature and scope of the concept of universal jurisdiction.

Although the doctrine of universal jurisdiction undoubtedly harbours noble
objectives, it has attracted considerable criticism from legal scholars.\footnote{M. Cherif Bassiouni has therefore concluded that 'it [universal jurisdiction] is not as well established
in conventional and customary international law as its ardent proponents, including major human rights
organizations, profess it to be' (M. C. Bassiouni, The History of Universal Jurisdiction and Its Place in
International Law' in S. Macedo (ed), Universal Jurisdiction: National Court and the Prosecution of
Serious Crimes under International Law (University of Pennsylvania Press, 2004) at 40). For a critique
of International Criminal Justice 580-84; and H. A. Kissinger. 'The Pitfalls of Universal Jurisdiction'
(2001) Foreign Affairs 86-96.}

In spite of these critical voices, the legality of the principle of universal jurisdiction has been
confirmed by a majority of states\footnote{See I. B. Cordero. 'Universal Jurisdiction' (2008) 79(1) Revue internationale de droit pénal 59-100;
Jurisdiction' (16 April 2009) 8827/1/09 REV 1 [hereinafter Expert Report] at para.15ff.} and international organisations, such as the EU
and the AU\textsuperscript{70}. In addition, the principle is acknowledged as a valid instrument of international law by the ICC\textsuperscript{71}, the ICTY\textsuperscript{72}, the ICTR\textsuperscript{73} and the SCSL\textsuperscript{74}. Although most international criminal institutions and states, from Africa and elsewhere, have accepted the legality of universal jurisdiction, the precise scope of the concept has remained a matter of controversy as there is ‘no generally accepted definition of universal jurisdiction in conventional or customary international law’.\textsuperscript{75} In order to fill this gap, a number of efforts were undertaken in the past to define the normative scope of the concept.\textsuperscript{76} However, none of the produced proposals has received sufficient support among the international community to be translated into a state-binding normative framework regulating the use of universal jurisdiction by states on a supranational basis.\textsuperscript{77}

Despite the fact that a coherent normative foundation delineating the boundaries of the concept of universal jurisdiction is lacking, there is a broad consensus on the substantive scope of the concept of universal jurisdiction. The recently established

\textsuperscript{70} See Expert Report, supra note 69. A detailed assessment of the AU position on the principle of universal jurisdiction is provided in infra section 4.3.2.

\textsuperscript{71} The preamble of the Rome Statute ‘[re]calls] that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’. In addition, it is noted that states parties to the Statute are ‘[d]etermined to put an end to impunity for the perpetrators of these crimes’.

\textsuperscript{72} The Prosecutor v. Dusko Tadic a/k/a 'Dule' (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 para.62; and The Prosecutor v. Anto Furundžija (IT-95-17/1-T), Judgment, 10 December 1998 para.156.

\textsuperscript{73} The Prosecutor v. Bernard Ntuyuhaga (ICTR-98-40-T), Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March, 1999.


\textsuperscript{76} The most prominent among them – the Princeton Project on Universal Jurisdiction – adopted the Princeton Principles of Universal Jurisdiction (Princeton Project on Universal Jurisdiction, 'Princeton Principles on Universal Jurisdiction' (2001) Program in Law and Public Affairs). More recently, and as a direct consequence of the political frictions between European and African states which were caused by the alleged misuse of the principle of universal jurisdiction by European states, a joint ad hoc expert group between the EU and the AU (EU/AU Expert Group) convened in 2008 ‘to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction’ (see Expert Report, supra note 69, at para.2 (emphasis in the original)).

\textsuperscript{77} As a consequence of this lack of a normative framework dealing with the principle of universal jurisdiction, a legislative diversity has emerged between different national judicial systems resorting to this type of jurisdiction. A prominent example illustrating such legislative diversity at a domestic level concerns the issue of trials in absentia. In light of the fact that there is no rule of international law proscribing the issuance of an arrest warrant or a trial in case the defendant is not present on the territory concerned, it can be argued in accordance with the lotus paradigm that the decision about the admissibility of proceedings in absentia falls within the competence of domestic legislators (see Arrest Warrant Case, supra note 75, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal para.56). On the differences in the implementation of the principle of universal jurisdiction in European countries, Cordero, supra note 69.
joint EU/AU Expert Group has determined that the following crimes, which form part of international customary law, fall within the category of crimes subject to universal jurisdiction: genocide, crimes against humanity, war crimes, torture, and piracy. Although this selection is rather conservative, it conforms well to the legislative practice of most states that have implemented the concept of universal jurisdiction in their legal systems. At the same time, this enumeration of core crimes also reflects the most prominent positions taken in legal literature.

The existence of a limited number of international core crimes reflecting common values of the international community is also evident from the fact that a number of widely accepted treaties deal with some of these crimes. However, it is important to understand that universal jurisdiction is explicitly established in international conventional law only with regard to piracy. Other relevant conventions in a related context, such as the 1949 Geneva Conventions, the Additional Protocol I of 1977, the Genocide Convention and the 1984 Convention against Torture, implicitly allow for the exercise of universal jurisdiction. In these treaties, the exercise of jurisdiction relates to the obligation of states parties to either prosecute or extradite alleged criminals, an obligation that will be discussed in more detail in the following.

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78 See supra note 76.
80 The Princeton Principles on Universal Jurisdiction, for example, also listed slavery and crimes against peace as crimes subject to the principle of universal jurisdiction (Principle 2 Princeton Principles, supra note 76).
81 An overview over national legal systems is provided in Cordero, supra note 69, at 59-100; and Amnesty International. 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (October 2012) Annex I (at 16ff.).
83 Notably the Geneva Conventions of 1949 were ratified by virtually all states of the world (see supra note 47).
84 Article 105 of the United Nations Convention on the Law of the Sea (10 December 1982, 1833 UNTS 3, Entry into Force 16 November 1994) reads as follows: ‘On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.’ See also, Bassiouni, supra note 68, at 47ff.
85 Geneva Conventions I-IV, supra note 47.
86 Protocol I, supra note 47.
87 Genocide Convention, supra note 47.
88 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, 1465 UNTS 85, Entry into Force 26 June 1987) [hereinafter Torture Convention].
The essence of this duty is that a state, as an alternative to the prosecution of the suspect, can also extradite the suspect to another state party which is willing to prosecute the person in question. This duty resembles the exercise of universal jurisdiction because it does require states parties to these conventions, where a state is not willing to extradite the suspect, to prosecute the alleged perpetrator even in the absence of any link to the accused. With respect to the Geneva Conventions, it remains to mention that such a duty only applies in the context of grave breaches.

In analysing the treaty-based duty of states to prosecute or extradite, it must, however, be stressed, firstly, that treaties are only binding on the consenting states, and secondly, that universal jurisdiction based on treaty law, except when the treaty in question has been ratified by all states, is not truly universal due to its inherent limitation to states parties. As a consequence, states which are not party to a specific treaty are not obliged to comply with the aut dedere aut judicare obligation. Rather, they can act at their own discretion and make use of the principle of universal jurisdiction whenever they consider it reasonable (permissive universal jurisdiction). The situation would be different if there existed a general duty to prosecute international crimes under customary international law. This, however, is not the case at present.

In any case, prior to exercising universal jurisdiction, treaty-based or not, a state is required to implement corresponding prescriptive national legislation within the boundaries of international law to ‘vest its courts with competence to try given criminal conduct’.

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89 This obligation is commonly referred to as aut dedere aut judicare (see infra Chapter 5, section 5.1.3.).
90 See Article 50 Geneva Convention I; Article 51 Geneva Convention II; Article 130 Geneva Convention III; Article 147 Geneva Convention IV. According to these common Articles, war crimes consisting of grave breaches include the following acts: wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; compelling a protected person to serve in the forces of the hostile power; wilfully depriving a protected person of the rights of fair and regular trial; unlawful deportation or transfer or unlawful confinement of a protected person and taking of hostages.
92 On the relationship between the concept of universal jurisdiction and the treaty-based aut dedere aut judicare principle, Colangelo, supra note 6, at 166ff.; and Expert Report, supra note 69, at para.11.
93 See Expert Report, supra note 69, at paras.9,13.
94 See infra Chapter 5, section 5.1.3.
95 Expert Report, supra note 69, at para.11.
4.3.2. African position towards the concept of universal jurisdiction

The subject of universal jurisdiction, as indicated previously, is a contested issue which has attracted criticism from various directions over a long period of time. In particular, European states’ exercise of universal jurisdiction against African defendants in recent years has provoked harsh reactions from the African Union against the ‘abuse’ of the concept of universal jurisdiction. This negative stance towards the principle of universal jurisdiction relates to the relatively high number of proceedings that were initiated in European states against high-profile African defendants, including senior state officials and military personnel, as of 2000.

However, while analyses of the (selective) application of the principle of universal jurisdiction can be found elsewhere, the present section specifically deals with the African states’ reception of the concept of universal jurisdiction and its underlying values, in order to evaluate the states’ acceptance of the previously identified international core crimes.

In this sense, it is important to emphasise that the AU, when it first endorsed the criticism on the (abusive) exercise of universal jurisdiction in July 2008, unambiguously recognised.


97 An overview over proceedings initiated on the basis on universal jurisdiction over the past two decades can be found in: J. Rikhof, ‘Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity’ (2009) 20(1) Criminal Law Forum at 26-33; and M. Langer, ‘The Diplomacy of Universal Jurisdiction’ (2011) 105(1) The American Journal of International Law see tables at 42-44. Langer, in particular, links the selective application of the principle of universal jurisdiction to the potential (international-relations) costs a defendant would impose on the prosecuting state if a prosecution and trial takes place (see ibid, at 2).

that universal jurisdiction is a principle of International Law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice, which is in line with Article 4(h) of the Constitutive Act of the African Union.99 Article 4 (h) of the Constitutive act of the AU100 enshrines ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’. Both the AU decision and Article 4 (h) of the Constitutive Act are clear indications that the AU does not call into doubt that the above enumerated crimes are applicable at a level that transcends the sovereignty of single states. More recently, the AU, still in the context of the European states’ exercise of universal jurisdiction, urged its ‘Member States to use the principle of reciprocity to defend themselves against the abuse of the principle of Universal Jurisdiction’.101 The rationale behind this request – to use the principle of reciprocity to compensate for the allegedly misguided exercise of universal jurisdiction by European states – is doubtful, to say the least. However, this request at the same time illustrates the AU’s commitment to bring perpetrators of international core crimes to justice in African states. In addition, simultaneously to the ‘reciprocity request’ to the AU member states, the Executive Council of the AU presented an ‘African Union Model National Law on Universal Jurisdiction over International Crimes’102, for that the member states ‘fully take advantage of this Model National Law in order to expeditiously enact or strengthen their national laws in this area’.103 The AU Model National Law not only contains the traditional crimes subject to the principle of universal jurisdiction, such as genocide, crimes against humanity, war crimes and piracy, but also covers the crimes of drug trafficking and

99 See Decision on the Report I, supra note 96, at para.3.
101 Decision on the Abuse V, supra note 96, at para.5.
terrorism. The inclusion of the core crimes of genocide, crimes against humanity and war crimes into the list of crimes provides further evidence that these crimes are now accepted by African states on a universal basis. In this sense, the AU Model National Law is an expression of the opinio juris of African States regarding the application of the principle of universal jurisdiction, as well as of the acceptance of the core crimes in general. With regard to the concept of universal jurisdiction, it remains to be mentioned that there are currently universal jurisdiction proceedings underway in Senegal and South Africa.

A recent development that is unrelated to the concept of universal jurisdiction, but that similarly corroborates the universality presumption of the core crimes, is the AU's adoption of the ‘Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights’ on 27 June 2014. With this initiative, the AU aims to create a mechanism to deal with crimes that are, inter alia, also covered by the ICC. More specifically, the amendment furnishes the (not yet operational) African Court of Justice and Human Rights (the merger of the African Court on Human and Peoples Rights and the Court of Justice of the AU) with competence over the international core crimes of aggression, genocide, war crimes and crimes against humanity, as well as a number of other crimes. An important development which is similarly evident in some African states, but which is not addressed here as an examination in this direction would extend beyond the scope of this study, relates to the adoption of domestic legislation and the initiation of proceedings based thereon.

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104 AU Model National Law, supra note 102, at 6, n.8. However, as Akande observes with regard to the inclusion of the treaty-based crimes of drug trafficking and terrorism: ‘Since African States have been complaining about the abuse of universal jurisdiction, it is a bit strange to see them pushing, through this Model Law, the boundaries of the crimes covered by that principle’ (Akande, supra note 103).

105 In a similar vein, Akande, supra note 103.

106 In Senegal, the trial against the former President of Chad, Hissène Habré started on 20 July 2015 (for more information on this trial, see https://www.hrw.org/tag/hissene-habre). In South Africa, the Constitutional Court, on 30 October 2014, paved the way for the prosecution of Zimbabwean state officials for torture on the basis of the principle of universal jurisdiction (see National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another (CCT 02/14), ZACC 30, Judgment, 30 October 2014).


109 On the performance of African jurisdictions, see van der Wilt, supra note 98, at 1051ff.; Rikhof, supra note 97, at 23ff. For an overview over national legislations in the context of international core crimes, Amnesty International. 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World' (October 2012) Annex I (at 16ff.).
4.4. The value system of the ICC

4.4.1. Introducing the negotiation process

The Rome Conference on the Establishment of an International Criminal Court opened its doors on 15 June 1998 and lasted until 17 July 1998.\textsuperscript{110} Delegates from more than 160 states, 16 international organisations and a great many of non-governmental organisations from all regions of the world participated in this epochal event and contributed to the accomplishment of founding the ICC.\textsuperscript{111}

The most influential alliance that crystallised during the negotiations was the group of like-minded states (LMG) which advocated a strong and independent court.\textsuperscript{112} The LMG was composed of middle powers and developing states which were particularly concerned about the opposition of the P-5 of the SC against an independent court.\textsuperscript{113} Over the course of the conference, the LMG assembled more than 60 states from different parts of the world.\textsuperscript{114} The position of these states towards the future court was by and large congruent with that of the NGO coalition which, due to its legal expertise and experience in the field, had a great deal of influence on the negotiation dynamic and on the drafting of the Statute.\textsuperscript{115} A key to the successful finalisation of the RS was the fact that traditional alliances, such as the Non-Aligned Movement (NAM) and the P-5 of the SC, both of which had played an active role during the

\textsuperscript{110} GA Res 52/160 (15 December 1997) UN Doc A/RES/52/160 para.3.
\textsuperscript{113} On the negotiations of Articles 13 (b) and 16 RS, see infra Chapter 7, section 7.2.; and infra Chapter 8, section 8.2.
\textsuperscript{114} Andorra, Argentina, Australia, Austria, Belgium, Benin, Bosnia-Herzegovina, Brunei, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Congo (Brazzaville), Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Ireland, Italy, Jordan, Republic of Korea, Latvia, Lesotho, Lichtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Romania, Samoa, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela, Zambia (see W. A. Schabas, An Introduction to the International Criminal Court (4th edn Cambridge University Press, 2011) at 18, n.63; and M. Glasius, The International Criminal Court: A Global Civil Society Achievement (Routledge, 2006) at 22-26).
\textsuperscript{115} See F. Benedetti and J. L. Washburn. ‘Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference’ (1999) 5 Global Governance at 20; Glasius, supra note 114, at 26-28. On the discursive role that NGOs played in the establishment of a permanent international criminal tribunal, Struett, supra note 52. On the role of NGO’s in the preparation of Articles 13 (b) and 16 RS, see also infra Chapter 7, section 7.2.3.; and infra Chapter 8, section 8.2.2.
preparatory stage of the negotiations, did not succeed in taking a unified position during the conference.\textsuperscript{116} As such, certain states of the NAM had initially opposed any influence of the SC on the future court and also had advocated including nuclear weapons in the list of crimes. However, these states found themselves under pressure to compromise on these issues during the conference.\textsuperscript{117} The Southern African Development Community (SADC) played an important role in dividing the NAM and in integrating some of these states into the group of like-minded states.\textsuperscript{118} The SC, on the other hand, was particularly interested in retaining control over proceedings affecting international peace and security, based on its powers under Chapter VII of the UNC.\textsuperscript{119} However, already prior to the conference, the U.K., as the first state of the P-5, affiliated with the LMG on this point, as will be outlined in more depth in Chapter 8.\textsuperscript{120} Over the course of the conference, France followed suit and similarly abandoned its position that the ICC should only be able to commence prosecutions in cases where the SC did not deal with a situation under Chapter VII UNC in the first place.\textsuperscript{121}

Analysing the dynamics of the negotiation process of the RS, it can be summarised that ‘[t]he main division was between a majority of states in favour of a strong, independent Court and a minority trying to curtail its powers’.\textsuperscript{122} By contrast, the otherwise much-emphasised division between states from the Global North and the Global South ‘was virtually absent at the ICC negotiations’.\textsuperscript{123} In this sense, the negotiations of the Statute were marked by transregional alliances between states, or group of states, thus reflecting the transcultural underpinning of the values underlying the system of the ICC. This interpretation is corroborated by the fact that the RS was adopted during the final plenary session by 120 votes in favour of the Statue, 7

\textsuperscript{116} See Glasius, \textit{supra} note 114, at 24f.
\textsuperscript{117} The disintegration of the NAM was described by F. Benedetti and J. L. Washburn as the ‘enthusiastic defection from the Nonaligned Movement by sub-Saharan African countries’ (Benedetti and Washburn, \textit{supra} note 115, at 33 (see also, at 31)). In a similar vein, Glasius, \textit{supra} note 114, at 24.
\textsuperscript{119} On the role of the SC during the negotiations, see also, \textit{infra} Chapter 7, section 7.2.; and \textit{infra} Chapter 8, section 8.2.
\textsuperscript{120} See, in particular, \textit{infra} Chapter 8, section 8.2.2. See also, Benedetti and Washburn, \textit{supra} note 115, at 21; and Glasius, \textit{supra} note 114, at 25f.
\textsuperscript{121} See \textit{infra} Chapter 8, sections 8.2.3.
\textsuperscript{122} Glasius, \textit{supra} note 114, at 24.
\textsuperscript{123} Ibid., at 24.
against and 21 abstentions.\textsuperscript{124} The only countries voting against the adoption of the Statute were: the U.S., Israel, China, Iraq, Yemen, Libya and Qatar.\textsuperscript{125}

4.4.2. The regime of core crimes under the Rome Statute

In substantive terms, the negotiating states have agreed that the ICC shall have jurisdiction ‘over the most serious crimes of concern to the international community as a whole’.\textsuperscript{126} More specifically, the subject-matter jurisdiction of the ICC, which is defined in Article 5 RS, extends to the crimes of genocide, war crimes, crimes against humanity and aggression. With regard to the crime of aggression, however, it must be noted that, although it is also part of the Article 5 catalogue of crimes within the jurisdiction of the Court, it will only become an operational crime as soon as certain additional requirements are met.\textsuperscript{127}

In contrast to the ICTY and the ICTR, whose statutes were unilaterally established by the SC, we saw that the legal basis of the ICC – the Rome Statute – has merged a multitude of national interests into one coherent legal instrument. Thus, unlike its famous ad hoc predecessors, the Court was created by states whose nationals were potential subjects to the jurisdiction of the Court at the time of the negotiations.\textsuperscript{128}

Accordingly, not only states parties to the ICC contributed to the establishment of the RS but all states which took part in negotiating it. This, of course, stimulated the debate and prompted national delegations to gather support for their positions among other states.

Taking the above outline of the Rome negotiations as a starting point, the author would like to approach these negotiations from a different perspective by making use of the technique of \textit{ex post} adoption of values on the basis of negotiations. This approach, which was briefly addressed in the introductory section to this part, is borrowed from a contribution of Emmanuelle Jouannet on the dichotomy between

\textsuperscript{124} ‘Summary Record of the 9th Plenary Meeting’ (17 July 1998) UN Doc A/CONF.183/SR.9 para.10.
\textsuperscript{125} See Benedetti and Washburn, \textit{supra} note 115, at 27.
\textsuperscript{126} See Preamble of the RS, paras. 4/9 and Articles 1 and 5 RS.
\textsuperscript{127} The crime of aggression, of which a definition was adopted at the 2010 Review Conference at Kampala (Article 8bis RS), only enters into force when: a) at least thirty States Parties have ratified or accepted the amendments (Articles 15bis (2) and 15ter (2) RS) and b) two-thirds of the States Parties have taken a decision to activate the crime of aggression at any time after 1 January 2017 (Articles 15bis (3) and 15ter (3) RS).
\textsuperscript{128} In a similar vein, Cryer, \textit{supra} note 36, at 236.
hegemonic and universal international law. Jouannet confirms that negotiations, which she describes as ‘more subtle practices that are sensitive to the context of contemporary globalized society’, can contribute to an international law that is a ‘cultural product that has been expanded to cover the whole planet’. Jouannet therefore comes to the conclusion that international law is not only instrumental to conceal hegemonic goals of powerful actors, but at the same time can also be considered as the paradigmatic space within which inter-subjective practices of negotiation and deliberation over the elaboration and application of values, principles and rules may flourish, whether this takes place at the level of specialized or general institutions, in the context of judicial decisions or diplomatic discussions.

It follows from this presumption that the classic objection that ‘consensus cannot exist between profoundly different socio-cultural systems [...]’ does not always translate systematically into the hegemonic victory of the legal values of one of the two, or pure decisionism. Although Jouannet discusses the foundations and the making of international law in general, the same line of argument can be transmitted to the field of ICL and the negotiations of the Rome Statute in 1998. The convertibility of this approach to the system of the ICC is supported by the fact that the Preamble explicitly emphasises the inter-cultural dimension of the Rome Statute. As such, it is described as a ‘delicate mosaic’ in which ‘all peoples are united by common bonds, their cultures pieced together in a shared heritage’.

While the RS as a whole can certainly be described as a treaty with a transcultural underpinning, there were, of course, certain issues that were more contested than others during the negotiations, a fact that was already touched upon in the previous paragraph. Particularly the role of the SC in matters relating to international peace and security proved to be a highly controversial matter, as will be shown in more detail in subsequent Chapters 7 and 8. The negotiations with respect to the subject-matter jurisdiction, by contrast, were less contested. Already in the early phases of the discussions on a permanent international criminal tribunal, it was emphasised

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129 E. Jouannet. ‘Universalism and Imperialism: The True-False Paradox of International Law?’ (2007) 18(3) European Journal of International Law at 397. On the methodology adopted in this section, see also introduction to Part II.
130 Jouannet, supra note 129, at 397.
131 Ibid., at 397.
132 Ibid., at 397f.
133 Preamble of the RS, para.1.
that the future court should deal with core crimes only and not include other (treaty-based) crimes such as terrorism or illicit drug trafficking.\textsuperscript{134} Support for the inclusion of these so-called transnational crimes waned during the preparatory works for the establishment of an international criminal court.\textsuperscript{135} The argument advanced related to the fact that the Court should be limited to deal with crimes which were already universally recognised by the time of the establishment of the ICC.\textsuperscript{136} A statement issued by the U.S. prior to the negotiations in Rome illustrates this position:

This court should not concern itself with incidental or common crimes, nor should it be in the business of deciding what even is a crime. This is not the place for progressive development of the law into uncertain areas, or for the elaboration of new and unprecedented criminal law. The court must concern itself with those atrocities which are universally recognized as wrongful and condemned.\textsuperscript{137}

The selection of crimes subject to the RS, as we saw above, conforms well to the most important historical developments in conventional and customary international criminal law.\textsuperscript{138} Robert Cryer even argues that ‘[t]he problem with the Rome Statute is that definitions of crimes are sometimes narrower than customary international law


\textsuperscript{138} However, a small number of categories of crimes within the Article 5 catalogue are considered to be in advance of customary international law. Antonio Cassese, for example, considers the inclusion of the categories ‘forced pregnancy’ (Article 7(1)(g) RS), ‘enforced disappearance of persons’ (Article 7(1)(i) RS) and ‘the crimes of apartheid’ (Article 7(1)(j) RS) to be in advance of customary international law. He also argues that the open-ended nature of the crime of ‘persecution against any identifiable group or collectivity’ (Article 7(1)(h) RS), by adding in particular ‘cultural, […] gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law’, extends beyond established law (A. Cassese, ‘Crimes Against Humanity’ in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), \textit{The Rome Statute of the International Criminal Court: A Commentary} (Vol.I, Oxford University Press, 2002) at 376-7 In a similar vein, W. A. Schabas, \textit{The International Criminal Court: A Commentary on the Rome Statute} (Oxford University Press, 2010) at 177. In addition, it is doubtful whether the prohibition of ‘conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’ (Article 8(2)(e)(vii) RS) is covered by customary international law (see Cryer, supra note 36, at 283).
permits (or, in some cases, requires)’.\textsuperscript{139} It therefore can be concluded that the negotiations of the RS have consolidated the system of core crimes under international law. The broad acceptance of the values underlying the system of the ICC among international actors which were present in Rome was similarly emphasised by Fanny Benedetti and John Washburn: ‘Any conclusions about the Rome diplomatic conference, as about its preparations, must take into account the almost total and frequently fervent moral agreement on the crimes it addressed’.\textsuperscript{140}

However, the negotiation history on the subject matter jurisdiction of the ICC also illustrates that negotiations between a multitude of actors from different cultures do not always translate into a universal vocabulary. Rather, it may well be the case that such a technique impedes the finding of a common understanding. This was the case in the context of crime of aggression, which was labelled the ‘supreme international crime’ at Nuremberg.\textsuperscript{141} However, despite a lack of consensus over the definition of aggression, the crime was formally included into Article 5 RS and the negotiating states decided that it would not become operational until the states have reached a broader consensus on the matter.\textsuperscript{142} Accordingly, the Statute, as of its entry into function, allowed the Court to exercise jurisdiction only over the crimes of genocide, war crimes and crimes against humanity. The exclusion of treaty-based transnational crimes from the jurisdiction of the Court and the process with regard to the crime of aggression therefore also demonstrate how important are negotiations in finding a common understanding on specific values.

It can be summarised that the RS, although it is still shaped by the national interests of single states, has created a value system which does not solely reflect the national interests of Western states, let alone of one imperial or neo-colonial centre. Rather, the broad participation of states and of a multiplicity of other actors in the negotiations of the Rome Conference reinforces the idea that the crimes subject to the RS have acquired a universal status by now. In this sense, the RS is a consensus between different socio-cultural systems transcending regional boundaries. Moreover, due to the fact that the ICC is acting on the ground of

\textsuperscript{139} Cryer, supra note 36, at 287.
\textsuperscript{140} Benedetti and Washburn, supra note 115, at 33.
\textsuperscript{142} On the requirements for the crime of aggression to become operational, see supra note 127.
delegated jurisdiction by states party to the ICC\textsuperscript{143}, the ICC’s inherent value system advocating the condemnation of international crimes at the same time is a reflection of the different national interests of states which have acceded to the Rome Treaty.

4.4.3. African states and the establishment of the ICC

As was indicated above and as will be further substantiated in the subsequent chapters of this study, the AU has not only been sceptical towards the principle of universal jurisdiction\textsuperscript{144} but also expressed strong misgivings about the way the ICC is dealing with some African situations\textsuperscript{145}. However, hitherto, it has been demonstrated that African states and the AU have at different levels committed themselves to the underlying value system of ICL consisting of a number of core crimes which are applicable on a universal basis. The same can be said for their acceptance of the value system of the ICC. By now, 34 African states out of a total of 54 AU member states\textsuperscript{146} have ratified the RS.\textsuperscript{147} The African continent thus contributes the largest continental share among the 123 member states to the ICC. The mere ratification of a treaty by a number of states, however, is not sufficient to ‘cure the imperialism objection to universalism’, as is rightly noted by Dire Tladi:\textsuperscript{148} Nevertheless, this number indicates a broad acceptance of the values guiding the jurisdiction of the ICC among African states.\textsuperscript{149} At the same time, African states have participated to a great extent in the negotiations and Libya was the only African state which voted against adopting the Statute.\textsuperscript{150} In this sense, Max du Plessis notes:

> The history of the ICC’s creation and the serious and engaged involvement of African states in that history demonstrates the ICC to be a court created in part by Africans and ultimately for the benefit of African victims of serious crimes. The high ideals and hard work that marked African states’ participation in bringing the ICC to life in Rome should not too easily be forgotten.\textsuperscript{151}

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\textsuperscript{143} See infra Chapter 5, section 5.2.3.1.
\textsuperscript{144} See AU-Decisions on universal jurisdiction, supra note 96.
\textsuperscript{145} On these claims, see, in particular, infra Chapter 8, section 8.5.
\textsuperscript{146} The only African state that is not member of the AU is Morocco.
\textsuperscript{147} At the time of writing, 123 states have ratified the RS (on the status of ratification, see Rome Statute of the International Criminal Court (17 July 1998, 2187 UNTS 3, Entry into Force 1 July 2002)).
\textsuperscript{149} See ibid., at 65.
\textsuperscript{150} Other states that have voted against the adoption of the RS were: the U.S.; Israel, China, Iraq, Yemen and Qatar (see Benedetti and Washburn, supra note 115, at 27).
As this statement indicates, African stakeholders also actively engaged in the preparations of the ICC in the run-up to the Rome Conference and many African governmental and non-governmental organisations lobbied for the establishment of the ICC throughout Africa. An important role in the unification of a common African position before and during the negotiations belonged to the SADC. In this regard, it is particularly noteworthy that one of the suggestions of the SADC, not making any reference to other treaty-based crimes, was ‘that the ICC should have universal jurisdiction over crimes of genocide, crimes against humanity, war crimes and crimes of aggression’. This enumeration of core crimes, after all, corroborates the previous conclusion that there existed a broad agreement among states, and groups of states, that the international core crimes of genocide, crimes against humanity, war crimes and, with some limitations, the crime of aggression, should form the substantive body of law under which the ICC operates.

4.5. Conclusion

Considering that the foundations of the discipline of ICL are multilateral rather than universal and that former colonial societies were excluded from the making of ICL after the Second World War, we saw that the proclaimed universal understanding of the values underlying the system of ICL is in need of justification. This holds true in particular since the claim to universality has masked expansion and manipulation by those political entities that have promoted the notion of universality in the past. In this sense, Chapter 3 has elaborated on how law, as an instrument of power, contributed to the establishment of colonial rule and to the expansion of Western values to non-Western societies. In raising the issue of whether the field of ICL in general and the ICC in particular are subject to a new form of legal colonialism, it is therefore essential to examine whether an imposition of law and values, comparable to the expansion of colonial law and legal principles, is similarly apparent in ICL today. The claim of the existence of a number of universal core crimes in the field of ICL thus required in a first step assessing the extent to which these crimes were accepted in retrospect by the states which did not take part in their creation. This question is of importance since the imposition of values upon societies without their

152 Ibid., at 6.
153 See ibid., at 6ff.; and Maqungo, supra note 118, 42-53.
154 Maqungo, supra note 118, at 47.
155 On the role of a universal international law in the context of colonial expansion, see Jouannet, supra note 129.
consent would undermine the universal aspirations of the international criminal justice project as a whole. Mindful of the conceptual differences between European colonial law and a purportedly universal international criminal law, Chapter 4 thus approached the issue whether international criminal law *stricto sensu* – the so-called core crimes – have been accepted by non-Western states as universally applicable by now.

Retracing the substantive core values that form the spearhead of international criminal law enforcement unsurprisingly revealed a Western background with the Allied Powers' Military Tribunals at Nuremberg and Tokyo taken as a starting point.\(^{156}\) To this day, however, the discipline of ICL has undergone an impressive development and there is evidence to suggest that a number of international core crimes have now indeed acquired a universal status. One of the significant general developments with respect to the international core crimes concerned the elaboration of the Nuremberg Principles by the International Law Commission (ILC).\(^{157}\) These principles contain a number of guiding rules which are relevant for the prosecution of international crimes, including the concept of individual accountability (Principle I) and a number of core crimes (Principle VI).\(^{158}\) The reliance of various national and international courts, in one form or another, on these guiding principles in the decades following the Second World War epitomises the significance of these principles within the domain of criminal justice.\(^{159}\) In addition, under the umbrella of the UN, a number of conventions dealing with core crimes were elaborated in the decades following the war.\(^{160}\)

Another indication that states have accepted the universal status of these norms is the rise of the doctrine of universal jurisdiction, which finds legitimacy in the nature of crimes which ‘are of concern to the international community as a whole’.\(^{161}\) The concept of universal jurisdiction testifies that a limited number of core crimes exist which can be prosecuted all over the world. Despite the fact that African states and

\(^{156}\) See *supra* section 4.2. On the selectivity claim in relation to these tribunals, see *infra* Chapter 6, section 6.2.3.1.\(^{157}\) See ILC, 'Text of the Nürnberg Principles Adopted by the International Law Commission' (1950) UN Doc A/CN.4/L.2.\(^{158}\) The principles are reproduced in *supra* section 4.2., note 44.\(^{159}\) See *Kolk and Kislyiy v. Estonia* (ECHR No. 23052/04 and 24018/04), Decision as to the Admissibility, 17 January 2006. On the use of these principles in national fora, see Cassese, Komarov, and Sadat Wexler, *supra* note 45.\(^{160}\) Geneva Conventions I-IV and Protocol I and II; Genocide Convention; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; International Convention on the Suppression and Punishment of the Crime of Apartheid, *supra* note 47.\(^{161}\) See *supra* section 4.3.
the AU have repeatedly criticised the ‘abuse’ of the principle of universal jurisdiction, it is noteworthy that the AU has clearly accepted that the concept of universal jurisdiction constitutes a valid instrument of international law.\textsuperscript{162} In 2012, the AU even issued an ‘African Union Model National Law on Universal Jurisdiction over International Crimes’\textsuperscript{163}, as a template for states wishing to adopt universal jurisdiction legislation. Moreover, in its (often critical) decisions on the principle of universal jurisdiction and the ICC, the AU has repeatedly reiterated its commitment to fight impunity for international crimes in accordance with Article 4 (h) of the Constitutive Act of the AU.\textsuperscript{164} This provision enshrines ‘the right of the Union to intervene in member states in cases of war crimes, genocide and crimes against humanity’.\textsuperscript{165}

Turning to the ICC, it is important to recall that 34 African states have accepted the jurisdiction of the Court on a permanent basis.\textsuperscript{166} Although the accession of a number of states to a treaty is not sufficient to prove the universal acceptance of the instrument, it nevertheless reflects the broad acceptance of the values guiding the jurisdiction of the ICC. Furthermore, the broad participation of a large number of state- and non-state actors in the negotiations of the ICC and the virtually unanimous adoption of the final package in Rome suggest that the RS can indeed be described as an agreement between different socio-cultural systems. This holds true, in particular, for the list of crimes that was included into the final compromise and which, since the early phases of the discussions, attracted broad consensus among the negotiating states.\textsuperscript{167}

On the basis of these developments, it can be summarised that African states have in various ways strongly committed themselves to the core values which form the basis of international crimes prosecution at both a national and international level. Accordingly, it can be deduced that contemporary ICL is based on values which may not be labelled Western values anymore, despite the fact that many (colonised) states were side-lined from the creation process of these values after the Second World War. Rather, the values underlying the discipline of ICL and the ICC in

\begin{itemize}
\item \textsuperscript{162} See, in particular, Decision on the Report I, supra note 96, at para.3.
\item \textsuperscript{164} See AU- Decisions, supra note 96.
\item \textsuperscript{165} Constitutive Act of the African Union (11 July 2000, Entry into Force 26 May 2001).
\item \textsuperscript{166} See supra section 4.4.3.
\item \textsuperscript{167} See supra section 4.4.2.
\end{itemize}
particular can fairly be considered to have acquired a universal status by now. In further consequence, this implies that any claim which purports that Western states ‘import their solutions’ to African states in the context of the concept of universal jurisdiction or the ICC is not sustained by closer scrutiny. This conclusion, at the same time, forecloses that the Western origins of international core crimes serve as an argument of a new form of legal colonialism in the field of ICL. However, these findings merely indicate that the very foundation of international crimes prosecution, the system of core crimes, is detached from any cultural heritage. They do not, by contrast, exclude the possibility that those values are applied in a one-sided or discriminatory manner. An assessment of this claim will be provided in Part III of this study. Moreover, the mere acceptance of these values does not identify the situations in which these values may legitimately overrule the sovereignty of states. This topic will be addressed in the following Chapter 5.

168 Having evaluated the AU’s objections in the context of the Al-Bashir indictment, Tladi also confirms that the value-based imperialism claim does not apply the context of the ICC: ‘[W]hatever their origins, the values under consideration have been (re)appropriated by African culture so that the imperialist potential […], whatever its validity, is not applicable to ICC action consistent with its mandate, i.e. these values reflect genuine universality’ (Tladi, supra note 148, at 66).
Chapter 5
The Application of Universal Values in the Field of International Criminal Law

5.1. The case of universal jurisdiction and national amnesties

5.1.1. Introductory remarks

Fueled by the horrors of the Second World War, inspired by the relative success of the Nuremberg trials and nourished by the aspirations of democratization and the new rhetoric of international human rights that followed the establishment of the United Nations, the "impunity" paradigm came to be replaced by calls for accountability and a demand for the investigation and criminal prosecution of those who ordered or committed human rights atrocities.¹

In this statement from 2006, Leila Sadat expresses the conviction that the ‘call for accountability’ has replaced impunity of perpetrators of international crimes. Therewith, she alludes to the seemingly completed paradigm shift in international law towards prioritising legal accountability over impunity of single perpetrators. Sadat particularly refers to the history of ICL, emphasising the impressive development of the field subsequent to the Second World War. As we saw in previous Chapter 4, she is surely right to conclude that the epochal post-World War II tribunals gave rise to the idea that perpetrators of international crimes should in any case be held responsible for their deeds.² In this sense, Principle I of the Nuremberg Principles determines that ‘[a]ny person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment’.³ The idea that the impunity paradigm is no longer valid also finds rhetorical support in the preamble of the RS which contains the ambition ‘to put an end to impunity for the perpetrators of these crimes [the most serious crimes of concern to the international community as a whole] and thus to contribute to the prevention of such crimes’.⁴ Moreover, the previous chapter has confirmed that there exist a number of international crimes today that reflect values that are now shared by virtually all states of the world. In the

² See supra Chapter 4, section 4.2.
⁴ Preamble of the RS, para.5.
context of universal jurisdiction, we saw that these values entitle states to investigate and prosecute perpetrators of these crimes even in case the forum state does not have any connection to the perpetrator or the crime.

However, despite these welcome developments, there are a number of issues that require further attention, in particular against the background of one of the fundamental principles of international law, the principle of sovereignty, which is enshrined in Article 2 (1) UNC. A consequence of the principle of sovereignty is that states are principally under a duty of non-intervention in the area of exclusive jurisdiction of other states. In this sense, the AU, when it endorsed the criticism on the ‘abuse’ of the principle of universal jurisdiction by European states, claimed that ‘the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders [...] is a clear violation of the sovereignty and territorial integrity of these States’. In addition, although international criminal law stricto sensu criminalises a certain conduct directly under international law and thus allows for permissive universal jurisdiction, this does not automatically imply that states are under a duty to prosecute offenders of international crimes. Put in a different way, a broad agreement on the underlying core values in the system of ICL is not tantamount to a consensus on how we are going to deal with them. A recent statement by U.S. President Obama, on the possibility of holding accountable officials of the Bush administration for widespread torture of detainees in American run prisons, illustrates this quandary:

This is a time for reflection, not retribution. I respect the strong views and emotions that these issues evoke. We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past.

Having analysed the process of how the idea of individual accountability under international law developed and to what extent it is effectively implemented in practice, it is the author’s impression that the accountability paradigm is (sometimes

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5 See also, Article 2(7) UNC.
misleadingly) used as a rhetorical tool for the cause of international justice.\(^9\) Although the concept of accountability is certainly desirable from a legal perspective, it appears that political realities draw a different picture when it comes to the question whether accountability or impunity should prevail for perpetrators of international crimes. In this sense, it should not be easily forgotten that the concept of sovereignty in principle leaves it to the states how to deal with their own past. Widespread recourse to the principle of individual accountability thus obscures the fact that (non-retributive) national reconciliation measures, as will be shown in the following sections by reference to national amnesties, are under certain conditions still accepted as a means to overcome a violent conflict, in conformity with international law.

In a broader context, the debate surrounding this paradigm change relates to the overarching controversy about ‘peace versus justice’. This sophisticated field of research is concerned with highly interesting and interdisciplinary approaches in the field of transitional politics in post-conflict regions.\(^10\) At its core, the ‘peace vs. justice’ debate centres on a dichotomy between restorative and retributive justice.\(^11\) Besides amnesties, various forms of truth and reconciliation commissions\(^12\), as well as approaches resorting to traditional justice\(^13\) are subject to this field of transitional politics. Post-conflict reconciliation mechanisms are typically introduced through the authorities of the state where the conflict has taken place with reference to the

\(^9\) This impression is confirmed by Michael Scharf who notes that ‘most of the scholarly writing on the subject has been in the abstract, glossing over the political realities and jurisprudential nuances that come into play in a specific factual context’ (M. P. Scharf. ‘Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?’ (1996) 31(1) Texas International Law Journal at 3).

\(^10\) A general introduction to this topic is provided in R. Kerr and E. Mobekk, \textit{Peace & Justice: Seeking Accountability after War} (Polity Press, 2007) at 1-14.


\(^13\) Traditional justice systems, some of which also ensure individual accountability, reveal an informal community-centred approach to reconciliation which is aimed at restoring broken social relationships (see Huyse supra note 11 at 5, 10ff.). A survey on traditional justice approaches in Africa is provided in L. Huyse and M. Salter (eds), \textit{Traditional Justice and Reconciliation after Violent Conflict} (International IDEA publications, 2008).
principle of national sovereignty. A core issue with regard to these reconciliation instruments pertains to the question of how far such measures triggered by one state are legally binding outside that state. This question is of crucial importance since post-conflict reconciliation instruments, depending on how they are implemented in practice, may constitute obstacles to international prosecution.

The present section will focus, first and foremost, on the controversy between national amnesties and the concept of individual accountability in international criminal law. In doing so, particular focus is put on the premise of universal jurisdiction. The reason for this emphasis lies in the fact that both the concept of national amnesty and the principle of universal jurisdiction, while promoting diametrically opposed objectives, fall within the realm of criminal jurisdiction. On the one hand, the instrument of national amnesties pre-empts criminal prosecution and is perceived to constitute an integral part of the political self-determination and sovereign authority of a state. On the other hand, the concept of universal jurisdiction, as we know from the previous chapter, provides for criminal prosecution at a level transcending the sovereignty of single states. In assessing the underlying dichotomy, it matters how these two conceptions relate to each other.

After introducing the concept of amnesty, therefore, it is first assessed whether states are under a general duty to prosecute perpetrators of international crimes. In case the answer to the question is affirmative, the invoked amnesties would appear to be illegitimate. Secondly, it is examined whether international law provides for a general prohibition of amnesties, regardless of any general duty to prosecute. In a third part, the relationship between national amnesties and the principle of universal jurisdiction is put to scrutiny. In consideration of the fact that the present chapter specifically analyses the compatibility of amnesties with the exercise of universal jurisdiction by states, only crimes subject to universal jurisdiction are included in the following discussion.

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14 In the context of amnesties, see infra section 5.1.2.
15 See Sadat, supra note 12, at 193.
16 Ibid., at 193.
18 See infra section 5.1.3.
19 See infra section 5.1.4.
20 See infra section 5.1.5.
5.1.2. The concept of amnesty

Amnesty typically describes a legal instrument which has the effect that perpetrators of crimes are spared from criminal liability for the commission of crimes in the state where the amnesty law is passed. The promulgation of amnesties is often coupled with the desire of crisis-hit societies for peaceful transition after periods of brutal violence and conflict. The concept became particularly popular in Latin American countries in the second half of the twentieth century after authoritarian rule was replaced by democratic governments. Historical experience shows that representatives of states, frequently military leaders and dictatorial regimes, often implemented self-amnesty to escape justice, or that they demanded impunity as a precondition for relinquishing their power.

Louise Mallinder defines amnesty in the following way:

Amnesty has traditionally been understood in a legal sense to denote efforts by governments to eliminate any record of crimes occurring, by barring criminal prosecutions and/or civil suits. In extinguishing liability for a crime, amnesty assumes that a crime has been committed. In this way, amnesties are retroactive, applying only to acts committed before the laws were passed. Furthermore, amnesties are always exceptional, and can be limited in a variety of ways: they could exclude certain categories of crimes, such as serious human rights violations, or certain individuals, such as the leaders and intellectual authors of the policies of oppression and violence.

The terminology distinguishes two particular types of amnesties. Blanket amnesties, on the one hand, apply ‘across the board without requiring any application on the part of the beneficiary or even an initial inquiry into the facts to determine if they fit the law’s scope of application’. The second type of amnesty is conditional in nature.

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21. On the concept of amnesty, see, among others, L. Mallinder, Amnesty, Human Rights and Political Transitions (Hart Publishing, 2008); Young, supra note 17, 427-82; Sadat, supra note 1, 955-1036; Roht-Arriaza and Gibson, supra note 17, 843-85; and R. Cryer and others, An Introduction to International Criminal Law and Procedure (3rd edn Cambridge University Press, 2014) at 569ff.
22. See Young, supra note 17, at 432ff.
23. An overview over various amnesty-legislations is provided in Roht-Arriaza and Gibson, supra note 17, at 846-860. On Haiti, Scharf, supra note 9, 1-41.
24. See Roht-Arriaza and Gibson, supra note 17, at 846-860; and M. P. Scharf. ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’ (1999) 32 Cornell International Law Journal at 509ff. (noting that ‘the offer of amnesty may be a necessary bargaining chip to induce human rights violators to agree to peace and relinquish power’).
25. Mallinder, supra note 21, at 5.
This is to say that the promulgation of an amnesty is coupled with specific conditions with which the applicant has to comply. A prominent example that promoted the conception of conditional amnesty has been post-Apartheid South Africa. Amnesty for individuals, in this case, was only awarded in cases where a) ‘the act, omission or offence to which the application relates is an act associated with a political objective’ and b) ‘the applicant has made a full disclosure of all relevant facts’.  

The decision to grant amnesty to individuals, or groups of individuals, constitutes an integral part of the self-determination and sovereign authority of states, a fact that was confirmed by the Appeals Chamber of the SCSL in its decision The Prosecutor v. Kallon & Kamara: ‘The grant of amnesty or pardon is undoubtedly an exercise of sovereign power which, essentially, is closely linked, as far as crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power.’

In the course of examining the relationship between universal jurisdiction and national amnesties, the present research focuses exclusively on amnesties as an expression of legislative and executive power of a sovereign entity. De facto amnesties – perpetrators enjoying impunity because the state responsible to prosecute simply fails to do so – will not be included here because they are not part of a formal state-run decision-making process. The present section, moreover, focuses solely on the legality of amnesties in light of contemporary international law and will not treat other (moral or political) aspects of amnesties.

5.1.3. The duty to prosecute or extradite under international law

The duty of states to either prosecute or extradite a person accused of having committed an international crime is commonly referred to in the vocabulary of international law as aut dedere aut judicare. This principle, which was already

27 Promotion of National Unity and Reconciliation Act 34 of 1995 ( Adopted 19 July 1995, entered into force 1 December 1995) at paras. 20 (1)(b) and (1)(c).
28 The Prosecutor v. Morris Kallon and Brima Bazzy Kamara (SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E)), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 para. 67. In a similar vein, Young, supra note 17, at 479; and Roht-Ariaza and Gibson, supra note 17, at 870-4.
29 See Sadat, supra note 12, at 197; and P. B. Hayner. ‘Fifteen Truth Commissions - 1974 to 1994: A Comparative Study’ (1994) 16(4) Human Rights Quarterly at 604 (noting that in many cases where truth commissions were included in post conflict reconciliation no trials were implemented to prosecute the identified violators).
30 See M. C. Bassiouni and E. M. Wise, Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law (Martinus Nijhoff, 1995) at 3.
briefly addressed in the previous chapter, defines the obligation of a state to either prosecute an accused of having committed an international crime before its own national courts, or to extradite him to a state which is willing and able to do so. The very objective of the _aut dedere aut judicare_ obligation is to ascertain that perpetrators of international crimes do not escape scot-free. The principle is stipulated in a number of multilateral treaties which address human rights violations and international crimes that affect the international community as a whole. The following analysis, as indicated previously, examines with respect to which core crimes the _aut dedere aut judicare_ obligation exists.

In a first step, we focus on the crime of war crimes and the regime of the Geneva Conventions. In the context of _international_ armed conflicts, the four Geneva Conventions of 1949 and the Protocol explicitly contain an (absolute) obligation of states parties to prosecute or extradite persons alleged to have committed war crimes that are part of the grave breaches regime. Any amnesty provision pertaining to war crimes in the context of an international armed conflict consisting of grave breaches is therefore contradictory to these binding obligations. Although a treaty, as a matter of principle, is only binding on states which have ratified the treaty in question, the near-unanimous acceptance of the Geneva Conventions worldwide results in a _de facto_ prohibition of amnesties in the context of war crimes in an international armed conflict. In this context, in addition, it is worth noting that the grave breaches provisions are now customary international law and as such binding on all states. On the basis of this understanding, Sadat has argued that the

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31 See _supra_ Chapter 4, section 4.3.1.
32 Bassiouni and Wise, _supra_ note 30, at 3.
33 An overview over the conventions that contain this obligation is provided in R. Jennings and A. Watts (eds), _Oppenheim’s International Law: Peace_ (Vol.I, 9th edn Longman Group, 1992) at 953-4.
34 Article 49 Geneva Convention I; Article 50 Geneva Convention II; Article 129 Geneva Convention III; Article 146 Geneva Convention IV. The provision is worded identical in all four conventions: ‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.’
35 Article 85 (1) Protocol I.
36 See Scharf, _supra_ note 9, at 20. See also, _supra_ Chapter 4, section 4.3.1.
38 1969 Vienna Convention, Article 34.
prohibition of blanket amnesties in the context of the grave breaches regime, as a corollary of the customary status of the *aut dedere aut judicare* obligation, has also evolved into a customary rule of international law.\(^{40}\)

The situation pertaining to war crimes committed in conflicts *not* of an international character is less conclusive, as none of the relevant provisions for the protection of victims of this category of conflicts contains a specific obligation of the contracting states to either extradite or prosecute suspects of international crimes.\(^{41}\) Instead, Article 6 (5) of Protocol II of the Geneva Conventions presumably allows for amnesties at the end of a hostile conflict of non-international character:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Unsurprisingly, this provision has repeatedly been used as an argument for the legality of national amnesties in periods of transition following the termination of armed hostilities.\(^{42}\) Although there are a number of arguments for restricting the use of Article 6 (5) Protocol II\(^ {43}\), the literal reading of the provision allows for sufficient leeway in interpretation. As a consequence, the author concludes that there is no prohibition of national amnesties in the context of non-international armed conflicts on the basis of Article 6 (5) Protocol II.

In the context of the crime of genocide, Article IV of the Genocide Convention provides that ‘[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals’. Article V contains the requirement to provide ‘effective penalties for persons guilty of genocide’. In addition, Article VI specifies that in particular the state on whose territory the crime occurs is competent to deal with

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\(^{40}\) Sadat, supra note 12, at 202.


\(^{42}\) For an overview on the use of this provision by courts, Roht-Arriaza and Gibson, supra note 17, at 864.

\(^{43}\) In this regard, it is worth consulting the arguments raised by Roht-Arriaza and Gibson, ibid., at 863ff.; and Sadat, supra note 12, at 202f. On the interpretation of this provision, Mallinder, supra note 21, at 125-6.
persons charged with genocide. Although not containing an aut dedere-obligation, those provisions clearly indicate that states parties to the convention are under a duty to prosecute and punish crimes of genocide. In relation to the crime of torture, the Torture Convention contains in Article 7 (1) an alternative obligation of states parties to either extradite a person alleged to have committed a crime which is subject to the convention, or ‘submit the case to [their] competent authorities for the purpose of prosecution’. The situation with regard to crimes against humanity, with the exception of torture and enforced disappearances, is different inasmuch as this offense is primarily rooted in customary law and not subject to a specific treaty. At least in the cases of torture and genocide, thus, it can be concluded that amnesty laws promulgated in states that have ratified those conventions are not reconcilable with the treaty based obligations to prosecute perpetrators of these categories of crimes.

However, as we learned in the previous chapter on universal jurisdiction, obligations based on treaty law are principally only applicable to states that have ratified the treaty in question, unless these obligations also exist in international customary law. In the context of the crime of genocide, the ICJ, in an advisory opinion dating back to 1951, has argued ‘that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation’. This formulation, obviously, suggests that the obligation to punish, as contained in Articles IV to VI of the Genocide Convention, reflects customary international law. Be that as it may,

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44 However, in view of the fact that the crime of genocide is now directly criminalised under international law, the territoriality-limitation inherent to Article VI does not prevent third states from legitimately exercising universal jurisdiction (see supra Chapter 4, section 4.3.1.).
45 The crime of torture, depending on the circumstances, may be referred to as discrete crime, war crime or crime against humanity (see A. Cassese and others, Cassese's International Criminal Law (3rd edn Oxford University Press, 2013) at 132ff.). The present section, it should be noted, is referring to torture as a crime of its own.
48 See supra Chapter 4, section 4.3.1. M. Cherif Bassiouni, in particular, contends that a duty to prosecute exists for international core crimes on the basis of their status as peremptory norms of international law (ius cogens). According to this line of argument, the duty to prosecute rests upon the nature of the crimes and, contrary to the concept of customary law, does not require the existence of opinio juris and consistent state practice (M. C. Bassiouni, ‘International Crimes: “Jus Cogens” and “Obligatio Erga Omnes”’ (1996) 59(4) Law and Contemporary Problems 63-74).
50 In a similar vein, Orentlicher, supra note 47, at 2565f.
issued not even three years after the adoption of the 1948 Genocide Convention and only two months after its entry into force, this ICJ-opinion is in the first place evidence of opinion juris regarding a duty to prosecute the crime of genocide. It does not, however, prove the existence of consistent state practice which is another requirement that a norm can be classified as a rule of international customary law. In the context of the crime of genocide rather, it is argued that examples of national prosecutions do not suffice to affirm that the prosecution of genocide is now considered by states as a duty under international customary law. The same can be said in relation to torture and crimes against humanity. As to a general duty to prosecute international core crimes, thus, Robert Cryer notes: '[S]ome national prosecutions have taken place, but these are quite rare and actual state practice does not support the position that states have a general duty to prosecute international crimes'. However, some of these commentators acknowledge that such a general duty ‘is emerging under international law’. In the context of the crimes of genocide and torture, this presumption is certainly corroborated by the fact that both conventions, at the time of writing, have been widely ratified worldwide.

It can be concluded that a customary rule aut dedere aut judicare only exists with regard to war crimes consisting of grave breaches in international armed conflicts.

52 See Wouters, supra note 51, at 26; Sadat, supra note 12, at 203. In the context of crimes against humanity, Scharf, for example, notes: ‘To the extent any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit crimes against humanity’ (Scharf, supra note 47, at 57). On a general duty to prosecute international core crimes, infra note 53.
53 Cryer and others, supra note 21, at 77. See also, J. Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’ in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), The Rome Statute of the International Criminal Court (Vol.I, Oxford University Press, 2002) at 698; W. A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2010) at 665. An assessment of the application of amnesties in national courts is provided in Mallinder, supra note 21, at 203-246. Mallinder comes to the conclusion that ‘national courts are substantially more likely to uphold an amnesty law, regardless of the crimes within the scope of that law, although there has been some convergence during the past decade’ (ibid. at 244). A number of authors nevertheless argue in favour of a customary duty to prosecute these crimes (see, among others, Orientlicher, supra note 47, at 2563ff.; K. Obura, ‘Duty to Prosecute International Crimes under International Law’ in C. Murungu and J. Biegon (eds), Prosecuting International Crimes in Africa (Pretoria University Press, 2011) 11-31; and D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14(3) European Journal of International Law at 490ff. (Robinson argues that such a duty exists at least with respect to ‘crimes committed on the state’s territory or by its nationals’)).
54 See Cryer and others, supra note 21, at 78; and Dugard, supra note 53, at 698.
55 At the time of writing, the Genocide Convention has been ratified by 146 states (Convention on the Prevention and Punishment of the Crime of Genocide (09 December 1948, 78 UNTS 277, Entry into Force 12 January 1951) and the Torture Convention has been ratified by 158 states (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, 1465 UNTS 85, Entry into Force 26 June 1987)).
The promulgation of amnesty laws by states, with the exception of existing treaty obligations and in the context of war crimes consisting of grave breaches in international armed conflicts, is thus not restricted by a general duty to prosecute or extradite perpetrators of international crimes under international customary law.

However, it remains to be noted that even where a duty to prosecute exists, possible exceptions to this duty are discussed in the context of post-conflict situations, due to the fact that transitional governments are often unable to comprehensively cope with demands for accountability.\(^{56}\)

5.1.4. Does international customary law prohibit amnesties?

Having come to the conclusion that no customary rule exists that obliges states to prosecute international crimes committed in non-international armed conflicts, which is the type of conflict most common these days, we now assess whether domestic amnesties are otherwise covered by a prohibition in customary international law. In particular, this section focuses on the position of the international community as pertains to the legality of the concept of amnesty.

In recent years, the UN and related institutions have at several occasions declared that the concept of amnesty does not apply to international core crimes. In 2009, the Office of the High Commissioner for Human Rights (OHCHR) released guidelines delineating the UN’s position on amnesties, thereby generally declaring amnesties incompatible with international law.\(^{57}\) In addition, in his report on the establishment of the SCSL in 2000, the Secretary-General of the UN declared domestic amnesties derogating international core crimes an unlawful act:

> While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.\(^{58}\)

This statement is consistent with the position taken by the ICTY- Trial Chamber in the *The Prosecutor v. Anto Furundžija* which, dealing with the crime of torture, declared

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56 Some reflections on this matter can be found in Cryer and others, *supra* note 21, at 570; and Robinson, *supra* note 53, at 493.
that the status of international core crimes as peremptory norms of international law (\textit{jus cogens}) is per definition not reconcilable with the concept of amnesty.$^{59}$

Although these recent statements suggest a clear opposition against the concept of amnesty, there is some countervailing evidence indicating that customary international law has not yet fully crystallised to this extent. The international community, including the United Nations themselves, have in the past repeatedly contributed to the establishment of domestic amnesty agreements in the aftermath of violent internal conflicts in the context of international core crimes.$^{60}$ In other words, international negotiators have often been tempted by the concept of amnesty, finding themselves trapped in an area of conflicting interests between rigorous demands for individual accountability and political solutions for conflicts. Recent conflicts, moreover, provide evidence that the demand for accountability of perpetrators of international crimes has not yet thoroughly replaced the impunity paradigm. With regard to the crisis in Syria (which is ongoing at the time of writing), the possibility was discussed that President Bashar al-Assad could escape scot-free in exchange for resigning from office and leaving the country. A statement of David Cameron, Prime Minister of the U.K., reflects this position: ‘Of course I would favour him facing the full force of international law and justice for what he’s done. I am certainly not offering him an exit plan to Britain but if he wants to leave he could leave, that could be arranged’.\footnote{Anonymous. ‘Cameron: Give Assad a safe passage’ \textit{Express} (6 November 2012) <http://www.express.co.uk/news/world/356472/Cameron-Give-Assad-a-safe-passage> accessed 19 June 2015.}$^{61}$

In addition to apparent inconsistencies as regards the practical implementation of a prohibition of amnesties, the Rome Statute of the ICC, although firmly dedicated to the principle of individual accountability otherwise, also fails to address the issue of national amnesties and thus contribute to a clearer understanding on the relationship between the prosecution of international crimes and the promulgation of domestic amnesty legislations.$^{62}$ Instead, the Statute presumably endows the prosecutor with the power to accept amnesty provisions.$^{63}$ According to Article 53 (1) (c) and (2) (c) RS, the prosecutor, at his discretion, may decline an initiative to investigate a situation where ‘there are nonetheless substantial reasons to believe that an

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\begin{itemize}
\item[$59$] \textit{The Prosecutor v. Anto Furundžija} (IT-95-17/1-T), Judgment, 10 December 1998 para.155.
\item[$60$] See, among others, Scharf, \textit{supra} note 24, at 509-512; Scharf, \textit{supra} note 47, at 41; and Sadat, \textit{supra} note 1, at 990-993.
\item[$62$] For a discussion on the issue, Robinson, \textit{supra} note 53; and Scharf, \textit{supra} note 24, at 521ff.
\item[$63$] See Sadat, \textit{supra} note 1, at 1022.
\end{itemize}
\end{footnotesize}
investigation would not serve the interests of justice.’ Darryl Robinson, with a view to this provision, has pointed out that

national programmes whereby amnesties may be sought even by those persons most responsible for international crimes are most unlikely to garner deference, but it is at least conceivable that the ICC could conclude that it would not be in the ‘interests of justice’ to interfere with a democratically adopted, good faith alternative programme that creatively advanced accountability objectives.64

From these developments, it can be inferred that international law does not provide a clear picture when it comes to the validity of domestic amnesty provisions that derogate peremptory norms of international law. Although there are strong jurisprudential arguments for the prohibition of amnesties65, there is no clear position identifiable according to which the concept of domestic amnesties for international core crimes today stands in conflict with international customary law. A similar position was adopted by Appeals Chamber of the SCSL in The Kallon & Kamara Case. Although denying that an international norm prohibiting amnesties has already ‘crystallised’, it has conceded ‘that such a norm is developing under international law’.66 This understanding is supported by the absence of an absolute duty of states to prosecute individuals alleged to have perpetrated international core crimes under customary international law.67 The current factual and legal position with regard to the concept of amnesty is well summarised by Mallinder, who notes that despite the objections of the United Nations and related institutions against the concept of amnesty,

states are continuing to amnesty crimes under international law. […] this implies that no clear state practice has as yet been established for amnesties for these crimes, which if coupled with the permissive duty to prosecute certain crimes under

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64 Robinson, supra note 53, at 481. In the context of SC referrals under Article 13 (b) RS, David Scheffer also argues that ‘The Security Council also could use the power of referral to insulate domestic amnesty arrangements from the reach of the ICC by specifying in a referral, for example, that those individuals who have received or will receive amnesty in accordance with domestic procedures fall outside the scope of the referral. This may be particularly relevant for amnesties of low and mid-level personnel who normally would be of little interest to an ICC Prosecutor anyway’ (D. J. Scheffer. ‘Staying the Course with the International Criminal Court’ (2001) 35(1) Cornell International Law Journal at 90). This interpretation of the SC referral powers, however, does not correspond with the scope of Article 13 (b) RS, as will be shown in infra Chapter 7, section 7.3.2.

65 See, eg, Scharf, supra note 9, at 35.


67 See supra section 5.1.3.
international law, or the inapplicability of treaty law to some situations of human right abuses, indicates that states have a degree of flexibility in determining how to respond to past crimes.\textsuperscript{68}

5.1.5. The binding effect of amnesties outside of the issuing state

Despite considerable efforts to replace the impunity paradigm through the accountability paradigm in the recent past, we saw that the concept of amnesty may still defeat the principle of individual accountability for international crimes as a matter of international law. Domestic amnesties, at least where states are not party to the above discussed international conventions, are a lawful instrument to deal with past atrocities. Consequently, we must assess the extent to which domestic amnesty provisions effectively affect legal procedures in third states. Put in different terms, does the promulgation of amnesty for international crimes prevent other states from exercising jurisdiction? In a landmark decision on the extradition of the Argentinean national Ricardo Cavallo to Spain, the Mexican Supreme Court denied that Argentinean amnesty legislation is binding on third states:

The fact that a State decided not to exercise jurisdiction in order to prosecute crimes subject to international jurisdiction did not prevent any other State of an international agreement to exercise its own jurisdiction. This is so because international treaties that are applicable to the present case recognized the jurisdiction of any State party to those treaties, namely, jurisdiction to prosecute them, judge them and punish them in conformity with their domestic law and the treaties themselves, with the purpose of preventing impunity.\textsuperscript{[...]} Argentinean laws could not be binding on another State nor would they have the legal effect of depriving it from exercising jurisdiction, not only by virtue of its internal legislation, but also on the basis of international treaties to which it is party.\textsuperscript{69}

The Appeals Chamber of the SCSL, in \textit{The Kallon & Kamara Case}, consolidates this position by stating with regard to the exercise of universal jurisdiction:

Where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a state in regard to grave international crimes in which there exists universal jurisdiction. A State

\textsuperscript{68} Mallinder, \textit{supra} note 21, at 406.

\textsuperscript{69} \textit{Extradiccion Ricardo Miguel Cavallo}, Mexican Supreme Court of Justice of the Nation, Amparo en Revision 140/2002, 10 July 2003. The Case is reproduced in English in (2003) \textit{42}(4) \textit{International Legal Materials} at 908f.
cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.\textsuperscript{70}

According to these positions, domestic amnesties, even in case they are in conformity with international law, do not bar other states from exercising jurisdiction in the same case.\textsuperscript{71} This understanding of the limited scope of domestic amnesties corresponds with the understanding of the concept of permissive universal jurisdiction employed in the present study.\textsuperscript{72} The sovereign decision of states to confer amnesty to perpetrators of international crimes, thus, does only produce an internal effect in that these perpetrators cannot be prosecuted by the courts of the state where the amnesty-law was passed. Domestic amnesty legislation, in other words, is denied to unfold binding extraterritorial effect in cases where crimes subject to the principle of universal jurisdiction are perpetrated.\textsuperscript{73}

It remains to be noted that although a state exercising universal jurisdiction is not bound to observe amnesty legislation passed in another state, it should take account of the fact that such a course of action deliberately ignores national legislative processes of third states. In this sense, the forum state faces the difficult task of balancing the international community’s interest in fighting impunity for international crimes against the national interests of states that in the same case decided not to treat past atrocities on the basis of individual accountability.\textsuperscript{74} With a view to the judicial concurrence between states, however, Sadat argues that the forum state ‘should treat the amnesty as presumptively invalid; a presumption that can be overcome if the state granting the amnesty in question did so pursuant to a process that did not undermine the quest for accountability as a whole’.\textsuperscript{75}

5.1.6. Interim conclusion

Returning to the previously elaborated understanding of neo-colonialism, we saw that traditional accusations of neo-colonialism emphasise the violation of the sovereignty

\textsuperscript{71} For an assessment of domestic proceedings in this context see Sadat, supra note 1, at 999-1014.
\textsuperscript{72} See supra Chapter 4, section 4.3.1.
\textsuperscript{73} However, there is a debate ongoing in legal literature that the exercise of universal jurisdiction should be restricted by a number of requirements. These requirements include, among other things, the presence of the perpetrator on the territory of the state exercising universal jurisdiction or the principle of subsidiary jurisdiction (see, e.g., Mallinder, supra note 21, at 304-11).
\textsuperscript{74} See Sadat, supra note 1, at 1027.
\textsuperscript{75} Ibid., at 968.
of states by external actors on the basis of unequal relationships of power deriving from structural conditions. In the context of international core crimes, consequently, the 'imposition claim' not only relates to the cultural background of the values concerned but also to the fact that these values, by affecting 'the international community as a whole', are designed to override the sovereignty of single states. At first glance, thus, this approach is vulnerable to allegations of neo-colonialism.

Up to here, the underlying paradox between sovereignty-transcending core crimes and the bedrock principle of sovereignty was approached through the juxtaposition of the doctrine of universal jurisdiction and the concept of domestic amnesties. Both concepts are relevant to the prevailing antagonism between national sovereignty and present-day ICL which, in the end, prioritises the community values vis-à-vis the singularity of sovereign interests. Even the legitimate promulgation of domestic amnesties, as we saw in the previously listed statements by the Mexican Supreme Court and the Appeals Chamber of the SCSL, does not preclude third states from legitimately making use of the principle of universal jurisdiction themselves. Essentially, thus, the concept of amnesty is prevented from unfolding binding extraterritorial effect. In further consequence, the exercise of universal jurisdiction does not reflect a case of unjustified 'intervention in the area of exclusive jurisdiction of other states'.

Moreover, besides the fact that those states whose sovereign decisions are overruled have acknowledged the universal character of the values underlying the concept of universal jurisdiction, this type of jurisdiction, we saw in Chapter 4, is open to every state. Combined with the previously gained understanding of neo-colonialism, it can thus be concluded that the exercise of universal jurisdiction does not reflect a case of neo-colonialism because the structural conditions establish a level playing field for all states. However, the legality of intervention by means of international criminal law under the law of universal jurisdiction, again, does not rebut the claim that law is applied in a one-sided fashion. It is in line with this concern to consider that states exercising universal jurisdiction bear responsibility to prevent an

76 See supra Chapter 2, sections 2.2. and 2.4.
77 See, in particular, supra section 5.1.5.
78 See supra notes 69 and 70.
79 Crawford, supra note 6, at 447.
80 See supra Chapter 4.
81 See, in particular, supra Chapter 4, section 4.3.1.
82 On the structural aspect of neo-colonial asymmetries, see infra Chapter 6.
abusive and unequal application when making use of the principle of universal jurisdiction.

In a next step, it is assessed on what basis the Rome Statute of the International Criminal Court is extended to states that have not ratified this treaty, in order to assess the ‘imposition claim’ in the context of the ICC.

5.2. The application of the Rome Statute against nationals of non-party states

5.2.1. Introductory remarks

Before dealing with the extension of the RS to nationals of states that have not accepted the jurisdiction of the Court, a few preliminary remarks remain to be addressed concerning the relationship between national jurisdictions and ICC jurisdiction. The ICC, as is widely known, operates under the principle of complementarity. This principle implies that the jurisdiction of the ICC should serve as a complement to domestic law enforcement mechanisms and that the Court is not meant to supersede national efforts in the enforcement of ICL. More specifically, the principle is explicitly included in the admissibility test under Article 17 RS and only allows the ICC to claim jurisdiction when the state in question ‘is unwilling or unable genuinely to carry out the investigation or prosecution’. In other words, the principle of complementarity determines that the ICC has to step back from prosecution when national courts exercise concurrent jurisdiction with regard to a case at hand. In this sense, the complementarity-approach ‘establishes the boundaries of the Court’s jurisdiction’ vis-à-vis domestic efforts to bring to justice perpetrators of international crimes. The decision whether or not a state is ‘unwilling or unable genuinely to carry out the investigation or prosecution’ rests within the competence of the Court.

Implicitly, thus, the subsidiary character of the ICC serves as a motivation for national authorities to carry out their own investigations and prosecutions with regard to perpetrators of international crimes. The primacy of national jurisdiction applies to all cases irrespective of whether the state of the defendant’s nationality has acceded to

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85 See Arsanjani, supra note 83, at 24.
87 Articles 17 (1)(a) and 19 (1) RS.
the RS. Keeping in mind that national jurisdictions are competent to exercise jurisdiction in the first place, the following discussion is based on the presumption that the extension of the RS to third states succeeded in line with the principle of complementarity.

As a matter of treaty law, the exercise of jurisdiction by the ICC over member states is justified by their consent, as those states voluntarily accepted the legal regime of the Court. Accordingly, the legitimacy of the application of the RS is beyond question in these cases. The extension of the RS to states that have not ratified the Statute, by contrast, has given rise to controversy. In what follows, we assess whether the legal regime of the ICC is illegitimately imposed on third states which have not consented to the jurisdiction of the Court either permanently or on an ad hoc basis. This question, we recall, is of relevance within the context of the present inquiry as the sovereignty of non-party states can be overruled by reference to the system of international core crimes, i.e., the system of the ICC. Before dealing with the imposition claim, in a first step, the scope of the Court’s jurisdiction is discussed in brief to provide the reader with an understanding in what cases the Court is allowed to become active.

5.2.2. The scope of ICC jurisdiction

The ICC, on the basis of Article 12 (2) RS, is in the first place competent to exercise jurisdiction when a crime was committed on the territory of a state party to the ICC or when the accused is a national of such a state. With respect to both situations, the consent of either of these states is sufficient to establish the jurisdiction of the ICC and accordingly ‘[t]here is no mandatory consent of the state of nationality of the accused.’ The consent of a state subject to the jurisdiction of the ICC either relates to its member status or to an ad hoc approval of a non-party state accepting the jurisdiction of the ICC with respect to the crime in question. Article 12 (2)(a) RS, however, not only provides the legal basis for the exercise of jurisdiction over nationals of consenting states; rather, this provision also establishes jurisdiction over

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88 Under Article 19 (2)(b) RS, a state may challenge the admissibility decision of the ICC in case it is ‘investigating or prosecuting the case or has investigated or prosecuted’ itself.
89 On the opposition of the U.S. against the complementarity approach, see infra section 5.2.3.1.
90 Article 12 (1) RS.
92 Articles 12 (1) and 12 (3) RS.
nationals of non-consenting states in cases where they commit a crime subject to the RS on the territory of a state party. In these cases, as becomes clear from the above statement, no approval of the state of the accused’s nationality is required to establish the jurisdiction of the ICC.\textsuperscript{93} The jurisdiction of the Court under Article 12 (2) RS can be triggered on the basis either of a referral by a state party\textsuperscript{94} or by the prosecutor initiating investigations on her own initiative (\textit{proprio motu} powers)\textsuperscript{95}.

In addition to the jurisdiction under Article 12 (2) RS, the ICC is competent to become active when the SC, acting under Chapter VII UNC, refers a situation to the Court under Article 13 (b) RS.\textsuperscript{96} In such circumstances, the consent of neither the territorial state nor the state of the accused’s nationality is a requirement for the exercise of jurisdiction by the ICC.\textsuperscript{97} Accordingly, in case a situation was referred to the ICC by the SC, any individual, of whatever nationality, is triable before the Court. Although Article 13 (b) RS does not make explicit mention of non-party states, it is likely that the SC will only make use of its powers under Article 13 (b) RS when neither states parties nor the prosecutor of the ICC are competent to prompt the jurisdiction of the Court.

It remains to note that whenever the ICC is competent to exercise jurisdiction on the basis of Articles 12 (2) or 13 (b) RS, it is a (negative) prerequisite that the SC did not deactivate the jurisdiction of the ICC on the basis of Article 16 RS with respect to a situation or an individual case at hand.\textsuperscript{98}

5.2.3. Legality of the extension of the Rome Statute to nationals of non-party states

5.2.3.1. Article 12 (2)(a) RS

One of the main legal objections against the ICC concerns the exercise of jurisdiction over nationals of non-party states under Article 12 (2)(a) RS.\textsuperscript{99} Misgivings, which were mostly raised on the part of the U.S., relate to the fact that the RS, even in the

\textsuperscript{93} See Danilenko, \textit{supra} note 91, at 1875.
\textsuperscript{94} Articles 13(a) and 14 RS.
\textsuperscript{95} Articles 13(c) and 15 (1) RS. In a situation where the prosecutor initiates an investigation \textit{proprio motu}, she is required to request the ICC Pre-Trial Chamber (PTC) for authorisation to proceed with an investigation (Article 15 (3) RS).
\textsuperscript{96} The SC referral power under Article 13 (b) RS is assessed in detail in \textit{infra} Chapter 7.
\textsuperscript{97} See Danilenko, \textit{supra} note 91, at 1877.
\textsuperscript{98} See \textit{infra} Chapter 8 on Article 16 RS.
absence of a SC referral, empowers the ICC with jurisdiction over non-party nationals in cases where they have perpetrated crimes on the territory of a state party.\textsuperscript{100} A statement by David Scheffer, who was head of the U.S. delegation to the Rome Conference, provides a contextual understanding of these concerns:

It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. No other country, not even our closest military allies, has anywhere near as many troops and military assets deployed globally as does the United States. The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory, even if the United States is not party to the ICC treaty and even if that foreign state is also not a party to the treaty but consents ad hoc to ICC jurisdiction, may appeal to those who believe in the blind application of territorial jurisdiction.\textsuperscript{101}

The objection of the U.S. is in the first place based on the general principle that ‘a treaty does not create either obligations or rights for a third State without its consent’.\textsuperscript{102} However, the RS, with granting the ICC jurisdiction over non-party nationals who committed crimes on the territory of a state party on the basis of Article 12 (2)(a) RS, does in no way impose an obligation on the state of the defendant's nationality. Rather, the Court, on the basis of the principle of complementarity, leaves states with the possibility to investigate or prosecute a crime in place of the ICC.\textsuperscript{103} The principle of complementarity, thus, gives a state the opportunity to avert the risk that their nationals are exposed to the jurisdiction of the Court.\textsuperscript{104} This, after all, is a practical consequence of the complementarity approach and not a legal duty which is

\textsuperscript{100} As David Scheffer notes: 'Under Article 12, the ICC may exercise such jurisdiction over anyone, anywhere in the world, even in the absence of a referral by the Security Council, if either the state of the territory where the crime was committed or the state of nationality of the accused consents' (Scheffer, supra note 99, at 18).
\textsuperscript{101} Scheffer, supra note 99, at 18. In a similar vein, Wedgwood, supra note 99, at 101.
\textsuperscript{103} See M. P. Scharf, 'The ICC’s Jurisdiction over the Nationals of Non-Party States: A Critique of the US Position' (2001) 64(1) Law and Contemporary Problems at 98. However, M. Scharf admits that the prosecution of non-party nationals could affect the sovereign interests of that state (ibid.). See also, Hafner and others, supra note 86, at 117.
\textsuperscript{104} The U.S., however, does not see the principle of complementarity as a safeguard to avoid ICC prosecution (these objections are dealt with further below in this section).
imposed on the states which have not ratified the Statute.\textsuperscript{105} Acknowledging that the RS does not \textit{per se} impose any obligations on non-parties under Article 12 (2) RS, this argument was modified by Madeline Morris in the following terms: ‘[B]y conferring upon the ICC jurisdiction over non-party nationals, the ICC Treaty would abrogate the pre-existing rights of non-parties which, in turn, would violate the law of treaties’.\textsuperscript{106} More precisely, she argues that no legal basis for ICC jurisdiction over non-party nationals exists in international law that allows states parties to a treaty to delegate their right to exercise jurisdiction over nationals of third (non-party) states to an international criminal tribunal without the consent of the state of the perpetrator’s nationality.\textsuperscript{107}

To be sure, the ICC states parties have only delegated to the Court their criminal jurisdiction over a national of a non-party state in case the crime was perpetrated on their territory\textsuperscript{108}; a delegation to the ICC of a state’s right to exercise universal jurisdiction, by contrast, was not accepted at the negotiations in Rome\textsuperscript{109}. The prosecution of an individual of a non-party state that has committed a crime in another non-party state, as was outlined previously, is only possible in case the SC has referred a situation to the ICC under Article 13 (b) RS.\textsuperscript{110}


\textsuperscript{108} Akande, e.g., has noted: ‘The power of the ICC to try nationals of non-parties where they commit crimes on the territory of a party constitutes a delegation to the ICC of the criminal jurisdiction possessed by ICC parties because the Court is given the power to act only in cases where the parties could have acted individually’ (D. Akande. ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003) 1(3) Journal of International Criminal Justice at 621f. In a similar vein, M. C. Bassiouni. ‘Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice’ (2001) 42(1) Virginia Journal of International Law at 92. For a different perspective, see Sadat, \textit{supra} note 1, at 976).


\textsuperscript{110} See \textit{supra} section 5.2.2.
Be that as it may, the argument of the U.S. does not withstand closer scrutiny for the following reasons. First, when a foreigner has committed a crime on the territory of another state, the prosecution thereof by the state of territoriality is not dependent on the consent of the state of the perpetrators nationality.\textsuperscript{111} This holds true not only for domestic crimes but similarly in the context of international crimes where the prosecuting state has acceded to an international treaty and the state of nationality has not.\textsuperscript{112} Secondly, ‘there is no rule of international law prohibiting the territorial State from voluntarily delegating to the ICC its sovereign ability to prosecute’.\textsuperscript{113} Not only does international law not contain a prohibition to that effect, but there is, according to Dapo Akande, an extensive practice of states delegating part of their criminal jurisdiction over non-nationals either to other states or to tribunals created by international agreements, in circumstances in which no attempt is made to obtain consent of the state of nationality.\textsuperscript{114}

In the context of the transfer of inherent jurisdictional power from domestic courts to the ICC, it remains to note that the RS, through the principle of complementarity\textsuperscript{115}, ‘provides a safeguard to non-parties that is not afforded by domestic legal systems’.\textsuperscript{116} As such, we saw that a non-party state, through genuinely investigating and prosecuting a case, can make sure that a case is inadmissible before the ICC.\textsuperscript{117} This option, by contrast, does not exist when the state of territoriality itself is willing to exercise territorial jurisdiction over a third-state national.

A second argument that was put forward by both Madeline Morris and Ruth Wedgwood concerns the exercise of ICC jurisdiction against nationals of non-party states ‘indicted for official acts taken pursuant to state policy and under state authority’.\textsuperscript{118} In this case, so the argument goes, the ICC illegitimately judges on the legality of official acts of states in proceedings that ‘resemble less that of a municipal criminal court than that of an international court for the adjudication of interstate legal

\textsuperscript{111} See Schabas, supra note 53, at 286; and Williams and Schabas, supra note 109, at 557.
\textsuperscript{112} Ibid., at 557.
\textsuperscript{113} Ibid., at 557. In the same vein, Hafner and others, supra note 86, at 117. The delegation of jurisdiction by national courts to international tribunals is assessed in detail in Akande, supra note 108, 621-634.
\textsuperscript{114} Ibid., at 633f.
\textsuperscript{115} See supra section 5.2.1.
\textsuperscript{116} Hafner and others, supra note 86, at 118.
\textsuperscript{117} Article 17 (1)(a) RS. On the U.S. position of the principle of complementarity, see below in this section.
\textsuperscript{118} Morris, supra note 99, at 14f. In a similar vein, Wedgwood, supra note 106, at 199ff.
dispute’. Morris and Wedgwood conclude that the state of the defendant’s nationality is a real party of interest in the proceedings before the ICC whose consent is a necessary requirement to the exercise of jurisdiction. This position is based on the fact that ‘[t]he gravity and seriousness of international crimes are such that it is often only those with the machinery or apparatus of the state, or state-like bodies, that are able to commit such devastation’. As a consequence, the ICC, but also domestic courts exercising universal jurisdiction and other international criminal tribunals, are necessarily required to deal, to a certain extent, with defendants who have acted on behalf of the state.

Although this position seems to be logical at a first glance, it neglects an important aspect of the system of ICL in general and the ICC in particular. Both instruments are designed to deal on an individual basis with a number of core crimes that are, by their nature, often committed by organs of the state or at least condoned by the state. From a conceptual perspective, thus, individual criminal responsibility ‘is not solely linked to that of the State he or she served, but also frees itself therefrom to become autonomous, completing the constitution of the individual as a subject of international law’.

In anticipation of this quandary, the negotiating states, in Article 25 (4) RS, have included that ‘[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law’. In other words, any consideration of the Court concerning the criminal conduct of individuals acting pursuant to an official state policy is without prejudice to the question of state responsibility under international law. The commentary on the draft articles on the Responsibility of States for Internationally Wrongful Acts from 2001 confirms this understanding of Article 25 (4) RS:

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119 Morris, supra note 99, at 15.
120 See Morris, supra note 99, at 15ff.; and Wedgwood, supra note 106, at 199.
121 Akande, supra note 108, at 634f.
122 Ibid., at 634.
124 Article 25 (4) RS is derived from Article 4 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind which separates the responsibility of individuals from state responsibility. According to the commentary to Article 4 ‘an individual may commit a crime against the peace and security of mankind as an "agent of the State", "on behalf of the State", "in the name of the State" or even in a de facto relationship with the State, without being vested with any legal power’. In addition, it is noted that ‘the Code is without prejudice to any question of the responsibility of a State under international law for a crime committed by one of its agents’ (ILC, ‘Report of the International Law Commission on the Work of its 48th Session’ (6 May - 26 July 1996) UN Doc A/51/10 at 23).
Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them. In certain cases, in particular aggression, the State will by definition be involved. *Even so, the question of individual responsibility is in principle distinct from the question of State responsibility.* The State is not exempted from its own responsibility for internationally wrongful conduct by the prosecution and punishment of the State officials who carried it out. *Nor may those officials hide behind the State in respect of their own responsibility for conduct of theirs which is contrary to rules of international law which are applicable to them.* The former principle is reflected, for example, in article 25 (4) of the Rome Statute [...]. The latter is reflected, for example, in the well-established principle that official position does not excuse a person from individual criminal responsibility under international law.  

Thus, while the ICC is likely to be confronted with questions that are relevant for the determination of the responsibility of states whilst dealing with individual cases, it ‘will not be engaged in making determination about a state’s legal responsibility, nor will it need to do so in order to convict an individual for war crimes, crimes against humanity or genocide’.  

This understanding is corroborated by the fact that none of these crimes require as a precondition to hold individuals accountable for the commission of international crimes the prior determination of the responsibility of the state of the defendant’s nationality. In this sense, any considerations of the Court pertaining to the responsibility of (third) states are factual (as opposed to legal) observations.  

However, it must be acknowledged that the above distinction between individual responsibility and state responsibility is not without difficulties and it remains to be seen how the determination of individual accountability affects the responsibility of

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127 Ibid., at 636f.
128 However, Akande admits that although these ‘will be findings of fact only, and not decisions on the legal responsibility of the state concerned, many will regard them as conclusively establishing state responsibility’ (ibid. at 637). Carrie McDougall adopts a different view on this matter, noting that ‘[t]he perpetration of crimes against humanity or war crimes or genocide against the nationals of one State by agents and officials of a neighbouring State could be the basis of a claim for compensation under principles of State responsibility. Determining the status of the individual perpetrators as agents or officials could well arise indirectly in the context of superior responsibility, or directly in the course of determining whether the State or organizational policy element of crimes against humanity has been satisfied’ (C. McDougall, *The Crime of Aggression under the Rome Statute of the International Criminal Court* (Cambridge University Press, 2013) at 245). See also, R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and Human Rights Law* (Oxford University Press, 2008) at 257-65.
third non-party states in practice.\textsuperscript{129} This holds true, in particular, for the (not yet operational) crime of aggression which, as opposed to the above assessed other crimes within the jurisdiction of the ICC which are formulated more open in this respect, requires the involvement of a state by definition.\textsuperscript{130} As a consequence, the exercise of jurisdiction over the crime of aggression by the ICC requires as a prerequisite the determination of an ‘act of aggression’.\textsuperscript{131} Article 15bis (6) RS declares the SC competent in this matter. According to Article 15bis (7) RS the prosecutor, ‘\textit{where the Security Council has made such a determination, [...] may proceed with the investigation in respect of a crime of aggression}’. In case the SC fails to make such a determination, the prosecutor, upon expiry of six months after notification of the Secretary-General of the United Nations, ‘may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression’.\textsuperscript{132} In other words, if the SC fails to act, the Court will be allowed to make such a determination. Be that as it may, for the purposes of the present study the question of the responsibility of states in the context of the crime of aggression needs no definite answer. This is because the ICC, in respect of a state that is \textit{not} a party to the RS, ‘shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory’.\textsuperscript{133} In deviation from Article 12 (2)(a) RS, thus, a national of a state not party to the RS may not be exposed to the jurisdiction of the ICC in relation to the crime of aggression without the consent of this state even in case the crime is committed on the territory of a state party.\textsuperscript{134} Beth van Schaack commented with a view to this solution: ‘The Non-Party State exclusion in

\textsuperscript{129} A related discussion in this context pertains to the functional immunity which is attached to acts that are attributable to states and exceptions thereof in the context of the commission of international crimes (see Van Alebeek, \textit{supra} note 128, in particular at 143-7; and Akande, \textit{supra} note 108, at 637-40.\textsuperscript{130} Article 8bis (1) RS reads as follows: ‘For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations’ (emphasis added).\textsuperscript{131} Article 8bis (2) RS. On the determination of an act of aggression, McDougall, \textit{supra} note 128, at 268ff.\textsuperscript{132} Article 15bis (8) RS.\textsuperscript{133} Article 15bis (5) RS.\textsuperscript{134} An in-depth analysis of the structure of the crime of aggression including an assessment on the position of states parties that do not ratify the amendments is provided in McDougall, \textit{supra} note 128.
the aggression amendments thus represents a major victory for the United States and a vindication of its prior position.\textsuperscript{135}

It follows from the preceding discussion that the arguments raised by the U.S. in the context of Article 12 (2)(a) RS cannot be sustained. Accordingly, the ICC may legitimately exercise jurisdiction over nationals of non-party states in case they have perpetrated a crime on the territory of a state party, without the explicit consent of the state of the perpetrator's nationality. To assuage U.S. concerns in this regard, it was pointed out by proponents of the ICC that interference by the Court could easily be avoided by conducting prosecutions at a domestic level, to bring to bear the principle of complementarity.\textsuperscript{136} However, some commentators have argued that the threshold set for the ICC to defer to national proceedings under the principle of complementarity will almost certainly not be relevant with regard to offences committed by U.S. personnel abroad.\textsuperscript{137} This is because U.S. political (executive) branches in 'matters peculiarly reserved to them, including certain foreign relations, military, and security issues' are given the power to decide that in such circumstances no judicial review is possible at a domestic level.\textsuperscript{138} In the context of the admissibility of proceedings before the ICC, accordingly, the application of this so-called political question doctrine (in most of these cases) will be tantamount to the unwillingness of the U.S. to carry out investigations or prosecutions. In other words, from the perspective of the U.S., the complementarity approach does not provide a safeguard from ICC prosecution due to the (arguably) political nature of proceedings affecting their military or political personnel.

There are two observations to be made in this regard. Firstly, the U.S. has acceded to a number of international treaties dealing with international core crimes which, in one form or another, require the states parties to these instruments to investigate and prosecute breaches of these conventions.\textsuperscript{139} The non-prosecution of

\textsuperscript{138} Ibid., at 388.
\textsuperscript{139} The U.S. has ratified the Geneva Conventions which contain an \textit{aut dedere aut judicare} obligation of states parties with respect to the regime of grave breaches (Article 49 Geneva Convention I; Article 50 Geneva Convention II; Article 129 Geneva Convention III; Article 146 Geneva Convention IV). In addition, the U.S. is also a party to the Genocide Convention which contains an absolute duty to
U.S. nationals responsible for the commission of international crimes on the territory of a RS-state party would therefore not only activate (hypothetical) ICC jurisdiction but also trigger compulsory treaty obligations of the U.S.\footnote{140} Thus, objections relating to the political question doctrine have to be considered in the broader context of compliance by the U.S. with its obligations under conventional international law.\footnote{141}

Secondly, the ICC, in order to ensure uniform application of the principle of complementarity, is the sole arbiter in deciding whether it should defer to the principle of complementarity with regard to a specific case.\footnote{142} Accordingly, from the perspective of the Court, it is not relevant whether particularities of national legal systems of third states increase the likelihood that nationals of these states can come within the jurisdiction of the ICC.\footnote{143}

As will be outlined in more depth in Chapter 9, the U.S., by concluding bilateral non-surrender agreements, has made considerable efforts to prevent its nationals from being surrendered to the Court even where it is not willing to investigate or prosecute a case, by yielding to the political question doctrine or for other reasons.\footnote{144} This contrasts sharply with the position of the U.S. in the negotiations of the Rome Statute.\footnote{145} In discussing the issue of competing agreements, the U.S. had advocated that the Court should be able to acquire jurisdiction where ‘states are unable or unwilling to comply with their [competing] agreements regarding the exercise of criminal jurisdiction’.\footnote{146} Of course, there is a touch of irony in the fact (one could also employ the term bad faith) that the U.S. had previously resorted to the terminology which it now deems incompatible with international law in the context of

\footnote{140} See Van der Wilt, supra note 105, at 97.
\footnote{141} On the track record of the U.S. in relation to war crimes or crimes against humanity, Marcella David states: ‘The American track record on judging whether the actions of its military in combat settings constitute war crimes or crimes against humanity does not inspire confidence in its impartiality and fairness. American courts have demonstrated willingness to defer to military judgment on matters implicating security’ (David, supra note 137, at 388).
\footnote{142} Articles 17(1) and 19(1) RS. See also, Holmes, supra note 84, at 672.
\footnote{143} However, in any case, states are allowed to challenge the decision of the Court regarding the admissibility of a case (Article 19 (2) RS).
\footnote{144} These bilateral agreements, besides containing a prohibition to surrender nationals of the contracting states to the ICC, merely require the contracting states to prosecute criminal conduct ‘where appropriate’ (see infra Chapter 9, section 9.4.).
\footnote{145} See infra Chapter 9, section 9.2.
complementary ICC jurisdiction over nationals of non-party states on the basis of Article 12 (2)(a) RS.

The present discussion of Article 12 (2)(a) RS concludes with a statement by John Bolton, made in personal capacity prior to the entry into force of the RS. In this statement, the impression is raised that the U.S. is primarily interested in receiving protection from ICC prosecution as a matter of policy and not as a matter of law.

Much of the media attention to the American negotiating position on the ICC concentrated on the Pentagon's fears for American peacekeepers stationed around the world. As real as those risks may be, however, the main concern is not that the Prosecutor will indict the isolated U.S. soldiers who may violate our own laws and values, and their own military training and doctrine, by allegedly committing a war crime. The main concern should be for the president, the cabinet officers who comprise the National Security Council, and other senior civilian and military leaders responsible for our defense and foreign policy. They are the potential targets of the politically unaccountable Prosecutor created in Rome.\(^{147}\)

5.2.3.2. Article 13 (b) RS

Apart from the exercise of jurisdiction over nationals of third states on the basis of Article 12 (2)(a) RS, we learned that the ICC may also receive the right to initiate proceedings against non-party nationals when '[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations'.\(^{148}\) In contrast to Article 12 (2) RS, Article 13 (b) RS does not rest upon the consent of either the state on whose territory the crime was perpetrated or the state of the accused’s nationality.\(^{149}\) Rather, a situation may be referred to the ICC in any case where the requirements of Chapter VII UNC are fulfilled.\(^{150}\) In further consequence, any individual, of whatever nationality, can be subjected to the jurisdiction of the Court following a SC referral under Article 13 (b) RS. However, as was indicated previously, a SC referral to the ICC will typically concern situations in which neither the prosecutor nor states parties are entitled to prompt the jurisdiction of the Court; i.e. situations in which nationals of non-party states commit crimes on the territory of


\(^{148}\) Article 13 (b) RS.

\(^{149}\) See supra section 5.2.2.

\(^{150}\) An analysis of Article 13 (b) RS is provided in infra Chapter 7, section 7.3.
a non-party state. The granting of referral power to the SC found widespread support among the negotiating states during the preparations of the RS.\textsuperscript{151} In particular from a perspective of the SC, this support does not come as a surprise, as the inclusion of the SC as a triggering source prevents that an Article 13 (b) RS referral is issued when of one of the permanent members of the SC (P-5)\textsuperscript{152} exercises its right to veto.\textsuperscript{153}

Similarly to the exercise of jurisdiction under Article 12 (2)(a) RS, the question arises whether the extension of the RS to non-party nationals following a SC referral under Article 13 (b) RS is legitimate in view of the aforementioned principle that ‘[a] treaty does not create either obligations or rights for a third State without its consent’.\textsuperscript{154} There are several observations to make in relation to this matter. In the first place, it is relevant that the authority of the SC to refer situations to the ICC relates to the monopoly position the SC occupies within the system of the UN in matters relating to international peace and security.\textsuperscript{155} This privileged position of the SC is rooted in the historical developments after the Second World War which translated the post-war pole position of the Allied Powers into a legal vocabulary.\textsuperscript{156} As a matter of principle, thus, the extension of the RS under Article 13 (b) RS to third states results from the structure of the UNC, which provides in Article 25 UNC that ‘[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’. A SC referral under Article 13 (b) RS, in other words, ensures that non-party states, too, are ‘bound to accept that the Court can act in accordance with its Statute’.\textsuperscript{157} This means that in case of a SC referral the state with respect to which the referral was issued is placed in an analogous position to that of a state party.\textsuperscript{158} However, the state subject to the referral, despite the general obligation of UN member states to comply with SC decisions, does not have any pre-existing obligations under the RS to cooperate with

\textsuperscript{151} See \textit{infra} Chapter 7, section 7.2.
\textsuperscript{152} The permanent members of the SC are: the U.K., the U.S., France, China and Russia.
\textsuperscript{153} See, in particular, \textit{infra} Chapter 7, section 7.6.2.
\textsuperscript{154} 1969 Vienna Convention, Article 34.
\textsuperscript{155} According to Article 24 (1) UNC, the member states to the UN have ‘[conferred] on the Security Council primary responsibility for the maintenance of international peace and security, and agree[d] that in carrying out its duties under this responsibility the Security Council acts on their behalf’.
\textsuperscript{156} On the creation of the SC after the Second World War, see also \textit{infra} Chapter 6, section 6.2.3.
\textsuperscript{158} Ibid., at 342.
the Court through the mere issuance of a referral under Article 13 (b) RS. Rather, it remains within the competence of the SC to explicitly enforce the cooperation of the concerned state with the ICC in accordance with the provisions set forth in Part 9 of the RS. Accordingly, as soon as the SC issues an obligation to cooperate, states are required to comply with requests and decisions by the Court. While such an obligation can on the one hand be directed exclusively against the state(s) with regard to which the referral was issued, the SC may similarly choose to impose such an obligation to all member states of the UN. In this case, the obligation of the states, parties and non-parties alike, derives from the SC resolution and thus from the UNC. By virtue of Article 103 UNC, these obligations will prevail over competing international obligations of these states. In the context of the later discussed referrals concerning the situations in the Sudan and Libya, the SC has determined that the governments of those two states ‘shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution’. An example of a cooperation obligation that was directed to ‘all states’, by contrast, is the SC resolutions establishing the ad hoc tribunals for the Former Yugoslavia and Rwanda.

Another source of legitimacy of SC referral power, as was indicated previously and as will be substantiated in more detail in Chapter 7, can be found in the legislative development of Article 13 (b) RS. During the Rome Conference, the instrument of referral power found almost unanimous agreement among the negotiating states and only a small number of countries opposed the inclusion of the SC as a triggering source of the jurisdiction of the ICC. As a consequence, most of the negotiating states have accepted the possibility that the commission of crimes subject to the RS could be referred to the ICC even in case the affected state has not accepted the

160 Ibid., at 305.
161 Akande, supra note 157, at 341.
162 Ibid., at 343.
167 See, in particular, infra Chapter 7, section 7.2.
jurisdiction of the Court. In other words, the broad acceptance of the referral power of the SC shows a general agreement of these states that the subject-matter jurisdiction of the ICC, consisting of the crimes of genocide, crimes against humanity, war crimes and aggression, could be applied to them, members and non-members alike, in the future. The fact that a vast majority of states seem to have accepted this risk at the same time supports the argument advanced in Chapter 4, namely that the crimes of the RS have now acquired a quasi-universal underpinning.

5.3. Conclusion

In the second part of Chapter 5, the jurisdiction of the ICC was analysed. The analyses revealed that ICC, in accordance with the principle of complementarity, may legitimately overrule the sovereignty of non-party states to the Rome Statute as a matter of international law in case national authorities remain inactive with regard to a specific situation or case. This holds true not only for the exercise of ICC jurisdiction against nationals of non-party states on the basis of Article 12 (2)(a) RS, but similarly for the Court’s jurisdiction following a SC referral decision on the basis of Article 13 (b) RS. Combined with the findings of Chapter 4 and of the previous analysis on universal jurisdiction and national amnesties, thus, we arrive at the following conclusion: 1) the international core crimes, which build the cornerstone of international crimes prosecution at a domestic and an international level, are accepted by states on a worldwide scale; 2) international criminal law strictu sensu endows third states and, with some limitations, the ICC with the power to pierce the sovereignty of states that fail to hold accountable perpetrators of international core crimes. In other words, the concept of sovereignty, although leaving states in defined circumstances with the possibility not to prosecute criminals, does not prevent other states or the ICC from initiating proceedings in their place. As a consequence, the mere fact that jurisdiction over universal core crimes is extended to third states does not reflect a case of legal neo-colonialism in the sense of the present study, as there is no case to represent an unjustified imposition.

What are the implications of this conclusion for the present survey and the notion of legal (neo-) colonialism in the field of ICL? This question is legitimate since the assessment of neo-colonialism revealed that the sovereignty of the inferior state in

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168 However, it remains to be observed that this argument does not apply to Libya which has throughout the conference been opposed to any role of the SC within the system of the ICC (on the negotiation process of Article 13 (b) RS, see infra Chapter 7, section 7.2.).
neo-colonial relationships is overruled by powerful third states. In addition, in legal terms, Chapter 3 on legal colonialism exposed how the imposition of Western law and values significantly contributed to the establishment of European colonial rule on the African continent. Analysing the system of core crimes and the evolution of the discipline of ICL, however, this traditional understanding cannot be sustained in the context of the commission of international core crimes. This, we saw, is because with the rise of ICL as a discipline the notion of sovereignty is not considered in absolute terms anymore when it comes to the perpetration of crimes that are ‘of concern to the international community as a whole’. As compared to historical colonial and neo-colonial relationships, thus, the field of ICL is conceptually different in that the values underlying the discipline are accepted by the states upon whom these values are applied and whose sovereignty is overruled.

Does this in turn also imply that the jurisdiction of the ICC is not open to claims of neo-colonialism? In the view of the author, the system of the ICC is still open to such claims. This is because the mere fact that a law is accepted on a universal basis does not preclude that the law is applied unevenly to all of its subjects. Put in a different way, selective law and the selective enforcement of a universal law may have the same effect for those who are subjected to legal processes. It follows from this that neo-colonialism does not always relate to the direct imposition of values from a different culture. This became also manifest, for example, in the context of Latin American dependencies where ‘the world capitalist market functions as an external structural condition and helps to preserve neo-colonial patterns of inequality after the formal end of colonialism’. Neo-colonialism, in other words, is a transformative concept that can exist in different contexts and that is based on the existence of structural conditions which are to the favour of the powerful. The concept thus combines the exercise of structural power with the concept of asymmetry.

Given that the present study assesses neo-colonialism in the context of the ICC, the rationale behind this approach is best illustrated by reference to the previously assessed jurisdiction of the ICC over non-party states under Article 13 (b) RS. Although the reference to the UNC provides assistance in explaining the logic of Article 13 (b) RS and justifying the extension of the Statute to non-party states, the privileged role of the SC as a triggering source of ICC jurisdiction is not without

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169 See supra Chapter 2, section 2.5.
170 See ibid.
difficulties in structural terms. The reason for this, as will become clear in the discussion to follow in Chapter 6, lies in the fact that the SC internalises structural power which allows the Council to define which situations are referred to the Court and which are not. In this sense, the jurisdiction of the ICC under Article 13 (b) RS contrasts to the jurisdiction of the ICC over nationals of non-party states on the basis of Article 12 (2)(a) RS. While the latter is legitimate by reference to general principles of international law, the former is specifically justified by reference to the system of the UNC. The former, however, is more open to imposition claims, as a limited number of states – namely the members of the SC – collectively decide whether the RS is applicable to states which have not ratified the ICC treaty. Thus far, the SC has used this collective power only twice, in the cases of Libya and Sudan.

Be that as it may, we learned that the mere fact that a few states are furnished with the power to refer cases to the Court does not render the extension of the RS illegitimate in the sense of the present study for the reasons previously outlined. Rather, as will be shown in the following chapters, the crucial feature of legal neo-colonialism in the context of the ICC is that these states can (mis-)use their privileged position to prevent the legitimate extension of the RS under Article 13 (b) RS to themselves, thereby producing an asymmetry which is based on their privileged position. In other words, the extension of the RS under Article 13 (b) RS is legitimate but the production of structural inequalities is not. The crucial issue, in other words, is that some states are able to prevent the application of these community-values to themselves. On the basis of this understanding, the following Chapter 6 addresses the issue of how neo-colonial inequalities transpire in the field of ICL.

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171 See, in particular, infra Chapter 7, section 7.6.2.1.
172 See infra Chapter 7, sections 7.4. and 7.5.
Part III

Re-inventing the Concept of Neo-colonialism by
Adopting an International Criminal Law Perspective
Introduction Part III

In the previous part, we saw that ICL, in defined circumstances, legitimately trumps the sovereignty of states when international core crimes are committed. Next, we will turn to another aspect of the universality of core crimes, namely that these crimes, a requirement that stems from their universal nature, have to be applied on a universal basis. In other words, in contrast to European colonial law, the law of the core crimes is general and designed to apply without any distinction to race, nationality, or personal status to all perpetrators of these crimes alike.¹ This quality is owed to the fact that core crimes, as we saw in Chapter 4, are ‘of concern to the international community as a whole’² and, accordingly, do not relate to particular cultural environments. However, the universal application of international crimes, in terms of practicability, is impossible to translate into practice and focus must by necessity be placed on some perpetrators, while others remain beyond the reach of the law.³ This is the starting point for the following chapters which deal with the second characteristic both of the law and order administration in European colonial possessions and of neo-colonial dependencies, to wit, the issue of asymmetry. The term asymmetry, we know from Chapter 3 on legal colonialism by European states, in general describes selectivity in the enforcement of law.⁴ While the asymmetric application of law at the time of European colonial rule on the African continent was a feature of unilateral domination, the issue of asymmetry is somewhat more complex in the field of ICL. As indicated previously, this is because international core crimes are by definition construed to apply universally, meaning that their enforcement should be guided by the nature of the crimes committed and not by underlying national interests. Despite this universal underpinning of the field of ICL, claims that powerful states illegitimately remain beyond the reach of international crimes prosecution have accompanied the field of ICL since its beginnings at Nuremberg and Tokyo after the Second World War.⁵ In due consideration of the focus of this study on the ICC, thus, the following chapters are based on the classical (neo-) colonial narrative that a legal system – i.e. the RS – is exclusively directed against

¹ See Article 21 (3) RS. This requirement stems from the principle of equality before the law (see infra Chapter 6, section 6.1.4.).
² This formulation can be found in the Preamble and in Articles 1 and 5 RS.
³ See infra Chapter 6, section 6.1.4
⁴ For an assessment of the terms asymmetry and selectivity, see infra Chapter 6, section 6.1.1.
⁵ See, in particular, infra Chapter 6, sections 6.1.3. and 6.2.3.
nationals of weak states only, while nationals of powerful states remain beyond the law.

In a first step, therefore, Chapter 6 approaches the issue of how the concept of neo-colonial asymmetry relates to the field of ICL in general. Recalling that the exercise of colonialism and neo-colonialism was based on the existence of external structural conditions which served the production of traditional inequalities, focus is specifically placed on the structural dimension of ICL. In other words, the interrelationship between structural power and unacceptable asymmetry in the enforcement of ICL is addressed to describe how powerful states flout the principle of equal (universal) application in the context of ICL. The assessment of the structural dimension of ICL enforcement is complemented through the expansion of the patron-client concept to an inter-state level, in order to explain the full scope of structural inequalities in the field of ICL.

In dealing with the question of the extent to which the Rome Statute fosters neo-colonial inequalities, Chapters 7 to 9 comprise an analysis of mechanisms of the RS that are particularly apt to protect powerful states and their allies from ICC prosecution, i.e. Articles 13 (b), 16 and 98 (2) RS. In particular in the context of the former two provisions, it will be shown that the members of the SC, although they did not manage to have full control over the Court, were able to retain a significant degree of influence on ICC proceedings (purportedly) intersecting with the powers of the SC under Chapter VII UNC. The chapter on Article 98 (2) RS, in addition, comprises an assessment of U.S. bilateral non-surrender agreements which were concluded to prevent the surrender of U.S. nationals to the ICC.

In view of the fact that the present analysis is aimed at analysing the framework of the RS only, the performance of national jurisdictions in the prosecution of international crimes, as was indicated previously, will not be addressed. This is noteworthy in so far as the ICC, we recall, can only become active in case the national jurisdictions are either unwilling or unable to prosecute perpetrators of international crimes.

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6 See supra Chapters 2 and 3.
7 See supra Chapter 5, section 5.2.1.
Chapter 6

The Issue of Unjustified Asymmetry in the Enforcement of International Criminal Law

6.1. Asymmetry in the enforcement of international criminal law

6.1.1. Asymmetry and selectivity

The historical analyses of the notions of colonialism and neo-colonialism in Chapter 2 revealed that these concepts are understood as relationships between states of unequal power in which a dominant part exercises influence on its weak counterpart. The notion of asymmetry is omnipresent in the context of these concepts and describes a lack of equality or equivalence at different levels of these interstate relationships. In the field of ICL, the notion of asymmetry is closely linked to the idea of selectivity. In the famous *Arrest Warrant Case*, for example, the issue of selectivity was addressed by a number of judges with a view to the concept of universal jurisdiction. In this case, the ICJ had to decide on the diplomatic immunity of the then incumbent Minister of Foreign Affairs of the Democratic Republic of Congo (DRC), Mr. Yerodia Ndombasi, after Belgium had issued an arrest warrant *in absentia* under its universal jurisdiction legislation. Judge Gilbert Guillaume, who was the presiding judge at that time, stated that supporting universal jurisdiction would be ‘to encourage the arbitrary for the benefit of the powerful, purportedly acting as an agent for ill-defined international community’. Ad hoc judge Sayeman Bula-Bula commented in a similar vein: ‘This is where universal jurisdiction shows its true colours as a "variable geometry" jurisdiction, selectively exercised against some States to the exclusion of others.’ In both cases, the judges refer to a lack of equality in the application of the principle of universal jurisdiction. In other words, they contend that the law of universal jurisdiction fosters an asymmetry which is to the benefit of ‘the powerful’ because it is enforced selectively against nationals of non-

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3. *Arrest Warrant Case*, Separate Opinion of Judge Bula-Bula, at para.104. Particularly with regard to the topic addressed in the present study, it is also noteworthy that Mr. Bula-Bula, while not going into detail in this matter, has labelled Belgium’s attempt to bring Mr. Ndombasi to justice under the principle of universal jurisdiction ‘the continued expression […] of the neocolonial chaos imposed upon it [the Congolese People] on the morrow of decolonisation’ (ibid., at para. 25.).
powerful states. While an assessment of the ‘selectivity claim’ in the context of the principle of universal jurisdiction, as was already indicated, can be found elsewhere⁴, those statements provide an understanding of how the notions of asymmetry and selectivity are used to describe inequality in the prosecution of international crimes. The term asymmetry, accordingly, portrays the result of selectivity and thus abstractly describes a lack of equivalence in the selection and enforcement of law.

The notion of selectivity in legal processes is multi-layered and can be used in different contexts. Kenneth Davis has summarised the different manifestations of the term selectivity in legal processes in the following way:

[W]hen an enforcement agency or officer has discretionary power to do nothing about a case in which enforcement would be clearly justified, the result is a power of selective enforcement. Such power goes to selection of parties against whom the law is enforced. Selective enforcement may also mean selection of the law that will be enforced; an officer may enforce one statute fully, never enforce another and pick and choose in enforcing a third.⁵

In the aforementioned example of universal jurisdiction, we saw that some judges in The Arrest Warrant Case have claimed that the law is enforced selectively against some violators of the law while other violators of the same law escaped from law enforcement.⁶ This understanding of selectivity essentially describes selectivity in personal terms because a law, which is designed to apply to both violators, is only enforced against one of them (selectivity *ratione personae*). Davis describes this kind of selectivity in the first part of his definition noting that the law is not enforced in a specific case although it ‘would be clearly justified’. Another form of selectivity, which is addressed in the second part of Davis’ definition, relates to the ‘selection of the law that will be enforced’. This dimension of selectivity concerns the decisions to establish a specific law in a particular field and to specify what conduct is covered by this law (selectivity *ratione materiae*). Both manifestations of selectivity are combined


⁶ See separate opinions to the Arrest Warrant Case, *supra* notes 2 and 3.
in the third part of the definition: ‘[A]n officer may enforce one statute fully, never enforce another and pick and choose in enforcing a third’. In other words, it is selected what law has to be applied to a specific situation and whether the law is enforced at all, or only against some violators of the law, while others escape from law enforcement.

6.1.2. Selectivity \textit{ratione personae} and \textit{ratione materiae} during colonial rule

A selective approach to the rule of law was apparent in both the French and British colonial possessions.\footnote{See, supra Chapter 3, sections 3.2. and 3.3.} More specifically, in the context of European colonial rule law was primarily enforced in circumstances where it was deemed favourable to the attainment of European colonial objectives.\footnote{Ibid.} As a consequence, the importation of European law in colonial Africa mainly concerned domains that were of importance to the maintenance of stability in the colonial territories, the exploitation of resources, the protection of European settlers or the settlement of disputes involving European elements.\footnote{Ibid.} In other domains, native law remained relevant at least where it was not considered to stand in conflict with ‘principles of civilisation’ or with moral values of the European colonial powers.\footnote{See, in particular, supra Chapter 3, section 3.3.1.} At the same time, with the exception of some small colonial units in which the French policy of assimilation was practised consequently, certain laws were designed to apply to Europeans or natives only.\footnote{Ibid.} Accordingly, in both the French and British domain, selectivity was a characteristic element of legal colonialism and had the effect that large portions of native inhabitants remained outside the European colonial legal framework.\footnote{See, in particular, supra Chapter 3, section 3.3.2.} Combined with the above outlined understanding of the term selectivity, it can thus be summarised that the rule of law approach adopted during European colonial domination combined a dual selectivity \textit{ratione materiae} and \textit{ratione personae}.\footnote{Ibid.}
6.1.3. Selectivity *ratione personae* and *ratione materiae* in the field of international criminal law

Timothy McCormack has referred to a dual selectivity in the field of ICL.¹³ On the one hand, he identifies a selectivity *ratione materiae* when it comes to the categorisation of specific acts as international crimes.¹⁴ On the other hand, McCormack identifies a form of selectivity in relation to the question upon which ‘particular alleged atrocities’ the selected law should be applied.¹⁵ McCormack specifically applies this dual selectivity approach to ad hoc and *ex post facto* reactions to atrocities. He is surely right to apply this categorisation in the context of these types of reactions. Examples, besides the previously discussed post-World War II Military Tribunals, include the SC-based ad hoc ICTY and ICTR.¹⁶ The decision of the SC to include the core crimes of genocide, war crimes and crimes against humanity into the statutes of the latter named tribunals reflects a case of selectivity *ratione materiae*. The decision to apply the selected law only to the conflicts in the Former Yugoslavia and Rwanda, although other conflict-situations would have similarly justified the establishment of such ad hoc reactions at that time, reflects a form of selectivity *ratione personae*, by contrast.¹⁷ By assessing this dual selectivity, it becomes evident that both types of selectivity are interlinked in the context of these ad hoc reactions. This is because the substantive law imposed (selectivity *ratione materiae*) is by definition only applicable to parties which were involved in these two conflicts (selectivity *ratione personae*).

The selection of the applicable law of the ICC (selection *ratione materiae*), as was discussed in Chapter 4, was made at the Rome Conference at which the negotiating states decided that the Court is given jurisdiction *ratione materiae* over the crimes of genocide, war crimes, crimes against humanity and aggression.¹⁸ Other crimes, notably transnational crimes such as terrorism and illicit drug trafficking, with respect to which the negotiating states were not able to find a common understanding, were

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¹⁴ McCormack, supra note 13, at 683f.

¹⁵ Ibid., at 683.

¹⁶ On the selectivity-claim in relation to these tribunals, see infra section 6.2.3.

¹⁷ On the reasons for this type of selectivity in the context of the ICTY and ICTR, infra section 6.2.3.2.

¹⁸ Article 5 RS. For a comparative assessment of the substantive provisions of the various international criminal tribunals see Cryer, supra note 13, at 232ff.
not included in the final compromise. In terms of acceptance of ICC jurisdiction *ratione materiae*, we saw that the negotiating states and organisations were almost unanimous on the question what crimes should be included in the RS. On the basis of this understanding, it was previously concluded with regard to the underlying core crimes that the RS, ‘although it is still shaped by the national interests of single states, has created a value system which does not solely reflect the national interests of Western states, let alone of one imperial or neo-colonial centre’. This, of course, is a major difference to European colonial law which was unilaterally established by the colonial powers. In further consequence, the ICC only applies rules that were defined by the very states against which the law is being enforced.

An important aspect of the law of the ICC is that it is, in contrast to the statutes of the ICTY and ICTR, not limited in geographical terms and thus applies to all situations that are dealt with by the ICC. Accordingly, all states parties (and, in some cases, also states not party) to the RS are subject to the same law. In this sense, the law of the ICC is general instead of specific (selective). In the context of the ICC, thus, selectivity *ratione personae* is essentially linked to the decision against whom enforcement of the selected law is sought and against whom not. In other words, this form of selectivity relates to prosecutorial choices in the process of the selection of situations and cases. The selection of situations at the ICC constitutes a distinguishing feature vis-à-vis the previous ad hoc criminal tribunals which were from the outset limited to a specific geographical context. However, one should bear in mind that the principle of complementarity imposes a limitation *ratione personae* on the Court in that it cannot exercise concurrent jurisdiction over persons that are dealt with by domestic authorities. Based on the fact that the law of the ICC – the core crimes – are designed to apply to all conflicts under ICC scrutiny alike, selectivity *ratione personae* thus defeats the principle that general law is applied even-handedly towards all perpetrators or situations alike. In other words, the present analysis is first and foremost concerned with the question whether the selected law is applied in a consistent manner. When using the term selectivity in the following paragraphs, the present author refers to selectivity *ratione personae* as described in the above sense.

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19 See *supra* Chapter 4, section 4.4.2.
20 See *supra* Chapter 4, section 4.4.
21 See *supra* Chapter 4, section 4.4.2.
22 See also, Cryer, *supra* note 13, at 236.
23 See *infra* section 6.2.3.2.
24 See *supra* Chapter 5, section 5.2.1.
6.1.4. Justified and unjustified selective law enforcement

Addressing selectivity *ratione personae* within legal processes, Davis stated in his definition on selectivity that selective law enforcement is a result of the power ‘to do nothing about a case in which enforcement would be clearly justified’.\(^{25}\) This part of Davis’ definition raises the important question under what circumstances law enforcement is ‘clearly justified’. Having thus far concluded that the field of ICL is based on a number of universal core crimes\(^ {26}\), it would seem obvious to expect that the law is also universally applied to every perpetrator of international crimes either at a domestic or an international level.\(^ {27}\) The preamble of the RS principally confirms this aspiration ‘[a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished’. In addition, the preamble at the same time proclaims the ambition ‘to put an end to impunity for the perpetrators of these crimes’. The catch-all expectations raised by this universalistic rhetoric, however, should not be solely projected on the ICC which, operating under the principle of complementarity, is only a Court of last resort which can become active in case domestic authorities fail to investigate and prosecute international crimes subject to the RS. In this sense, the former prosecutor of the ICC, Louis Moreno-Ocampo, emphasised in a speech after assuming office in 2003 that

> [t]he effectiveness of the International Criminal Court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.\(^ {28}\)

The effective prosecution of perpetrators of international crimes at a domestic level therefore fosters (justified) selectivity with regard to criminal proceedings initiated by the ICC. However, despite this ‘shared responsibility’ approach, universal enforcement of international core crimes and the complete eradication of impunity for

\(^{25}\) Davis, *supra* note 5, at 163.

\(^{26}\) See *supra* Chapter 4, section 4.5.

\(^{27}\) M. Koskenniemi has described the consequences of the universal aspiration of ICL in the following terms: ‘The universalization of the Rule of Law calls for the realization of criminal responsibility in the international as in the domestic sphere. In the liberal view, there should be no outside-of-law: everyone, regardless of place of activity or formal position, should be accountable for their deeds’ (M. Koskenniemi. ‘Between Impunity and Show Trials’ (2002) 6(1) Max Planck Yearbook of United Nations Law at 2).

international criminals is a task that is impossible to translate into practice. As Kai
Ambos notes: ‘Even if a strict mandatory prosecution is called for there are
mechanisms of factual discretion since no criminal justice system has nowadays the
capacity to prosecute all offences no matter how serious they are’.\(^29\) The ICTY
Appeals Chamber in *The Prosecutor v. Delalić et al.* has noted in a similar vein: [I]n
many criminal justice systems, the entity responsible for prosecutions has finite
financial and human resources and cannot realistically be expected to prosecute
every offender which may fall within the strict terms of its jurisdiction.\(^30\) Both
statements emphasise the limited capacities of criminal justice systems, domestic or
international, therewith suggesting that selectivity *ratione personae* is intrinsic to
criminal law enforcement processes in general. In the context of international criminal
law, the lack of capacities is accentuated by the fact that international crimes are
often committed in a highly complex environment, featuring patterns of widespread
and systematic criminal behaviour which is typically embedded into some kind of
complex organisational policy of state or non-state actors.

Be that as it may, the mere fact that criminal justice systems have limited
capacities for the prosecution of criminals does not imply that selectivity *ratione personae*
in criminal justice processes is always legitimate. As Davis has noted:
‘Selective Enforcement obviously may be just and unjust, depending upon how the
selections are made’.\(^31\) Put in a different way, although there may be system-related
limitations inherent to criminal justice systems, the choices to be made by the
prosecutors within the limits of available resources can still render selectivity *ratione personae*
illegitimate. In what follows, thus, we assess under what conditions a
differentiation between violators of the same law is possible. In due consideration  
of the present study on the ICC, the following analysis will deal with the selection
process at international criminal tribunals only and not assess selection criteria
guiding national criminal prosecutions.

Having pointed out that the ‘entity responsible for prosecutions has finite financial
and human resources’, the ICTY Appeals Chamber continued with the observation

\(^29\) K. Ambos, ‘Comparative Summary of the National Reports’ in L. Arbor and others (eds), *The


\(^31\) Davis, *supra* note 5, at 167 (emphasis added).
that a prosecutor ‘must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments’. In a similar vein, Louise Arbour, former prosecutor of the ICTY and ICTR, commented with a view to the prosecutor of the ICC:

In the international context, particularly in a system based on complementarity with State jurisdiction, the discretion to prosecute is considerably larger [as opposed to the domestic level], and the criteria upon which such prosecutorial discretion is to be exercised are ill-defined, and complex. In my experience, based on the work of the two Tribunals [the ICTY and the ICTR] to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.

While the prosecutors at international criminal tribunals enjoy broad discretion in their decisions whom to prosecute and whom not, the discretion of the prosecutor, as also becomes clear in the above statements, is not unfettered. Rather, there have to be acceptable reasons for a differentiation in treatment in the prosecution of international crimes, a requirement that derives from the principle of equality before the law, which is an accepted principle in international law, as well as ICL. In other

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35 The applicability of the principle of equality before the law to the field of ICL was confirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in The Prosecutor v. Delalić et al. Therein, it declared that the prosecutor, in exercising discretion with regard to the selection of defendants, ‘is subject to the principle of equality before the law and to the requirement of non-discrimination’ (The Prosecutor v. Zejnil Delalic et al, supra note 30, para. 605). See also, Article 21 (3) RS, Article 21 (1) ICTY Statute and Article 20 (1) ICTR Statute. On the applicability of the principle of equality in ICL, M. M. DeGuzman and W. A. Schabas. ‘Initiation of Investigations and Selection of Cases’ (2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1999003> accessed 9 June 2015 (noting that ‘[t]he most important principle that limits discretion in selection decisions is that of equality along with its corollary, the prohibition against invidious discrimination and the related principle of impartiality’ (ibid., at 4)); and C. Angermaier, ‘Essential Qualities of Prioritization Criteria: Clarity and Precision; Public Access; Non-Political and Confidence-Generating Formulations; Equal and Transparent Application; and Effective Enforcement’ in M. Bergsmo (ed), Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd edn Torkel Opsahl Academic EPublisher, 2010) 201-4.
words, the existence of system-related imperfections which prevent the prosecution of all perpetrators of international crimes does not absolve the prosecutor from selecting situations and cases on the basis of reasonable (legal) criteria. The principle, more specifically, requires that ‘differences in treatment or outcome are permissible as long as they pursue a legitimate aim in a proportionate manner’. The ICTY Appeals Chamber, in The Prosecutor v. Delalić et al., listed the higher degree of responsibility, the seriousness of the offences and the brutality of criminal conduct as possible objective criteria for the selection of defendants. In a similar vein, the ICC Office of the Prosecutor (OTP), since 2005, has adopted the policy that ‘cases inside the situation are selected according to their gravity’ and that focus is particularly placed on those defendants ‘who bear the greatest responsibility for these crimes’. The prosecutor’s emphasis on high level perpetrators derives from the principle of complementarity and aims at ‘[encouraging] national prosecutions, where possible, for the lower-ranking perpetrators’. However, these statements merely refer to the criteria that are relevant for the selection of cases inside a specific situation. The present study, by contrast, primarily focuses on the selection of (country) situations. As was outlined in Chapter 5, there are three different ways how ‘situations’ can be brought under the sway of the ICC: a state party referral, a SC

36 On the criteria for the selection of defendants in the prosecution of international crimes, see M. Bergsmo (ed), Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd edn Torkel Opsahl Academic EPublisher, 2010).


38 ‘The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landžo was consistent with the stated policy of the Prosecutor to focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences.’ (The Prosecutor v. Zejnil Delalic et al, supra note 30, at para.614).


In all three situations, the prosecutor has to determine whether there is a ‘reasonable basis’ to commence or proceed with an investigation. The statutory provisions provide relatively little guidance as concerns the criteria according to which the prosecutor will choose the situations to be examined and the circumstances under which there is a ‘reasonable basis’ to proceed with an investigation. The focus on the concept of gravity within the admissibility test suggests that also the situation selection (at least implicitly) is based on the gravity of crimes within the situation examined. This is confirmed in the OTP’s Policy Paper on Preliminary Examinations: ‘Gravity includes an assessment of the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation’. In these guidelines, the OTP has added with regard to the selection of situations: ‘There are no other statutory criteria. Factors such as geographical or regional balance are not statutory criteria for a determination that a situation shall be investigated by the Court’. The approach adopted by the prosecutor can be exemplified by reference to the situation in Iraq. Although the prosecutor did conclude that ‘there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed’, it denied that the crimes committed within this situation met the gravity threshold. On 13 May 2014, after having received new information on alleged crimes committed by U.K. officials ‘involving systematic detainee abuse’, the Prosecutor again decided to re-open the preliminary examination of the situation in Iraq.

However, despite the existence of a number of basic principles that are designed to limit the exercise of prosecutorial discretion, in many instances the prosecutor’s

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41 See supra Chapter 5, section 5.2.2.
42 Articles 15 (3), 18 (1) and 53 (1) RS and Articles 29 and 30 Regulations of the Office of the Prosecutor (Entry into Force 23 April 2009, ICC-BD/05-01-09).
43 See Articles 17 (1)(d) and 53 (1)(c) RS.
46 Ibid., at para.11.
47 OTP. ‘Response to Communications Received Concerning Iraq’ (9 February 2006), at 8.
decisions, as well as the intention behind decisions pertaining to the (non-) selection of situations or cases remain elusive. This holds true especially in cases where the prosecutor does not become active with regard to a specific situation or case (negative selectivity). In particular with regard to conflict situations of (seemingly) comparable gravity, this lack of information may fuel speculation that the decision not to investigate or prosecute a situation or case is taken on basis of considerations other than legal ones. Joachim Herrmann thus notes that vast discretion can result in ‘differences in the administration of criminal law and subject the prosecutor to the suspicion that he might be influenced by political motives and considerations of expediency’.

Ian Brownlie commented in a similar vein with regard to the field of ICL: ‘Political considerations, power, and patronage will continue to determine who is to be tried for international crimes and who not’. In other words, Herrmann and Brownlie refer to illegitimate criteria, i.e. criteria which do not objectively take into account legal criteria such as quantity and gravity of criminal conduct. Those illegitimate criteria, as was already indicated, come to the fore primarily in cases of negative selectivity ratione personae.

Based on the fact that the present analysis places a particular emphasis on the reasons why powerful states remain beyond the reach of the ICC (while African states are particularly ‘visited’ by the Court), the following section will not further focus on the legal justification why certain situations have actually come under ICC scrutiny. This is because the present study does not call into doubt that ongoing proceedings have met the above discussed criteria of situation selection. Rather, focus is placed on the phenomenon that powerful states are (apparently) able to keep aloof from being targeted by the ICC on the basis of illegitimate criteria. In line with the focus of this study on structural frameworks as a condition to control, emphasis is thus placed on the (negative) selectivity ratione personae that is intrinsic to the structural framework of the ICC, the RS. Therefore, the following section will explain in greater depth how the notions of structural power and patronage relate to the field of ICL and how they (illegitimately) contribute to the so-called African bias in the enforcement of the RS. This approach, so to speak, conceptualises the accusation of Brownlie that ‘[p]olitical considerations, power, and patronage will

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49 J. Herrmann, ‘The German Prosecutor’ in K. C. Davis and others (eds), Discretionary Justice in Europe and America (University of Illinois Press, 1976) at 18 (emphasis added).
50 I. Brownlie, Principles of Public International Law (7th edn Oxford University Press, 2008) at 604.
continue to determine who is to be tried for international crimes and who not', by linking the idea of (negative) selectivity \textit{ratione personae} to structural neo-colonial inequalities.

6.2. Structural conditions and patronage in the field of international criminal law

6.2.1. Introductory remarks

From Chapter 2 on the theoretical background of the concepts of colonialism and neo-colonialism we know that these concepts are exercised against the backdrop of structural conditions which served the production of long-standing traditional inequalities. At the time of colonialism, examples in which structural conditions formalised the colonial process were, in particular, the Berlin Conference and the Mandate System of the League of Nations.\textsuperscript{51} However, the Mandate System merely translated the historical reality of (former German) colonial rule \textit{ex post facto} into a legal vocabulary, albeit without the colonial rhetoric.\textsuperscript{52} The 1884/5 Berlin Conference, by contrast, was aimed at structuring the colonial powers claims to African territory in the years to come. Nevertheless, it is beyond doubt that European colonial powers would have used their (military and political) power to subordinate African states even without an agreement such as the Berlin Act.\textsuperscript{53} Chapter 3 on legal colonialism furthermore analysed the legal structures introduced by the European powers in their colonial possessions, all of which internalised an asymmetry at different levels.\textsuperscript{54} This meant that legal and political structures were introduced which formalised the exercise of colonialism by the different colonial powers and served the promotion of (colonial) inequalities. At the same time, these structures provided the foundation for neo-colonial relationships between European powers and their former colonial possessions in the post-colonial era. The structural dimension of neo-colonialism was highlighted in Chapter 2 by reference to the Latin American \textit{Teoría de la Dependencia}, which links asymmetry in the development of states to the world economic market.

It follows from the dismantling of the traditional notions of colonialism and neo-colonialism that the contention of the existence of neo-colonialism in the field of ICL

\textsuperscript{51} See supra Chapter 2, section 2.4.

\textsuperscript{52} Ibid.


\textsuperscript{54} See supra Chapter 3, section 3.3.2.
relates to the power facilitated by structural conditions in the field of ICL. These structural conditions provide for the production (and reproduction) of traditional patterns of inequality between the power exercising states and the states that are disfavoured by the legal framework. The structural conditions, in other words, systematically privilege certain actors due to their specific position within the system of international criminal law enforcement.\textsuperscript{55} This understanding of power not only includes the exercise of power on the basis of structural disparities but similarly the power to define legal frameworks and structural conditions which themselves serve the preservation of historical neo-colonial patterns of inequality.\textsuperscript{56} As was the case with respect to traditional colonial and neo-colonial relationships, the exercise of power in the field of ICL is based on legal frameworks which were defined by actors that form part of the international system. However, before the present chapter will deal with the establishment of historical (structural) privileges that are relevant in the field of contemporary ICL, the concept of patronage between states, which subsequently provides assistance in explaining the full extent of structural inequalities in the context of the ICC, will be addressed.

6.2.2. The concept of patronage between states

We learned in Chapter 2 that the traditional concept of patronage was characteristic for colonial and neo-colonial relationships, as well as for the perpetuation of power at a domestic level in the aftermath of European colonial rule.\textsuperscript{57} The instrument of patronage, in these contexts, served the preservation of asymmetric relationships between the actors involved in these forms of domination. Despite the asymmetric character of these relationships, we saw that patron-client ties are, although to varying degrees, beneficial for both actors involved.\textsuperscript{58} While the patron typically seeks to expand its control over the client, clients are interested in a privileged position within their own societies. The reciprocal nature of these relationships implies that both parties to the asymmetric relationship have a vested interest in the

\textsuperscript{55} M. Koskenniemi has used the term 'structural bias' to describe this phenomenon: ‘[T]here is a structural bias in the relevant legal institutions that makes them serve typical, deeply embedded preferences, and that something we feel that is politically wrong in the world is produced or supported by that bias’ (M. Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press, 2005) at 607. See also, S. Guzzini. 'The Limits of Neorealist Power Analysis' (1993) 47(3) International Organization at 462.

\textsuperscript{56} See A. Pustovitovskij and J-F Kremer. 'Structural Power and International Relations Analysis ''Fill Your Basket, Get Your Preferences'' (working paper)' (2011) 191 Institut für Entwicklungs forschung (IEE) at 3.

\textsuperscript{57} See, in particular, supra Chapter 2, section 2.3.

\textsuperscript{58} Ibid.
status quo which is to the disadvantage of those who remain outside of this patron-client dyad. In other words, the negative effects of patronal power affect those who are not the recipients of the benefits of the patron, namely those parts of the society which are not vested with power. The degree of reciprocity within such relationships is dependent on the relational power the parties to the relationship are able to exercise on their counterparts. In the neo-colonial case, we saw that patronal relationships are frequently characterised as internal structural conditions to the exercise of neo-colonial domination. As opposed to neo-colonial relationships which are additionally based on the existence of external structural conditions, pure patron-client relationships are merely based on the exercise of relational power.

While the concept of patron-client relations was originally mainly employed with respect to ‘relatively limited, dyadic, interpersonal, semi-institutionalized relations between a single patron and one or several clients’, it was over time extended ‘to a broader variety of social relations and organizations’. Nicolas van de Walle accordingly comes to the conclusion that ‘[c]lientelism exists in all polities. The form it takes, its extent, and its political functions vary enormously, however, across time and place’. In other words, the phenomenon of clientelism has proven ‘highly adaptable to different political, economic and cultural environments’. In the post-colonial era, the patron-client concept was extended to the inter-state political level to describe the policies of the Great Powers after the Second World War. The application of the patron-client approach as an analytical tool to the international level

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59 On relational power, see supra Chapter 2, section 2.4.
60 See ibid.
63 A. Hicken, ‘Clientelism’ (2011) 14 Annual Review of Political Science at 290. In a similar vein, Eisenstadt and Roniger note: ‘[P]atron-client relations were not destined to remain on the margins of society nor to disappear with the development and establishment of democracies with well-functioning political and economic systems marked by economic development and modernization […] It was also seen that, while any single type of patronage […] may disappear under such conditions, new types may appear, and that they can be found in a variety of forms in many societies, cutting across different levels of economic development and political regimes, and seemingly performing important functions within these more highly developed modern frameworks’ (Eisenstadt and Roniger, supra note 61, at 46).
64 See C. Shoemaker and J. Spanier, Patron-Client State Relationships: Multilateral Crises in the Nuclear Age (Praeger Publishers, 1984); Carney, supra note 61; and A. Maćzak, ‘Clientelism as the Highest Stage of Imperialism’ (2005) 91 Acta Poloniae Historica at 186.
has to some extent led to a depersonalisation of the concept focusing instead on general necessities of states. Christopher Shoemaker and John Spanier, assessing patronal relationships of the U.S. and the Soviet Union during the Cold War, confirm this view noting that '[p]atron-client state relationships are a reality in the present global political system'.

Similarly to colonial and neo-colonial relationships, inter-state patron-client relationships ‘differ from pure dependency relationships in that they involve not only socio-economic factors, but also ideological, cultural, military, and diplomatic/strategic ones as well’. The pervasive fact of asymmetry is thereby inherent to all these types of domination. As Christopher Carney observes, ‘[t]he same type of asymmetries that constitute dependency relationships are also manifest, albeit in different forms, in relations between states of unequal power and capabilities’. Despite the asymmetric nature of patron-client relationships, the patron-client exchange between states is also characterised by a certain degree of affection and voluntariness. However, as Rene Lemarchand and Keith Legg note:

[C]lientelism differs from mere instrumental friendship in the conditional character of the personal loyalties involved. This is largely a reflection of the discrepancies in status, power, and influence which serve both to segregate and to unite patrons and clients.

According to Shoemaker and Spanier, a patron-state will typically enter into a relationship with a client state on the basis of ideological considerations, solidarity or for strategic purposes, which may include geopolitical and/or military advantages. As a consequence of the reciprocal character of the relationship, the client state, of course, similarly expects an advantage through the establishment of a relationship with a patron and accordingly tries to bargain the most favourable conditions. The objectives of the client state, as is the case with the objectives of the patron, can vary enormously and typically include assistance in military, police or intelligence matters.

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65 Shoemaker and Spanier, supra note 64, at 10.
67 Carney, supra note 61, at 43.
68 See ibid., at 44f.; and R. Lemarchand and K. Legg, ‘Political Clientelism and Development: A Preliminary Analysis’ (1972) 4(2) Comparative Politics at 152f.
69 Ibid., at 152.
70 Shoemaker and Spanier, supra note 64, at 18ff. In a similar vein, Carney, supra note 61, at 49ff.
Mindful of the variability of internal and external parameters which determine the conditions of patron-client exchanges at an international level, these relationships between states are inherently unstable and subject to constant change. Accordingly, Shoemaker and Spanier characterise patron-client relationships as ‘fuzzy, fluid, fluctuating partnerships’. In a similar vein, Carney emphasises the non-permanent nature of such relationships noting that ‘patron-client interstate relationships are particularized to the event or issue at hand’. It follows from the above analysis that a patron-client exchange is a mutable concept that cannot only be applied to micro-political systems but which similarly has become relevant at a macro-political level in the context of international relations. A similar approach to describe state behaviour in the field of international relations is used by some authors through so-called international relations cost-benefit analyses. With regard to the (non-) enforcement of democratic sanctions by the international community, for example, Daniela Donno notes: ‘Enforcement is less likely to be found in geopolitically important countries or strategic allies where the external actor’s interest in promoting democracy is trumped by other foreign policy goals.’ Put in a different way, the importance of client states as ‘strategic allies’ of powerful states may prevent the enforcement of democratic sanctions, despite the fact that the enforcement of sanctions would principally be desirable. With regard to client states that are less important for strategic or other reasons, by implication, the effective enforcement of sanctions is more likely. As will become clear in the following chapters, this example of the enforcement of democratic sanctions corresponds to the situation where the Security Council has to decide whether or not it should refer a conflict-situation in a non-party state to the ICC, therewith subjecting the conflicting parties in this state to the sanction regime of the ICC.

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71 See Carney, supra note 61, at 48; Shoemaker and Spanier, supra note 64, at 21ff.; and M. J. Gasiorowski, 'Dependency and Cliency in Latin America' (1986) 28(3) Journal of Interamerican Studies and World Affairs at 52.
72 See Shoemaker and Spanier, supra note 64, at 16; Kaufman, supra note 61, at 289; and Gasiorowski, supra note 71, at 53.
73 Shoemaker and Spanier, supra note 64, at 16.
74 Carney, supra note 61, at 47.
76 See infra Chapter 7 on Article 13 (b) RS.
In the context of the exercise of universal jurisdiction, Máximo Langer has used a similar approach to describe selectivity ratione personae in the enforcement of the law of universal jurisdiction:

[S]ince international crimes are often committed by state officials, the political branches of the prosecuting states must be willing to pay the international relations costs that the defendant's state of nationality would impose if a prosecution and trial take place. As these costs can be substantial, universal-jurisdiction-prosecuting states have strong incentives to concentrate on defendants who impose low international relations costs because it is only in these cases that the political benefits of universal jurisdiction prosecutions and trials tend to outweigh the costs.77

In other words, the higher the international relations costs for the forum state, the lower the probability that universal jurisdiction is exercised against individuals of ‘cost-intensive’ states. The fundamental idea behind this theory can also be found in the context of patron-client relationships. Thus, the benefits a client can offer to the patron, e.g., a strategic advantage in case of good relations with the government of a geostrategic important state, are crucial for the protection the client may receive from the patron in the context of international crimes prosecution. This form of protection perfectly illustrates the reciprocal character of patron-client relationships with regard to the prosecution international crimes, involving benefits for both the patron and the client alike. However, in contrast to international relations cost-benefit analyses, the system of patronage not only relies on cost-benefit thinking, but is also characterised by ideological, historical or cultural aspects which, in the author's view, are likewise important elements in the description of behavioural patterns in the field of inter-state relationships.

It remains to be observed that while the traditional concept of patronage has been identified as an internal structural condition to the exercise of colonial and neo-colonial dependencies78, the situation is slightly different with regard to the exercise of power in the context of the ICC. This is because structural power exercised to avoid ICC prosecution, as will become clear in the chapters that follow, is (typically) not directed against another state but towards the Court itself.79 In these situations, thus, the concept of patronage, comparable to the above examples on the

77 Langer, supra note 4, at 2.
78 See supra Chapter 2, section 2.3.
79 However, the situation is different with regard to Article 98 (2) RS, where the U.S. has exercised power to prevent third states from surrendering U.S. nationals to the ICC (see infra Chapter 9).
enforcement of democratic sanctions, helps in extending structural power to client states. However, the effects of both kinds of patronage are the same. This is because the crucial aspect of the concept of patronage in the context of neo-colonial relationships, as was indicated at the beginning of this section, is that both parties to the asymmetric patron-client relationship have an interest in the status quo which is to the disadvantage of those who remain outside of this patron-client dyad. Accordingly, if a state is not the recipient of patronal benefits, it may face the consequences of not profiting from the structural power exercised by the powerful actor.

In the chapters that follow, the concept of patronage is particularly relevant in the context of the exercise of SC referral power under Article 13 (b) RS and with regard to the deferral of proceedings under Article 16 RS. In addition, relational power exercised within a patron-client relationship has similarly promoted the establishment of bilateral non-surrender agreements under Article 98 (2) RS, which provides protection from ICC prosecution for the patron, i.e. the U.S. However, before focus is shifted towards the ICC, the remaining part of the present chapter is concerned with the ascendency of the SC within the legal system of the UNC, a development which is highly relevant, in structural terms, in the context of the ICC as well.

6.2.3. The transformation of historical facts into legal reality: the United Nations Security Council

6.2.3.1. The Allied Powers after the Second World War

It was indicated in the chapter on the development of international core crimes that the post-war Military Tribunals at Nuremberg and Tokyo contributed significantly and lastingly to the emergence of the discipline of ICL. However, the Second World War was not only the trigger for the establishment of these epochal tribunals but at the same time brought into existence the United Nations and with it the Security Council with the adoption of the United Nations Charter on 26 June 1945 (UNC). This development ‘carved into stone’ the political hierarchy among states after the Second World War, granting the Allied Powers – the U.S., China, Russia, France and Great Britain – a superior position within the system of the UN as permanent members of

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80 See infra Chapters 7 and 8.
81 See infra Chapter 9.
82 See supra Chapter 4, section 4.2.
the Security Council (P-5).\textsuperscript{84} The UNC recognised the SC as the organ with primary responsibility for the maintenance of international peace and security.\textsuperscript{85} It also endowed the P-5 with (irrevocable) veto power over the most important decisions to be taken by this executive instrument.\textsuperscript{86} Even though the SC is composed of fifteen members in total, the right of the P-5 to veto any decision taken by this instrument \textit{de facto} relativizes the power of the remaining members.\textsuperscript{87} According to Dimitris Bourantonis, ‘[t]he intention was for the victorious states, which were the world’s great powers at the time, to exercise global leadership with a view to managing or governing the international system’.\textsuperscript{88}

Neither the losers of the war nor the states then colonised were included in the establishment of these fundamental structures which continue to affect international law and politics until today. This is relevant for two reasons. On the one hand, these states had naturally no leverage to take influence on the legal structure of the UNC and oppose the allocation of power provided for in the UNC. On the other hand, the UNC also contains in two parts regulations which concerned the colonial territories. Chapters XII-XIII, as was already briefly outlined previously, established the Trusteeship System as a successor of the Mandate System of the League of Nations.\textsuperscript{89} Chapter XI, in addition, deals with dependent (non-self-governing) territories in general.\textsuperscript{90} Similarly to the structure adopted with respect to the SC, these chapters of the Charter mirror the bipolar historical reality after the Second World War which was characterised by the division between sovereign states and administered and colonial territories.

The one-sided approach adopted with regard to the establishment of the United Nations in general and the Security Council in particular is also evident in the context of the Military Tribunals at Nuremberg and Tokyo. Those tribunals have only brought to justice crimes committed by the Axis Powers\textsuperscript{91}, although ‘there is little doubt that

\textsuperscript{84} Article 23 (1) UNC.
\textsuperscript{85} Article 24 (1) UNC.
\textsuperscript{86} Article 27 (3) UNC.
\textsuperscript{87} On the use of veto power in the context of the ICC, see \textit{infra} Chapter 7, section 7.6.2., and Chapter 8, section 8.6.
\textsuperscript{88} D. Bourantonis, \textit{The History and Politics of UN Security Council Reform} (Routledge, 2005) at 3.
\textsuperscript{89} See supra Chapter 2, section 2.4.
\textsuperscript{91} While the Statute of the IMTFE has not explicitly ruled that the tribunal shall be limited to Japanese war criminals, the Charter of Nuremberg, in Article 6 (i) of the Charter of the IMT, expressly stated that the tribunal shall be exclusively applicable to the European Axis: ‘The Tribunal established by the
some allied actions would have proved amenable to the laws of Nuremberg. The Allied Powers have justified this ‘victor’s justice-approach’ to the tribunals in the following way:

Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The world-wide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. After the First World War, we learned the futility of the latter course.

Thus, with establishing the statutes of the IMT and IMTFE, the Allied Powers have used their power to create a legal framework which reflected the balance of power among the world states after the war. In terms of selectivity, the Statutes of the IMT and the IMTFE and the subsequent adjudication processes are an example of the previously discussed dual selectivity ratione materiae and ratione personae. However, in dealing with the selectivity issue in the context of these tribunals, it should be accounted for that the one-sided emphasis of these tribunals was not a result of long-established political structures; rather, the selection scheme of the tribunals was predefined by the outcome of the war and the thereupon based ad hoc alliance between the victors of the war. The Allied Powers, moreover, were not only confronted with an unprecedented quantity and ferocity of crimes, but at the same time no legal framework existed at that time which proved expedient to dealing with war criminals internationally. Therefore, the selective character and other ills of the tribunals need to be evaluated against the background of the need to restore a completely disrupted world political order after the Second World War. As Michael

Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes’ (emphasis added).

93 On the claim of victor’s justice, e.g., see ibid. at 805f.; Schabas, supra note 44; Cryer, supra note 13, at 206; and R. H. Minear, Victors’ Justice: The Tokyo War Crimes Trial (Princeton University Press, 1971).
95 See McCormack, supra note 13, at 683f. On the dual selectivity in the context of ad hoc tribunals, see supra section 6.1.3.
96 For a critical assessment of these tribunals see, e.g., Cryer, supra note 13, at 206ff.; H. Ehard. ‘The Nuremberg Trial against the Major War Criminals and International Law’ (1949) 43 The American Journal of International Law 223-45; and Minear, supra note 93.
Scharf notes, ‘Nuremberg must be judged, not by contemporary standards, but through the prism of history’.  

In addition, whereas the system of colonialism was based on the perceived dichotomy between sovereign and powerful states on the one hand and non-sovereign backward states on the other, the Second World War was a conflict between sovereign powers \textit{inter se}. On the basis of this understanding, the one-sided focus in the prosecution of international criminals after the Second World War does not represent a case of systemic inequalities in the sense of deeply embedded structural inequalities. Rather, the Military Tribunals after the Second World War are an example of pragmatic ad hoc international cooperation among states acting together in an international conflict against a common enemy.

Be that as it may, the consolidation of the political and legal structures that took place after the war, of which the tribunals were an expression, remains a major legacy of this period until today. This holds true also for the field of ICL. This is because the structural power conferred on the P-5 of the SC in the process of creating the UN, which finds expression in Chapter VII UNC, applies to situations affecting international peace and security irrespective of a specific historical, geographical or temporal context. An example of how this unprecedented power was used in the field of ICL is the establishment of the ad hoc ICTY and ICTR in the nineteen-nineties, which will be addressed in the following section.

6.2.3.2. The Security Council and ad hoc reactions to atrocities in the 1990s

As we saw in Chapter 4 of this study, the SC, acting under Chapter VII UNC, ordered the establishment of the ad hoc ICTY\textsuperscript{98} and ICTR\textsuperscript{99}, in 1993 and 1994 respectively. Both tribunals were established in response to violent regional conflicts and contained a limited geographical and temporal mandate.\textsuperscript{100} In the first trial before the

\textsuperscript{98} SC Res 827 (25 May 1993) UN Doc S/RES/827.  
\textsuperscript{99} SC Res 955 (8 November 1994) UN Doc S/RES/955.  
\textsuperscript{100} According to Article 1 ICTY Statute, ‘[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991’. According to Article 1 ICTR Statute ‘[t]he International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994’.
ICTY, the Trial Chamber was anxious to stress the differences between the ICTY and its famous predecessors at Nuremberg and Tokyo:

[T]he Nuremberg and Tokyo Tribunals were multinational but not international in the strict sense as only the victors were represented. By contrast, the International Tribunal [for the Former Yugoslavia] is not the organ of a group of States; it is an organ of the whole international community. [...] The Nuremberg and Tokyo trials have been characterized as "victor's justice" because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war. [...] Therefore, the International Tribunal is distinct from its closest precedents.\textsuperscript{101}

Despite the fact that the Tribunal, for reasons of legitimacy, distanced itself from its forerunners noting that the Court 'is an organ of the whole international community', the ICTY and the ICTR are in fact a product of the same states that formed the Allied Powers after the Second World War. As William Schabas notes, the political agenda of the SC at the time of the establishment of the ICTY 'was set out by what at Nuremberg were still referred to as the "great powers" but by 1993 were labelled with the perhaps less pejorative term of the "permanent five".'\textsuperscript{102} However, as opposed to the International Military Tribunals after the Second World War, both ad hoc tribunals were set up by states that had not actively participated in the respective conflicts at the time of their creation.\textsuperscript{103}

The establishment of these reactions to the atrocities committed in the Former Yugoslavia and Rwanda, again, was accompanied by criticism of selective enforcement. Observing that other conflicts would have similarly justified the establishment of such an instrument, Gerry Simpson has asked: 'If Yugoslavia, why not Somalia; if Rwanda, why not Guatemala?'\textsuperscript{104} This claim of selectivity \textit{ratione personae} deals with the legitimate concern that, except for the Former Yugoslavia

\textsuperscript{101} The Prosecutor v. Dusko Tadic a/k/a 'Dule' (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 at paras.19,21.

\textsuperscript{102} Schabas, \textit{supra} note 44, at 537.

\textsuperscript{103} In the case of the establishment of the ICTR, it is relevant to note that Rwanda, at the time of the creation of the tribunal, was a non-permanent member of Security Council. On the basis of a number of objections, Rwanda was the only country voting against the adoption of the resolution 955 which formally established the ICTR (see SC Verbatim Record (8 November 1994) UN Doc S/PV/3453 at 14ff.).

and Rwanda, no other ad hoc tribunals were established by the SC under Chapter VII UNC. While the reasons for this inactivity on the part of the Council will be discussed below, we will briefly deal with the legal foundation of these instruments.

In both resolutions establishing these tribunals, the SC emphasised that the situations in these countries would ‘constitute a threat to international peace and security’, therewith activating its powers under Article 39 UNC. In addition, it was also emphasised that the tribunals and the prosecution of perpetrators of international crimes were considered ‘effective measures’ that contribute to the ‘restoration and maintenance of peace’. Both of these formulations indicate that the SC saw the tribunals as a ‘[measure] not involving the use of armed force’ under Article 41 UNC. With these references, the SC satisfied the formal requirements to become active under Chapter VII UNC. However, although prima facie in conformity with the requirements of Articles 39 and 41 UNC, some commentators raised doubts as to whether the SC indeed had the substantive power to establish such tribunals. While the present author does not aim to enter the discussion of the legality of these tribunals, the establishment of the ICTY and ICTR by the SC illustrates the structural dimension of the powers of the SC under Chapter VII UNC. This is because the (contested) creation of these instruments makes it obvious that the playing field of the SC is not exactly predefined by the Charter. What is more, with establishing these tribunals, the SC has set a precedent that the field of ICL and international peace and security are closely intertwined. In this sense, the SC’s interpretation of its Chapter VII powers in the context of the establishment of the ICTY and ICTR, as will be demonstrated in the following chapter, also paved the way for the Council’s later involvement as a triggering source within the system of the ICC.

108 On the requirements of Articles 39 and 41 UNC, see infra Chapter 7, section 7.3.1.
111 See in particular, infra Chapter 7, section 7.2.
The analysis of the legal foundation of these tribunals leads us to the first aspect of selectivity *ratione personae*, to wit, the wide discretion of the SC when it comes to deciding how to respond to a Chapter VII situation. This decision, as we saw in the above discussion, relates to the determination of ‘the existence of any threat to the peace, breach of the peace, or act of aggression’ under Article 39 UNC. This provision not only refers to the power of the SC to determine the situations in which a threat to the peace, breach of peace, or act of aggression exists, but similarly to the power ‘what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security’. Intrinsic to the provisions under Chapter VII is that the SC enjoys a wide discretion in these matters. As the Appeals Chamber of the ICTY, in *The Prosecutor v. Dusko Tadic*, has noted with regard to Article 39 UNC:

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.\(^{112}\)

As opposed to the prosecutor of an international criminal tribunal who is bound to observe a number of legal principles when it comes to the selection of situations and cases\(^{113}\), thus, the discretion of the SC is more difficult to demarcate in legal terms. This is mainly because the SC is a political body which takes its decisions based on political rather than legal considerations (such as gravity or equality).\(^{114}\) This becomes also evident from the above statement which emphasises that Article 39 determinations involve ‘political evaluation of highly complex and dynamic situations’. In a similar vein, Robert Cryer has observed with regard to the role of the SC in the establishment of the ICTY and the ICTR: ‘The Security Council has not considered itself under any legal duty to respond to any other conflicts in a similar way’.\(^{115}\)


\(^{113}\) See supra section 6.1.4.

\(^{114}\) Stefan Talmon, for example, notes: ‘The determination of a threat to the peace thus requires more than mere normative considerations; it also necessitates an analysis of political realities. For this reason, the UN Charter gives the Council broad, but not unfettered, discretion when determining a threat to the peace’ (S. Talmon, *The Security Council as World Legislature* (2005) 99(1) The American Journal of International Law at 180). A more detailed assessment of this matter, as well as of the possibility to review SC decisions, is provided in *infra* Chapter 7, sections 7.3.1. and 7.3.3. In a similar vein, *infra* Chapter 8, section 8.3.4.

\(^{115}\) Cryer, supra note 13, at 211 (emphasis added).
A number of reasons are likely to have played a role in the decision not to establish further ad hoc tribunals besides the ICTY and the ICTR. First of all, it was already mentioned that the prosecution of international crimes at an international level is limited in terms of available resources.\textsuperscript{116} This holds true not only with regard to the number of cases that can be dealt with by the tribunals but is similarly relevant for the number of tribunals that are established. In this sense, ad hoc reactions to atrocities, as the name suggests, are per definition an exercise of selective and asymmetric law enforcement because law is applied to a limited geographical context and is therefore \textit{per se} specific instead of general. As Cryer notes:\[117\]

Selectivity is not solely related to law; [...] \textit{it also relates to the extent to which the law is general} and enforced in accordance with its terms, matters which relate to the legitimacy of the enforcement regime. On that point, ad hoc reactions by an executive body such as the Security Council, laudable though they are, fall far short of the ideal.\textsuperscript{117}

It is exactly this inherent selectivity of ad hoc responses which has served as an argument for the establishment of a permanent criminal court designed to deal with violent conflicts worldwide. Along these lines, it was repeatedly reiterated during the negotiations in Rome that the establishment of a permanent international criminal tribunal would obviate further ad hoc international criminal tribunals in the future.\textsuperscript{118} In addition, we learned that a number of hybrid tribunals were elaborated and put into practice in collaboration between the United Nations and national authorities subsequent to the ICTY and ICTR.\textsuperscript{119} Both of these developments suggest that the creation of more ad hoc tribunals was considered impractical by the SC in the long run. Another reason not to establish further ad hoc reactions, according to Michael Scharf, has been ‘tribunal fatigue’, an expression which denotes the unwillingness (and perhaps inability) of the SC to find agreement on and negotiate and elaborate, again and again, the specific conditions for such tribunals including statutes, the selection of judges, etc.\textsuperscript{120} While all of these reasons relate to the ‘basket of feasibility’ there are other possible explanations why focus was particularly placed on

\begin{itemize}
  \item \textsuperscript{116} See \textit{supra} section 6.1.4.
  \item \textsuperscript{117} Cryer, \textit{supra} note 13, at 211 (emphasis added).
  \item \textsuperscript{118} See, in particular, \textit{infra} Chapter 7, section 7.2.
  \item \textsuperscript{119} On these ‘hybrid’ tribunals, S. Nouwen. "‘Hybrid Courts”: The Hybrid Category of a New Type of International Crimes Courts" (2006) 2(2) Utrecht Law Review 190-214. See also, \textit{supra} Chapter 4, section 4.2.
  \item \textsuperscript{120} See M. P. Scharf. ‘The Politics of Establishing an International Criminal Court’ (1995) 6 Duke Journal of Comparative & International Law at 169f.
\end{itemize}
those two conflict situations. On the one hand, the conflicts in the Former Yugoslavia and Rwanda were perhaps the most visible and traumatic of their time and were therefore considered to require immediate attention. In this sense, the establishment of these tribunals by the SC certainly reflected a sense of urgency.\textsuperscript{121} On the other hand, it is also believed that the failure of the international community to prevent, or stop the commission of atrocities in these conflicts has increased support among the international community for these legal instruments.\textsuperscript{122}

However, although these reasons in part explain why the situations in the Former Yugoslavia and Rwanda were chosen by the SC, the basic problem remains that this focus cannot be adequately explained from a legal perspective. This brings us back to the decision-making procedure inherent to Chapter VII UNC which, obviously, is susceptible to political abuse because the members of the SC are not required to rely on legal criteria in their deliberations. In this sense, the political nature of SC decision-making in the context of Chapter VII situations increases the likelihood that political considerations prevent the establishment of other tribunals with regard to situations where crimes of comparable scale are committed. What is more, we saw that the P-5 states have the possibility to block any decision which stands in conflict with their own national interests. From this it follows that the P-5 are likely to use their veto-power to prevent an ad hoc reaction which could put themselves or allied client states in the focus of such tribunals.\textsuperscript{123} Accordingly, the structure of the UNC contains a \textit{de facto} limitation to the extent that Chapter VII-based international ad hoc tribunals are likely to be established only with regard to situations in states which do not form part of the P-5 or are protected by them.

The same mechanism that allows the P-5 of the SC to prevent the extension of the ad hoc approach to themselves arises from the structure of the RS, as will be outlined in the chapters that follow. Article 13 (b) RS gives the SC the possibility to establish jurisdiction of the ICC over nationals of states that are not party to the RS through the referral of a situation to the Court. As is the case with regard to the establishment of the ad hoc tribunals, the SC may only become active under Article

\textsuperscript{121} As Karl Zemanek has noted with regard to the establishment of the ICTY: ‘[I]t is evident that the urgency of the situation excluded the use of a multilateral convention for the establishment of the tribunal and militated in favour of a more expedient procedure’ (Zemanek, \textit{supra} note 109, at 637).
\textsuperscript{122} For the ICTY, see ibid., at 637.
\textsuperscript{123} See Scharf, \textit{supra} note 120, at 170.
13 (b) RS in case it is acting under Chapter VII of the Charter.\textsuperscript{124} Although the referral power of the SC is designed to broaden the reach of the ICC, it \textit{de facto} implies that no situations affecting the P-5 or allied states will be referred to the Court under Article 13 (b) RS, because of the P-5 states’ right to veto such a referral decision.\textsuperscript{125} However, an important difference between the establishment of ad hoc tribunals and the powers of the SC in the context of the ICC is that the SC, in the latter case, is not limited by any resource or feasibility considerations. Article 16 RS, in addition, provides the SC with the power to defer an ICC investigation or prosecution for a (renewable) period of twelve months.\textsuperscript{126} In contrast to Article 13 (b) RS, this provision is explicitly designed to curtail the jurisdictional scope of the ICC in case the SC feels itself competent to deal with a Chapter VII situation instead of the ICC. Again, it will be shown in Chapter 8 that this provision is likely to be invoked when members of the P-5 or allied states are at risk of being prosecuted by the ICC.\textsuperscript{127}

Given the low probability that the SC will establish further ad hoc tribunals in the future and considering the focus of the present study on the ICC, the present section will not further deal with the ‘selectivity-claim’ in the context of the ICTY and ICTR. Rather, the arguments advanced in the chapters on Articles 13 (b) and 16 RS, on the nature and consequences of the involvement of the SC within the system of the ICC, apply, \textit{mutatis mutandis}, in the context of the SC’s discretion under Chapter VII UNC (not) to establish ad hoc international criminal tribunals.

6.3. Conclusion

Justice is universal, but the right to administer it is earned on the basis of having shown oneself to be, not the neutral, but the just party or the party of the just party. […] Justice may be a matter for the angels, above all things and looking down, but the administration of justice is an earthly mission that partakes as much of partiality as impartiality.\textsuperscript{128}

This statement is taken from the Kenneth Anderson’s contribution ‘The Rise of International Criminal Law: Intended and Unintended Consequences’. It addresses the problem that the notion of universality and the resulting quest to apply the law on

\textsuperscript{124} See \textit{infra} Chapter 7, section 7.3.
\textsuperscript{125} See, in particular, \textit{infra} Chapter 7, section 7.6.2.
\textsuperscript{126} See \textit{infra} Chapter 8, section 8.3.
\textsuperscript{127} See \textit{infra} Chapter 8, section 8.6.
a universal basis should be considered in isolation from the right to administer (universal) justice. The right to administer justice in the aforementioned cases related to the political and legal structures which crystallised after the Second World War. At that time, the Allied Powers not only monopolised the making of international law in the context of the International Military Tribunals immediately after the war. Rather, they similarly ensured that any subsequent decision which relates to a threat to international peace and security has to be taken by the very same states that already decided on the establishment of the Military Tribunals.  

With the creation of the SC, so to say, the Allied Powers have established a legal framework which internalises their preferences in the long run. The structural dimension of the system of the P-5 of the SC is thus comparable to colonial and neo-colonial relationships in that it consolidates the status quo of a few powerful states vis-à-vis other non-powerful states. The structural power of these states is characterised by the fact that their power does not, in the first place, correspond to the balance of power these days; rather, it transcends the historical and temporal context on whose basis it was established. Moreover, the competence of the SC under Chapter VII is such that the Council may intervene in Chapter VII situations worldwide and is not bound by geographical constraints. The Chapter VII structures established after the Second World War thus differ from pure relational aspects of power between states in that they are permanent and not subject to constant change. Accordingly, the structural power of the P-5 exists independently from external factors. The exercise of structural power and the extension thereof on the basis of patronal relationships serves the production of traditional inequalities because the power-exercising states prevent that their interests are negatively affected by decisions of the Council.

Having concluded in Chapters 4 and 5 that the universal character of the underlying values legitimates third states or the ICC to overrule the sovereignty of states in specific situations, the present chapter has explained that the non-extension of these universal values is illegitimate in circumstances where it is linked to the exercise of structural power. In this sense, legal neo-colonialism in the field of ICL is defined in negative terms in that the exercise of structural power defeats the principle that perpetrators of international crimes, irrespective of their nationality, are held accountable. The previously discussed ICTY and ICTR are an expression of the structural inequalities inherent in the system of the UN, as the SC has conferred upon

\[129\] See supra section 6.2.3.1.
itself the power to establish ad hoc tribunals as a reaction to atrocities in only two specific situations. However, the establishment of the ICC and a number of hybrid tribunals, both of which serve as surrogates for SC-based ad hoc reactions, indicate that the SC was aware that the ad hoc approach could by no means satisfy the ambition to provide a comprehensive strategy in the fight against impunity. What is more, analysing the issue of selectivity, it is relevant that the ICTY and the ICTR were created by states which did not partake in either of the conflicts. In this sense, the argument that states keep aloof from international crimes prosecution on the basis of their structural power does not have the same relevance as in the case of the ICC. This is because the legal foundation of these courts contributes significantly to the expectations that accompany these institutions. The ICC, surely to a larger extent than the ICTY and ICTR, has raised the expectation that the Court will be independent from political constraints and serve as a universal instrument in the fight against impunity, a claim that will be placed under scrutiny in the chapters that follow.

A statement of M. Cherif Bassiouni on 18 July 1998 at the Ceremony for the Opening for Signature of the Rome Statute (RS) well illustrates these hopes:

> The world will never be the same after the establishment of the International Criminal Court. Yesterday's adoption of the Final Act of the United Nations Diplomatic Conference and today's opening of the Convention for signature marks both the end of a historical process that started after World War I as well as the beginning of a new phase in the history of international criminal justice. The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph for all peoples of the world. The ICC reminds governments that realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted. It asserts that impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated.\(^{130}\)

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Chapter 7

The Security Council Referral Power under Article 13 (b) Rome Statute

7.1. Introductory remarks

The first of the three provisions examined within the context of the RS is Article 13 (b) RS.¹ This provision confers on the SC the status of a triggering source within the jurisdiction of the ICC in addition to the prosecutor and states parties to the RS.² The decision to include a highly political element, the SC, in the triggering procedure of the Court relates to the dominant position of the SC within the system of the UNC.³ More specifically, this privilege is derived from the responsibilities of the Council in matters pertaining to international peace and security under Chapter VII UNC.⁴ While the legality of the extension of the jurisdictional powers of the ICC under Article 13 (b) RS was confirmed as a matter of international law in Chapter 5 of this study⁵, the following analysis is concerned with the question of how far this provision promotes a two-class enforcement system which allows powerful states to immunise their nationals from the jurisdiction of the ICC. The analysis, in short, focuses on two interrelated issues which are best illustrated by reference to two separate statements. The first of these statements was made by the representative of the U.S. to the SC and belongs to the context of the non-referral of the situation in Syria to the ICC. The second statement stems from the representative of the Sudan who comments on the referral of the situation in Darfur to the ICC.

On the one hand, as is widely known, a draft resolution on the referral of the situation in Syria to the ICC was put to the vote in the SC on 22 May 2014. The adoption of the resolution failed as Russia and China used their right to veto.⁶ The U.S. commented on the vote in the following terms: ‘Sadly, because of the decision of the Russian Federation to back the Syrian regime no matter what it does, the Syrian

¹ Article 13 (b) RS provides that the Court can exercise jurisdiction if ‘[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations’.
² See infra section 7.2.
³ Article 24 (1) UNC.
⁴ See supra Chapter 5, section 5.2.3.2.
⁵ See ‘Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution’ (Press Release, 22 May 2014) UN Doc SC/11407.
people will not see justice today. They will see crime but not punishment.\textsuperscript{7} This statement illustrates the first predicament of Article 13 (b) RS. Although the provision is by nature designed to extend the jurisdiction of the ICC to situations which otherwise would not fall within the jurisdiction of the Court, the option of the P-5 to veto referral decisions, as the above statement illustrates, at the same time appears to limit the possible jurisdictional scope of the referral power under Article 13 (b) RS. The following analysis, therefore, assesses to what extent Article 13 (b) RS establishes a \textit{de facto} immunity of nationals of the P-5 and allied non-party states to the RS, which emanates from the privileged position of the P-5 states within the system of the UNC.

On the other hand, when the situation in the Darfur region was referred to the ICC in 2005, the Sudanese delegate to the SC cynically commented: 'To the claim made by some that this resolution sends a message to all the parties that no one will now enjoy impunity, I would add — in order to avoid hypocrisy — "\textit{Except if he belongs to a certain category of States}".\textsuperscript{8} The Sudanese representative, by claiming that certain categories of states are treated differently from others under Article 13 (b) RS, explicitly refers to Paragraph 6 of resolution 1593 which deals with the exemption of ‘nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute’ from the jurisdiction of the ICC.\textsuperscript{9} This provision, as will become clear in the later analysis, was included by the SC to prevent the ICC from exercising jurisdiction over nationals of non-party states that contribute personnel to UN missions in the Darfur conflict. A similar provision was later included in resolution 1970, which referred the situation in Libya to the ICC in 2011.\textsuperscript{10} However, the fact that a situation in a non-party state was referred to the ICC, while at the same time nationals from other non-parties were excluded from the jurisdiction of the Court, obviously raises the question of the precise scope of the powers of the SC under Article 13 (b) RS. In other words, is the SC allowed to include in referral resolutions personal \textit{de jure} immunities for nationals of some non-party states while others remain subject to the jurisdiction of the Court?

In methodological terms, the present author has adopted a three-tiered structure comprising historical, legal and analytical elements to approach the above outlined

\begin{footnotesize}
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\item[7] SC Verbatim Record (22 May 2014) UN Doc S/PV/7180 at 4 (emphasis added).
\item[8] SC Verbatim Record (31 March 2005) UN Doc S/PV/5158 at 12 (emphasis added).
\item[10] See infra section 7.5.
\end{footnotes}
\end{footnotesize}
contradictions in relation to Article 13 (b) RS. In a first step, the historical assessment of Article 13 (b) RS unveils the evolutionary background of the provision. In analysing the negotiation process of Article 13 (b) RS, the present author is specifically interested in how the opinions of the single participating states developed with respect to the provision during the negotiations. The reason for this examination is to find out whether the controversies relating to the SC referral power under Article 13 (b) RS were already apparent during the negotiations of the Statute, or if they are merely linked to the subsequent judicial practice of the SC and the ICC. Second, the provision will be interpreted and its scope of application will be defined both in abstract and practical terms. In a final section, the findings will be incorporated with the understanding of legal neo-colonialism gained in previous chapters, in order to identify whether Article 13 (b) RS is formally fostering a neo-colonialist dimension.

7.2. Drafting process of Article 13 (b) RS

7.2.1. Early considerations on the role of the Security Council by the International Law Commission

After early initiatives to establish a permanent international criminal tribunal did not bear fruit due to the unwillingness of states to curtail their sovereign powers, the possibility of creating an international criminal court resurfaced in the nineteen-eighties. In a first step, the International Law Commission (ILC)\textsuperscript{11} was requested by the General Assembly of the United Nations (GA) in 1981 ‘to resume its work with view to elaborating the draft Code of Offences against the Peace and Security of Mankind’\textsuperscript{12}. Against the background of rising challenges in the fields of illicit drug trafficking and international terrorism at a transnational level the GA, in the years 1989-1993, specifically charged the ILC with the task of considering the establishment of an international criminal court\textsuperscript{13} and of elaborating a draft text for a permanent criminal tribunal\textsuperscript{14}.

\textsuperscript{11} The ILC is a body which was formally established by the GA of the UN in 1947 ‘for the purpose of encouraging the progressive development of international law and its codification’ (GA Res 174 (II) (21 November 1947)).


\textsuperscript{14} See GA Res 47/33 (25 November 1992) UN Doc A/RES/47/33 para.6; and GA Res 48/31 (9 December 1993) UN Doc A/RES/48/31. The work of the ICL on the establishment of a permanent international criminal court is well documented in the annual reports of the ILC since 1990 (ILC. ‘Report of the International Law Commission on the Work of its 42nd Session’ (1 May- 20 July 1990)).
Already during these initial ILC discussions on the establishment of a permanent international criminal court, it was discussed whether not only states parties but also an organ of the United Nations, i.e. the GA or the SC, should, in one form or another, be included in the triggering procedure of the court to be established.\textsuperscript{15} However, given that the tribunal was from the outset designed to deal only with ‘the most serious crimes of concern to the international community’\textsuperscript{16}, it was clear that the future court would primarily exercise jurisdiction over crimes committed in situations falling within the competence of the SC.\textsuperscript{17} As a consequence, the option to grant the GA such power was soon discarded.

The initial deliberations on the role of the SC within the system of a permanent criminal court were primarily limited to the crime of aggression and the determination of such an act.\textsuperscript{18} This understanding was derived from the (exclusive) competence of the SC under Article 39 UNC to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’. Notwithstanding the fact that this prerogative is widely accepted otherwise, the role of the SC in the context of an international criminal tribunal raised much controversy and concerns about a double standard materialised, as is evidenced by an ILC statement in the year 1991:

\begin{quote}

[\text{G}]ranting the Council the possibility of blocking criminal proceedings might create a basic inequality between persons accused of the crime of aggression, and that would be contrary to the principle of all being equal before the criminal law. […] It would be shocking if, because a State had the right of veto, its leaders, or those of a
\end{quote}


\textsuperscript{17} See also, H. Olásolo, The Triggering Procedure of the International Criminal Court (Martinus Nijhoff, 2005) at 172.

State which it protected, were to be treated differently from the leaders of another smaller, or more isolated, State.\textsuperscript{19}

The successful implementation of the ICTY and ICTR, in 1993 and 1994 respectively, generally reinforced the conviction of many stakeholders that the SC needed to be given a certain degree of influence with respect to the initiation of criminal proceedings before an international criminal court.\textsuperscript{20} At the same time, the prominent role of the SC in the establishment of these institutions has shown that the maintenance of international peace and the issue of international criminal justice are not mutually exclusive domains. As was already pointed out in the previous chapter, thus, with the establishment of these tribunals the SC has set a precedent for its later referral power under Article 13 (b) RS.

In sum, initial deliberations on the role of the SC reveal a broad consensus that the SC, at least with regard to the crime of aggression, should be given some measure of control vis-à-vis the future court. However, it is at the same time evident that any influence of the SC within the system of an international criminal court was from the outset loaded with scepticism due to a presumed conflation of judicial and political elements.

7.2.2. ILC Draft Statute

In 1994, the ILC submitted a Draft Statute for an International Criminal Court.\textsuperscript{21} The draft text envisaged in the relevant provision a tripartite role of the SC:

Article 23 (Action by the Security Council)

1. Notwithstanding article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the

\textsuperscript{21} See ILC Draft Statute, supra note 16, at 20-73.
peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.\(^22\)

Paragraph 1 of Article 23 is the forerunner of Article 13 (b) RS. It was included to '[allow] the Security Council to initiate recourse to the court by dispensing with the requirement of the acceptance by a State of the court's jurisdiction'.\(^23\) Again, it was emphasised by the Commission 'that such a provision was necessary in order to enable the Council to make use of the court, as an alternative to establishing ad hoc tribunals and as a response to crimes which affront the conscience of mankind'.\(^24\) With regard to the forthcoming analysis of Article 13 (b) RS, it is in particular relevant that the ILC, in describing the scope of the SC referral power, referred to the term 'matter' instead of 'case'. As the ILC noted in its commentary to Article 23 (1):

> The Commission understood that the Security Council would not normally refer to the court a 'case' in the sense of an allegation against named individuals. Article 23, paragraph 1, envisages that the Council would refer to the court a 'matter', that is to say, a situation to which Chapter VII of the Charter applies.\(^25\)

In order to review the ILC proposal, an ‘Ad Hoc Committee’ was established by the GA in December 1994.\(^26\) Although many of the delegations of the Ad Hoc Committee were positive about the role of the SC within the scope of Article 23 (1) of the ILC Draft Statute, some expressed serious misgivings that the involvement of the SC

would reduce the credibility and moral authority of the court; excessively limit its role; undermine its independence, impartiality and autonomy; introduce an inappropriate political influence over the functioning of the institution; confer additional powers on the Security Council that were not provided for in the Charter; and enable the permanent members of the Security Council to exercise a veto with respect to the work of the court.\(^27\)

Paragraph 2 of Article 23 ILC Draft Statute conferred to the SC the competence to determine whether or not an act of aggression was committed by a state. The prior determination that a state has engaged in an act of aggression was considered a necessary prerequisite to establishing jurisdiction of the Court over individual cases.

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\(^22\) Ibid., at 43f. (emphasis added).
\(^23\) Ibid., at 44.
\(^24\) Ibid., at 44.
\(^25\) Ibid., at 44.
in the context of this crime.\textsuperscript{28} Paragraph 2 can be seen as the forerunner of Article 15bis (6) RS, which was included in the RS following the Kampala Review Conference in June 2010.\textsuperscript{29}

Paragraph 3 of Article 23 ILC Draft Statute, in addition, devised that any Chapter VII situation would only fall within the jurisdiction of the Court when the SC has given effect to this end. This provision was from the outset considered with great scepticism as such ruling would grant the SC a\textit{ carte blanche} to prevent proceedings before the international criminal court.\textsuperscript{30} Article 23 (3) formed the basis for the Article 16 RS compromise which allows the SC to defer proceedings before the ICC under certain circumstances.\textsuperscript{31} While Article 23 (3) ILC Draft Statute and its derivative will be dealt with more in depth in the following chapter, the present division exclusively focuses on the referral power of the SC under Article 23 (1) Draft Statute, the equivalent provision of Article 13 (b) RS.

7.2.3. The Preparatory Committee on the Establishment of an International Criminal Court

The Ad Hoc Committee, again, was replaced in late 1995 by the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) which was entrusted with preparing ‘a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries’.\textsuperscript{32} Between 25 March 1996 and 9 May 1998, the PrepCom convened in six official sessions and various informal inter-sessional and preparatory meetings to reconcile the different understandings on the future court and to elaborate a draft proposal for the negotiations to come in Rome in 1998.\textsuperscript{33} In

\begin{itemize}
\item \textsuperscript{28} ILC Draft Statute,\textit{ supra} note 16, at 44.
\item \textsuperscript{29} Article 15bis (6) RS: ‘Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents’.
\item \textsuperscript{30} See ILC Draft Statute,\textit{ supra} note 16, at 45.
\item \textsuperscript{31} See infra Chapter 8, section 8.2.1.
\item \textsuperscript{32} GA Res 50/46 (11 December 1995) UN Doc A/RES/50/46 para.2. Resolutions dealing with the interim reports of the PrepCom were issued by the General Assembly between 1996 and 1998 (see GA Res 51/207 (17 December 1996) UN Doc A/RES/51/207; and GA Res 52/160 (15 December 1997) UN Doc A/RES/52/160).
\end{itemize}
composition, the PrepCom was a hybrid between various state and non-state actors. Besides the state delegations, which comprised a combination of legal personnel, diplomats, politicians, experts and civil servants, an important role was also played by the UN Secretariat and a number of NGOs. This mixture of participants with different institutional backgrounds proved favourable to successfully accomplishing a viable and constructive draft statute compromise. The fact that the recently established ad hoc ICTY and ICTR were successfully implemented rendered the international community even more strongly convinced of the need for a permanent international criminal tribunal. In addition, as Fanny Benedetti and John Washburn have noted, ‘creating more and more ad hoc tribunals was clearly impractical. The Security Council did not want to do this anyway, and a majority of countries in the UN distrusted the council as an instrument of its permanent members’.

Issues surrounding the role of the SC not only permeated the initial work of the ILC since 1990 but also preoccupied the PrepCom as of its first session. However, the views on the degree of influence to be exercised by the SC on the Court continued to diverge. While some states forcefully advocated a strong and independent court with broad jurisdictional authority, others continued to consider SC influence as a necessary precondition for obviating the need to establish further ad hoc criminal tribunals. Although a number of states opposed any role of the SC within the future court, a majority advocated the retention of Article 23 (1) Draft Statute which grants the SC referral power when acting under Chapter VII UNC. While there were no significant amendments compared to Article 23 (1) ILC Draft Statute, it is noteworthy that the term ‘situation’ was included in the draft text as an alternative to the term

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34 See Benedetti and Washburn, supra note 33.
35 See ibid., at 25.
36 See ibid., at 3f.
37 Ibid., at 4.
38 The first session took place from 25 March-12 April 1996.
39 See 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March - 12 April 1996' (7 May 1996) UN Doc A/AC.249/1 at paras.147-152. The varying positions of the states involved can be retraced in the protocols of the 16th-18th meetings (see 'Role of the Security Council in Triggering Prosecution Discussed in Preparatory Committee for International Criminal Court' (4 April 1996) L/2776; 'Conflict between Security Council Powers, International Court, Discussed in Preparatory Committee' (4 April 1996) L/2777; and 'Preparatory Committee on International Criminal Court Discusses Power to be Given Prosecutor' (4 April 1996) L/2778)).
40 See 'Summary of the Proceedings of the Preparatory Committee during the Period 25 March - 12 April 1996' (7 May 1996) UN Doc A/AC.249/1 at para.149.
41 Ibid., at para.150.
42 Ibid., at paras.149-152.
'matter'. In addition, it was proposed by some delegations that the SC’s referral authority should be extended to cover Chapter VI situations as well.

However, in view of the fact that the discussion of the role of the SC not only concerned the referral power of the SC but also other (more) contested questions in relation to Article 23 (3) ILC Draft Statute, it was decided that the whole matter of SC involvement should be resolved within the framework of the planned Rome Conference. The square brackets, which are included in the relevant provision of the PrepCom Draft Statute, illustrate that no (final) agreement has yet been reached.

**Article 6 PrepCom Draft Statute**

[Exercise of jurisdiction] [Preconditions to the exercise of jurisdiction]

1. The Court [may exercise its] [shall have] jurisdiction [over a person] with respect to a crime referred to in article 5, paragraph [(a) to (e), or any combination thereof] [and in accordance with the provisions of this Statute] if:

[a] the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 10] [acting under Chapter VII of the Charter];

[…]

It was indicated at the beginning of this section that NGO’s actively participated in the work of the PrepCom. Throughout the process, they exerted significant influence on the stakeholders involved in the negotiations, making the case for a strong and independent court. The NGO coalition principally advocated that both the SC and states parties should be granted the authority to refer situations to the future court. At the same time, the coalition was also strongly in favour of granting

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43 See Article 21 (1)(a) of the consolidated draft text ('Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997' (14 August 1997) UN Doc A/AC.249/1997/L.8/Rev.1 at 3).
45 In this regard, it was decided that a proposal submitted by the U.K., in the sixth session of the PrepCom, on the trigger-mechanism would 'be included in documents to be transmitted to the Rome Conference and placed under the appropriate articles in the draft statute' (see 'Netherlands Reiterates Offer to Host Seat of International Criminal Court' (Press Release, 1 April 1998) L/2860 at 3f.).
46 PrepComDraft Statute, supra note 33, at 30.
47 Benedetti and Washburn, supra note 33, in particular at 21ff.
49 See, e.g., Amnesty International. 'The International Criminal Court: Making the Right Choices- Part I' (January 1997) at 109; Human Rights Watch. 'Commentary for the August 1997 Preparatory Committee Meeting on the Establishment of an International Criminal Court' (1 August 1997) 8; International Peace Bureau. 'International Criminal Court- A Briefing Paper Analysis of Issues and
referral power to an independent prosecutor, in order to avoid politicising the jurisdiction of the Court, contending that both the SC and states were political entities which took decisions based on political instead of legal considerations. Without an independent prosecutor – so the argument went – it was likely that the situations referred to the Court would be primarily politically motivated. The risk of a biased and unbalanced selection of situations was illustrated by analogy with the establishment of the ad hoc ICTY and ICTR. In particular, it was argued that the SC, having created these tribunals, would also have been under a duty to establish tribunals with regard to other situations of similar or comparable severity.

7.2.4. The Rome Conference

The following analysis of the negotiation process will focus on three different stages of the Rome Conference. In a first round of discussions, states were invited to share their views on the PrepCom Draft Statute in plenary meetings and meetings of the Committee of the Whole. The second stage analysed pertains to the debates which took place in the Committee of the Whole after a first draft, the so called ‘Bureau Discussion Paper’, was released on 6 July 1998. In a third step, the states were able to comment on the second draft paper issued on 10 July 1998, the ‘Bureau Proposal’.

Already in the first plenary meetings, it seemed that the question of SC referral power would be settled in a timely manner. In total, 42 countries (17 European states, seven states from the Americas and from Africa, ten states from Asia and one


This position was likewise adopted by many states. Having the SC as an exclusive triggering source was widely considered unacceptable (see Amnesty International, supra note 49, at 107ff.).

Ibid., at 109.

Ibid., at 109. On the ‘selectivity claim’ in relation to these tribunals, see supra Chapter 6, section 6.2.3.2.

‘Summary Record of the 2nd Plenary Meeting’ (15 June 1998) UN Doc A/CONF.183/SR.2, at paras.10 (Australia), 21 (Norway), 38 (U.K.), 46 (Japan), 55 (Sweden), 64 (Canada), 76 (Egypt), 84 (Republic of Korea), 90 (Slovenia); ‘Summary Record of the 3rd Plenary Meeting’ (16 June 1998) UN Doc A/CONF.183/SR.3, at paras.45 (Brazil), 53 (Lithuania), 60 (Romania), 75 (Costa Rica), 89 (Armenia); ‘Summary Record of the 4th Plenary Meeting’ (16 June 1998) UN Doc A/CONF.183/SR.4, at paras.45 (Macedonia), 54 (Sierra Leone), 57 (Namibia), 66 (Chile); ‘Summary Record of the 5th Plenary Meeting’ (17 June 1998) UN Doc A/CONF.183/SR.5, at paras.3 (Italy), 7 (United Arab Emirates), 37 (Poland), 47 (Estonia), 60 (U.S.); ‘Summary Record of the 6th Plenary Meeting’ (17 June 1998) UN Doc A/CONF.183/SR.6, at paras.5 (Belgium), 17 (Ireland), 53 (Netherlands), 69 (Luxembourg), 96 (Gabon), 102 (Argentina); ‘Summary Record of the 7th Plenary Meeting’ (18 June 1998) UN Doc A/CONF.183/SR.7, at paras.13 (Turkey), 34 (Madagascar), 38 (Switzerland), 66 (Qatar), 70 (Oman); ‘Summary Record of the 8th Plenary Meeting’ (18 June 1998) UN Doc A/CONF.183/SR.8, at paras.4 (Denmark), 9 (Jordan), 12 (Georgia), 21 (Russia), 32 (Haiti), 47 (Bahrain), 50 (Congo), 66 (Botswana).

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state from Oceania) endorsed the referral power of the SC provided that it would be acting under Chapter VII UNC. The main argument that the SC should be able to act as a complementary triggering source related to the primary role of the SC in the maintenance of international peace and security within the system of the UN. However, it is noteworthy that many delegations, which were principally sympathetic to SC referral power, raised serious misgivings about other aspects of the envisaged relationship between the Council and the future court. Only a small number of states from Africa and Asia opposed the idea that the SC should be granted referral power within the system of an international criminal court. These states, however, were hostile to all influence of the SC on the future court. Among the most vocal opponents were Pakistan, India, Yemen, Nigeria and Libya. The position adopted by these states is most saliently reflected by a quote of the Indian representative delivered during the fourth plenary meeting:

Any pre-eminent role for the Security Council in triggering the Court’s jurisdiction constituted a violation of sovereign equality and of equality before the law because it assumed that the five veto-wielding States did not by definition commit the crimes covered by the Court’s Statute or, if they did, that they were above the law and possessed de jure impunity from prosecution. The anomaly of the composition and veto power of the Security Council could not be reproduced in an international criminal court.

The idea of SC referral authority also found strong support in the course of the following discussions in the Committee of the Whole on this item. However, it was emphasised by several delegations that the referral power of the SC should only be

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54 The countries are allocated to the regions of the world by reference to the UN statistics division (this classification is available at: http://millenniumindicators.un.org/unsd/methods/m49/m49regin.htm).
55 These issues are discussed in infra Chapter 8, section 8.2.
56 Summary Record of the 3rd Plenary Meeting, supra note 53, at paras.92f. (Pakistan); Summary Record of the 4th Plenary Meeting, supra note 53, at para.51 (India); Summary Record of the 6th Plenary Meeting, supra note 53, at paras.80f. (Libyan Arab Jamahiriya); Summary Record of the 7th Plenary Meeting, supra note 53, at para.87 (Nigeria); Summary Record of the 8th Plenary Meeting, supra note 53, at para.36 (Yemen).
57 Summary Record of the 4th Plenary Meeting, supra note 53, at para.51.
exercised with regard to entire situations, not individual cases. In addition, the proposal to extend the referral power of the SC to matters under Chapter VI was not seriously considered by the states during the negotiations and only found entry into a small number of statements. In light of this virtually unanimous agreement, the referral power of the SC with regard to Chapter VII situations was included in the Bureau Discussion Paper without square brackets and subsequently transmitted without modification to the Bureau Proposal.

Article 6 Bureau Proposal

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

[…] (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations

[…] Discussions pertaining to the role of the SC at that point of the conference no longer related to the referral mechanism but rather focused on the question of how far the SC should be given the power to defer proceedings before the Court. A last minute proposal submitted by India requesting the deletion of Article 6 (b) of the Bureau Proposal on 15 July 1998 did not bear fruit. Article 6 (b) Bureau Proposal was included verbatim in the RS under Article 13 (b).

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59 Committee of the Whole, Summary Record of the 7th Meeting, supra note 58, at para.68 (Sweden); Committee of the Whole, Summary Record of the 8th Meeting, supra note 58, at paras.11 (Spain), 26 (Slovakia); Committee of the Whole, Summary Record of the 9th Meeting, supra note 58, at paras.34 (Egypt), 54 (Senegal); Committee of the Whole, Summary Record of the 10th Meeting, supra note 58, at para.60 (Norway); Committee of the Whole, Summary Record of the 11th Meeting, supra note 58, at para.2 (Trinidad and Tobago).

60 See Committee of the Whole, Summary Record of the 9th Meeting, supra note 58, at para.113 (Israel); Committee of the Whole, Summary Record of the 10th Meeting, supra note 58, at paras.78 (Chile), 87 (Brazil); Committee of the Whole, Summary Record of the 11th Meeting, supra note 58, at para.5 (United Arab Emirates).


63 See infra Chapter 8, section 8.2.3.

7.2.5. Concluding remarks

What are the implications of this analysis of the negotiation history of Article 13 (b) RS for the present study? First of all, the almost unanimous agreement on this matter shows that the vast majority of the negotiating states were willing to accept that the RS, also in case of non-ratification, can be extended to situations in their own countries. In this sense, Article 13 (b) RS is destined to broaden the jurisdiction of the ICC so as to include situations in non-party states to the RS where the Court would not otherwise have jurisdiction. The willingness of the negotiating states to accept, in principle, the authority of the ICC even in case of non-ratification at the same time mirrors the states’ acceptance of the subject-matter jurisdiction of the ICC consisting of the crimes of genocide, war crimes, crimes against humanity and aggression. 65

While the broad support for Article 13 (b) RS during the negotiations is relevant for the legitimacy of extending the RS to non-party states, the acceptance of the SC as a triggering source, however, does certainly not imply the understanding that Article 13 (b) RS shall serve as political tool of a number of states to promote a two-class enforcement system. Rather, many states seem to have recognised such a risk in the context of the power of the SC to suspend ICC investigations and prosecutions, a matter that will be discussed in the following chapter. 67

In addition, it is important to bear in mind that the SC referral power relates to the role of the SC in the context of establishing international ad hoc criminal tribunals. As such, it appears that states have considered the referral power of the SC a necessary instrument for obviating the need for (further) ad hoc international criminal tribunals. As the Chinese delegate noted, ‘it was essential that the Security Council be empowered to refer cases to the Court, since otherwise it might have to establish a succession of ad hoc tribunals in order to discharge its mandate under the Charter’. 68

In other words, not granting the SC any measure to initiate proceedings with regard to core crimes would have implied the possibility of the Council’s dealing (in parallel) with situations under the purview of the ICC. 69 This would of course have significantly undermined the legitimacy of the Court.

65 On the acceptance of these crimes by the international community, see supra Chapter 4.
66 See supra Chapter 5, section 5.2.3.2.
67 See infra Chapter 8, section 8.2.
68 Committee of the Whole, Summary Record of the 10th Meeting, supra note 58, at para.85.
69 See also, Olásolo, supra note 17, at 91.
7.3. Article 13 (b) RS analysis and interpretation

According to Article 13 (b) RS, the ICC may exercise jurisdiction where ‘[a] situation in which one or more of such crimes [crimes referred to in Article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations’.\(^70\) As indicated previously, the SC exercises referral authority in addition to states parties and the prosecutor’s powers to initiate an investigation on his own motion (propio motu powers). Thus, it is likely that the SC exercises its powers under Article 13 (b) RS in situations in which the ICC would not otherwise be competent. Accordingly, the SC will typically refer to the Court situations in which non-party states are involved and none of the requirements of Article 12 (2) RS are given. However, the SC, of course, may also refer a situation occurring on the territory of a state party to the ICC.\(^71\) To date, there are only two country situations, the Darfur situation in the Sudan and the situation in Libya, which have been referred to the ICC by the SC under Article 13 (b) RS.\(^72\) In both of these cases, a SC referral was necessary to establish ICC jurisdiction as neither Sudan, nor Libya is a party to the RS.

A SC referral under Article 13 (b) RS must conform to a number of requirements. First of all, it is important to note that the ICC may only become active in relation to crimes committed after the entry into force of the RS on 1 July 2002.\(^73\) In formal terms, the referral resolution must be based on Chapter VII UNC. In addition, the referral decision must be in written form.\(^74\) In material terms, the situation referred to the Court must be sufficiently defined and contain the reason for the activation request.\(^75\) The procedure between the SC and the Court in the case of a referral is ruled in Article 17 (1) of the Relationship Agreement between the ICC and the UN:\(^76\)

When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to article 13, paragraph (b), of

\(^70\) Emphasis added.
\(^73\) Article 24 (1) RS.
\(^75\) See Olásolo, *supra* note 17, at 92.
\(^76\) Relationship Agreement, *supra* note 74.
the Statute, a situation in which one or more of the crimes referred to in article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure and Evidence. Such information shall be transmitted through the Secretary-General.

Through the referral of a situation to the Court, the SC obtains procedural status as a party to the proceedings within the ICC.\textsuperscript{77} This entails, among other things, that the SC is kept informed on the status of the proceedings by the OTP\textsuperscript{78} and that it may challenge the prosecutor’s decision before the ICC Pre-Trial Chamber (PTC)\textsuperscript{79}.

7.3.1. Acting under Chapter VII UN Charter

The reference to Chapter VII of the UNC obviously occupies a prominent position within the provision of Article 13 (b) RS. The centrality of the Chapter VII powers of the SC in the context of the ICC, as we saw above, already became evident during the early negotiation process of the provision. The monopoly position of the SC in the context of promoting and maintaining international peace and security thus served as a pretext for claiming a leading role within the system of the Court during the negotiations. Accordingly, the Ad Hoc Committee conceded that the role envisaged for the SC in Article 23 (1) ILC Draft Statute is ‘consistent with its primary responsibility for the maintenance of international peace and security and its existing powers under the Charter as reflected in recent practice’.\textsuperscript{80}

The prerequisite that the SC must be ‘acting under Chapter VII of the UNC’ in order to refer a situation to the Court implies that a referral may only come into question where a conflict situation amounts to a ‘threat to the peace, breach of the peace, or act of aggression’.\textsuperscript{81} Although it must be clear that the resolution is adopted under Chapter VII of the Charter, an explicit reference to Article 39 or Chapter VII is not required.\textsuperscript{82} However, as Nico Krisch notes, ‘where no other clear indications for

\textsuperscript{77} Olásolo, supra note 17, at 91f.
\textsuperscript{78} Articles 53 (2) RS and 105 (1) and 106 (1) RPE.
\textsuperscript{79} Articles 53 (3)(a) RS and 107 RPE.
\textsuperscript{80} GA. ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (1995) UN Doc A/50/22 at para.120.
\textsuperscript{81} Article 39 UNC.
Chapter VII action are present, resolutions should be interpreted narrowly and should not be regarded as providing for enforcement action. Following from the requirement that an Article 13 (b) referral must be issued under Chapter VII of the UN Charter, it can be derived that the referral of a situation by the SC to the Court is a measure under Article 41 UNC. Under this provision, the SC has the discretion to decide what 'measure short of the use of force it deems useful for the maintenance of international peace and security as long as it remains within the general framework of Chapter VII powers and corresponds with the Council’s primary police function.

7.3.2. Situation

Both states parties and the SC, under Articles 13 (a) and 13 (b) RS, are conferred the right to refer a ‘situation’ to the prosecutor in case one or more crimes under the statute appear to have been committed. It was mentioned previously that the ILC Draft Statute contained the term ‘matter’ instead of ‘situation’. However, the commentary to this draft text reveals that the notions ‘matter’ and ‘situation’ were basically understood as synonyms and that ‘matter’ was interpreted as ‘a situation to which Chapter VII of the Charter applies’. In the subsequent draft of the PrepCom, we saw that both terms were included in square brackets as alternative options.

There are no indications available in the minutes of the Rome Conference why the term ‘situation’ was finally chosen over the term ‘matter’. However, the Committee of the Whole eventually decided to include the former in the final draft text. Above all, the historical interpretation of Article 13 (b) RS suggests that the use of the notions ‘situation’ and ‘matter’ was meant to prevent that single cases can be referred to the Court by either of the triggering authorities.

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83 Ibid., at para.47.
84 Article 41 UNC reads as follows: ‘The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.’
86 ILC Draft Statute, supra note 16, at 44.
87 PrepCom Draft Statute, supra note 33, Article 6 (at 30).
88 See Schabas, supra note 71, at 297f.
90 See Committee of the Whole, Summary Record of the 7th Meeting, supra note 58, at paras.68 (Sweden); Committee of the Whole, Summary Record of the 8th Meeting, supra note 58, at paras.11 (Spain), 26 (Slovakia); Committee of the Whole, Summary Record of the 9th Meeting, supra note 58,
In line with this historical understanding of the term ‘situation’, commentators have expressed the conviction that the notion ‘situation’ should be only defined in geographical and temporal terms and not include reference to individual cases. This interpretation not only excludes that single cases are referred to the ICC by the SC or states parties; rather, it likewise prevents a classification alongside personal characteristics such as nationality of the perpetrator or victim. In a similar vein, Antonio Marchesi notes with regard to state party referrals that a state cannot limit the referral to include crimes committed by one side to a conflict in a situation [...] or restrict the nationality of those who can be investigated and prosecuted. [...] The prosecutor must be free to investigate all persons who may be responsible for crimes within the court’s jurisdiction in a situation.

Daniel Nsereko has approached the situation issue in a more general way stating that a referral ‘may include a "situation”, or a whole set of circumstances, such as war or other untoward episode, in which one or more of the crimes within the Court’s jurisdiction might have been committed’. The understanding that the notion ‘situation’ should not be limited in personal terms also corresponds with the legal mandate established in the context of the ICTY and the self-referrals to the ICC by the Democratic Republic of Congo at paras.34 (Egypt), 54 (Senegal); Committee of the Whole, Summary Record of the 10th Meeting, supra note 58, at para.60 (Norway); Committee of the Whole, Summary Record of the 11th Meeting, supra note 58, at para.2 (Trinidad and Tobago). In a similar vein, GA, ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (1995) UN Doc A/50/22 at para.120; and V. Gowlland-Debbas, ‘The Relationship between the Security Council and the Projected International Criminal Court’ (1998) 3 Journal of Armed Conflict Law at 102f.


92 See Cryer, supra note 91, at 212; and Kirsch and D. Robinson, supra note 91, at 625.


95 Article 1 of the ICTY Statute defines the jurisdiction of the ICTY in the following terms: ‘The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.’
(DRC)\textsuperscript{96}, the Central African Republic (CAR)\textsuperscript{97}, and Mali\textsuperscript{98}, all of which contain a limitation in geographical and temporal terms only. In addition, it remains to be noticed that recent practice of the OTP in the context of the self-referral of the Ugandan government also suggests that a referral may not be limited in personal terms, since this would limit the OTP in its power to deal with a situation comprehensively. As such, the OTP did not accept that the Northern Uganda referral, as was suggested by the Ugandan government, is limited in personal terms to elements of the Lord’s Resistance Army (LRA).\textsuperscript{99} Rather, the prosecutor explicitly ruled that ‘the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict involving the LRA’.\textsuperscript{100}

A more open interpretation of the term ‘situation’ was initially suggested by the ICC PTC in the context of the country situation in the DRC:

Situations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation such.

Thus, the PTC has broadened the scope of the definition to include, at least in some instances, personal parameters. Such a personal limitation was already implemented in the context of the ICTR, which only provided for the prosecution of Rwandan nationals.\textsuperscript{102} However, in October 2011 the PTC, in the case The Prosecutor v. Callixte Mbarushimana, seems to have revised this position noting that

\begin{itemize}
\item \textsuperscript{96} 'Prosecutor receives referral of situation in the Democratic Republic of Congo' (Press Release, 19 April 2004) ICC-OTP-20040419.
\item \textsuperscript{97} 'Prosecutor receives referral concerning Central African Republic' (Press Release, 7 January 2005) ICC-OTP-20050107.
\item \textsuperscript{99} 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' (Press Release, 29 January 2004) ICC-20040129.
\item \textsuperscript{100} Situation in Uganda (ICC-02/04-01/05), Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005 para.5 (emphasis added).
\item \textsuperscript{101} Situation in the Democratic Republic of the Congo (ICC-01/04), Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006 para.65 (emphasis added).
\item \textsuperscript{102} Article 7 ICTR Statute: ‘The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by
a State Party may only refer to the Prosecutor an entire situation [...]. A referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons or crimes committed before or after a given date; as long as crimes are committed within the context of the situation of crisis that triggered the jurisdiction of the Court, investigations and prosecutions can be initiated. [...] The boundaries of the Court's jurisdiction can only be delimited by the situation of crisis itself.\textsuperscript{103}

With this clarification, the PTC distanced itself from its previous stance by adopting the position that the notion 'situation' should in no case be defined alongside personal parameters.

Another indication that the notion 'situation' should not be defined in personal terms relates to the contextual understanding of the RS. As such, Article 16 RS, using the term 'prosecution', is designed to give the SC the option to prevent or suspend the prosecution of single cases.\textsuperscript{104} As opposed to Article 13 (b) RS, both the historical and literal interpretation of this provision explicitly allow the deferral of individual cases under this provision, as will become clear in the discussing to follow in Chapter 8.\textsuperscript{105}

Unsurprisingly, a broad understanding of the powers of the SC under Article 13 (b) RS is adopted by the U.S. As David Scheffer notes:

The power of the Security Council to refer situations enables the Council to shape the ICC's jurisdiction in any particular situation provided sufficient support is found in the Council to refer the situation under a Chapter VII resolution. This means that if the Council seizes the opportunity, particularly in a situation that has already engaged the Council as a threat to international peace and security, to refer a situation to the ICC, \textit{then such referral can be tailored to minimize the exposure to ICC jurisdiction of military forces deployed to confront the threat. The Chapter VII resolution would define the parameters of the Court's investigations in the particular situation}. The Security Council also could use the power of referral to insulate domestic amnesty arrangements from the reach of the ICC \textit{by specifying in a Rwandan citizens}. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994'.

\textsuperscript{102} The Prosecutor v. Callixte Mbarushimana (ICC-01/04-01/10), Decision on the "Defence Challenge to the Jurisdiction of the Court", 26 October 2011 para.27 (emphasis added).

\textsuperscript{104} Article 16 RS reads as follows: 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'. On Article 16 RS, infra Chapter 8.

\textsuperscript{105} See ibid., section 8.3.2.
referral, for example, that those individuals who have received or will receive amnesty in accordance with domestic procedures fall outside the scope of the referral. This may be particularly relevant for amnesties of low and mid-level personnel who normally would be of little interest to an ICC Prosecutor anyway. This statement reveals the position that the SC has the power to define the referral also in personal terms ‘to minimize the exposure to ICC jurisdiction of military forces’ or to exclude from the referral ‘those individuals who have received or will receive amnesty in accordance with domestic procedures’.

However, as will be outlined in more detail in the following section, it is in the end the Court that decides on the scope of Article 13 (b) RS. In other words, with the release of the referral the SC accepts that ICC investigations and prosecutions take place in accordance with the RS. Accordingly, a referral may not bind the OTP in a manner that disregards the terms of the Statute and that limits the powers of the OTP under Article 53 RS. This requirement, after all, is consistent with the concept of integrity of international treaties which bars the SC from amending international treaties.

It can be summarised that both the OTP and the PTC have ruled that a referral, from states parties or the SC, cannot limit the jurisdiction of the ICC in personal terms. The preceding discussion has shown that this understanding of the limits of the powers of the SC under Article 13 (b) RS is supported by the historical and contextual interpretation of this provision. Article 13 (b) RS, therewith, provides for a limitation ratione personae of the structural power of the SC in that it is not allowed to pick and choose which non-party nationals are exempted from the jurisdiction of the Court in case of an Article 13 (b) RS referral.

7.3.3 Legal review of Security Council referral decisions by the ICC

In general terms, before the ICC exercises jurisdiction with respect to a situation or a specific case, it must satisfy itself that the exercise of jurisdiction is in conformity with

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107 Article 1 RS reads as follows: ‘The jurisdiction and functioning of the court shall be governed by the provisions of this Statute’.
108 See Sarooshi, supra note 91, at 98; Cryer, supra note 91, at 213f.; and Schabas, supra note 71, at 299.
110 See also, infra section 7.6.3.
the terms of the RS.\textsuperscript{111} Article 19 (1) RS accordingly rules: ‘The Court shall satisfy itself that it has jurisdiction in any case brought before it’. Article 21 (1)(a) RS adds that the Court shall apply ‘in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence’.\textsuperscript{112} Broadly speaking, this power of the Court is a necessary prerequisite for its proper functioning. With respect to a referral of the SC to the ICC, the Court, prior to launching an investigation and initiating proceedings, must therefore satisfy itself that the SC referral is in conformity with the aforementioned formal and material requirements under Article 13 (b) RS.\textsuperscript{113} With regard to the situation requirement, as a consequence, the OTP is allowed to investigate a situation comprehensively and is not bound by any imposed limitation \textit{ratione personae}.

While the ICC is allowed, in principle, to assess whether the referral complies with the terms of Article 13 (b) RS, the requirement that the SC referral must be issued ‘acting under Chapter VII of the Charter of the United Nations’ deserves some further attention. As we saw in the previous analysis on Article 13 (b) RS, the Court is allowed to satisfy itself that the deferral resolution has been formally adopted under Chapter VII UNC.\textsuperscript{114} However, it is important to understand that this (formal) review competence is not tantamount to the competence to assess the material scope of Article 39 UNC. This distinction is important in so far as the Court is not qualified to review ‘the bases for the UNSC coming to a Chapter VII referral decision or the grounds for referring a situation to the Court’.\textsuperscript{115} In other words, the ICC is not empowered to scrutinise the SC Chapter VII determination in substance. The position that Chapter VII determinations are not suitable for legal review finds widespread support among international lawyers.\textsuperscript{116} Dapo Akande, for example, states:

\begin{itemize}
\item \textsuperscript{111} See Articles 1, 19 (1) and 21 (1)(a) RS.
\item \textsuperscript{112} In a similar vein, \textit{The Prosecutor v. Omar Hassan Ahmad Al Bashir} (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 at para.45.
\item \textsuperscript{114} Ibid., at 320.
\item \textsuperscript{115} Ibid., at 322.
\end{itemize}
This view that Article 39 determinations of the Security Council are final and non-reviewable is one which is perfectly acceptable. The Charter gives the discretion to determine whether there is a threat to the peace or a breach of the peace—a political question—to the Security Council: a political body. These questions are not properly suited to determination by a judicial body as there no clear legal standards as to what constitutes a threat to the peace or a breach of the peace.117

Peter Malanczuk adds that granting a Court such power 'would mean that the Court would have to substitute the Council’s political judgement by a political judgment of its own for which it is not qualified'.118 A similar view was taken by the ICTR Trial Chamber in The Prosecutor v. Kanyabashi: ‘[S]uch discretionary assessments are not justiciable since they involve the consideration of a number of social, political and circumstantial factors’.119 It follows from these considerations that it lies in the very nature of Chapter VII determinations that the SC enjoys considerable discretion in determining whether a situation amounts to a threat to the peace, breach of peace or act of aggression.120 This interpretation is equally supported by the negotiation history of the RS, from the outset of which the ‘need to recognize the prerogatives of the Security Council in terms of the maintenance of international peace and security as these interact with the role of the Court’ was emphasised.121

However, where a SC referral is open-ended in temporal terms, ‘the end date of the situation could be deemed to be attained when the conditions for Chapter VII are no longer present’.122 In such a situation, according to William Schabas, ‘it would be for judges of the Court to determine when there is no longer such a threat to the peace, breach of the peace, or act of aggression’.123 What remains to be noted is that the question whether a Chapter VII situation is indeed at hand is not relevant for the prosecutor in determining whether or not to initiate an investigation. Rather, as was

opposite view is taken by L. Condorelli and S. Villalpando who note that ‘the Court shall determine whether the Security Council had the power to invoke Chapter VII and thus whether it has preliminarily determined the existence of a threat to peace, a breach of the peace, or an act of aggression as provided for in Article 39’ (L. Condorelli and S. Villalpando, ‘Referral and Deferral by the Security Council’ in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds), The Rome Statute of the International Criminal Court: A Commentary (Vol.I, Oxford University Press, 2002) at 641).

117 Akande, supra note 116, at 338.
118 Malanczuk, supra note 116, at 98.
120 See Krisch, supra note 82, at 1275, para.4.; and The Prosecutor v. Dusko Tadic, supra note 85, para.32.
121 Schabas, supra note 71, at 333.
122 Ibid., at 298.
123 Ibid., at 298f.
indicated in the previous chapter, the OTP is in any case obliged to satisfy itself that there is 'a reasonable basis' to proceed with an investigation.\textsuperscript{124}

In analysing the justiciability of Chapter VII determinations, Akande makes a distinction between Chapter VII determinations of a threat to the peace or a breach to peace on the one hand, and the crime of aggression on the other. He argues that the determination of the existence of a crime of aggression is not merely political in character, as aggression constitutes a fundamental violation of international law.\textsuperscript{125} In a similar vein, the ICTY Appeals Chamber has noted in \textit{The Tadic Case}: 'While the "act of aggression" is more amenable to a legal determination, the "threat to peace" is more of a political concept'.\textsuperscript{126} However, in view of the fact that the crime of aggression will certainly not become operational before 2017, the present section will not further elaborate on the question whether the nature of a SC decision with regard to the crime of aggression would authorise the ICC to review such decisions.

Following from the conclusion that the ICC is not allowed to assess Chapter VII determinations in substance, it equally can be derived that the Court is not qualified to assess the appropriateness and effectiveness of the measures taken by the SC under Article 41 UNC.\textsuperscript{127} Similarly to Chapter VII determinations, the decision what measures are taken as a response is exclusively left to the SC as ‘this choice involves political evaluation of highly complex and dynamic situations’.\textsuperscript{128} Whether or not a referral of a situation to the Court is an appropriate measure to maintain or restore international peace and security is thus not subject to legal review by the ICC.

We can conclude from the above discussion that the SC is largely left on its own to decide whether a situation amounts to a threat to peace under Article 39 UNC and what response should be taken under Article 41 UNC. As we shall see in the further course of this study, this is exactly where so-called ‘illegitimate criteria’, such as national interests of P-5 states and/or patronal protection of friendly client states from ICC prosecution, may come into play.\textsuperscript{129} In addition, lacking substantive review

\begin{footnotesize}
\textsuperscript{124} Articles 15 (3) and 18 (1) RS and Articles 29 and 30 Regulations of the Office of the Prosecutor (Entry into Force 23 April 2009, ICC-BD/05-01-09). See also, supra Chapter 6, section 6.1.4.
\textsuperscript{125} Akande, supra note 116, at 339. In a similar vein, Gowlland-Debbas, supra note 90, at 105ff.
\textsuperscript{126} \textit{The Prosecutor v. Dusko Tadic}, supra note 85, at para.29.
\textsuperscript{127} See Condorelli and Villalpando, supra note 116, at 641f.
\textsuperscript{128} \textit{The Prosecutor v. Dusko Tadic}, supra note 85, at para.39.
\textsuperscript{129} See \textit{infra} section 7.6.2.
\end{footnotesize}
power, the ICC is even bound to referrals in situations where no threat to the peace is existent.\textsuperscript{130}

Even though the SC should not exceed its competences under the RS, conflicts on the interpretation of the jurisdictional limitations of the RS may in the future pose a serious challenge to the relationship between the Council and the ICC. This is because SC referrals which are incompatible with the terms of the RS may leave states parties in a situation where they are confronted with conflicting obligations between the SC and the Court. Any incompatibility in this regard may require the consultation of Article 103 UNC: ‘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.’\textsuperscript{131} However, by taking into account Article 103 UNC in the case of a conflict of law, one needs to bear in mind that this provision only implies an obligation of states to give priority to SC decisions as opposed to obligations arising under the RS.\textsuperscript{132} The ICC, in contrast, being an international person under international law, is not a member of the UNC and thus not bound by this provision.\textsuperscript{133} As a consequence, the ICC is under no obligation to give effect to SC decisions which are not in conformity with the terms of the RS.\textsuperscript{134}

7.4. Application of Article 13 (b) RS in the context of the conflict in Darfur

7.4.1. Introductory remarks

Having thus far interpreted the provision of Article 13 (b) RS in abstract terms, focus is now placed on the referral resolutions issued by the SC in the context of the conflict situations in the Sudan and Libya. Put in a different way, this section provides the reader with an understanding how the Security Council has interpreted its powers under Article 13 (b) RS in these situations. Combined with the previously gained understanding on the scope of Article 13 (b) RS and the thereon based review competence of the ICC, the following section will give some indication whether and, if

\textsuperscript{130} See infra Chapter 8, sections 8.4.2.1. and 8.6.3.
\textsuperscript{131} Russia, during the 29th meeting of the Committee of the Whole at the Rome Conference, expressed the belief that the Charter would prevail in such circumstances (‘Committee of the Whole, Summary Record of the 29th Meeting’ (9 July 1998) UN Doc A/CONF.183/C.1/SR.29para.116).
\textsuperscript{134} See Cryer, supra note 91, at 213f.
so, how the SC (mis-)uses its referral powers under Article 13 (b) RS to impose a *ratione personae* limitation on the ICC. This assessment belongs to the previously discussed basket of *'de jure immunity'*. In order to better understand the merits of referral resolutions 1593 (Sudan) and 1970 (Libya), a brief introduction of the respective conflict situations is provided prior to the legal assessments.

7.4.2. The conflict situation in Darfur: background information

With resolution 1593, the SC referred 'the situation in Darfur' to the prosecutor of the ICC on 31 March 2005.\(^{135}\) As becomes clear from this formulation, resolution 1593 limits the geographical scope of the referral to the Darfur region in the Western part of the Sudan.\(^{136}\) The Darfur crisis received a great measure of international attention when two Darfuri rebel groups, the Sudan Liberation Army and the Justice and Equality Movement, launched attacks in the central region of Darfur during peace negotiations in the North-South conflict between the Khartoum-based Arab government and the Sudan People's Liberation Army/Movement in February 2003.\(^{137}\) In response to these attacks, government forces, together with pro-government Arab tribal militias (first called *Murahilin*, now *Janjaweed*)\(^{138}\), launched a wide-ranging counterinsurgency campaign in the years 2003/4 which turned the Darfur region into a regional conflagration, with multiple parties on both sides engaging in criminal behaviour.\(^{139}\) A number of initiatives to broker a peaceful settlement of the conflict failed and the situation remains critical at the time of writing.\(^{140}\)

After the situation had escalated in 2003/4, the African Union, in May 2004, decided to deploy the African Union Mission in Sudan (AMIS) to monitor a previously negotiated cease-fire agreement.\(^{141}\) In the following, the international community saw

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\(^{138}\) A detailed analysis of the *Janjaweed* can be found in Flint and de Waal, *supra* note 136, at 33-71.

\(^{139}\) Ibid., at 116-150.


\(^{141}\) See Flint and de Waal, *supra* note 136, at 173ff. The AMIS was eventually integrated into the hybrid mission between the African Union and the United Nations in Darfur pursuant to SC resolution
itself under pressure to react to the escalation of the conflict between government forces and government affiliated militias on the one hand and rebel factions on the other. On 18 September 2004, the SC ordered the establishment of an International Commission of Inquiry on Darfur (ICID). The commission issued its findings in January 2005 and concluded

that the Government of the Sudan and the Janjaweed are responsible for a number of violations of international human rights and humanitarian law. Some of these violations are very likely to amount to war crimes, and given the systematic and widespread pattern of many of the violations, they would also amount to crimes against humanity. The Commission further finds that the rebel movements are responsible for violations which would amount to war crimes.

Unlike the U.S., which in September 2004 employed the term ‘genocide’ in connection with the atrocities in Darfur, the ICID concluded that the government and related militias did not fully satisfy the genocide criteria. However, the commission conceded that some individuals, including officials of the government, may have acted with genocidal intent.

The ICID not only assessed the scale and intensity of the conflict and its impact on the civilian population but also advised that the situation in Darfur be referred to the ICC. With this in mind, the ICID submitted a sealed list with alleged perpetrators to the Secretary-General. The reasons for recommending the situation for referral to the ICC were manifold. It was argued that the situation in Darfur ‘constitutes a threat to international peace and security’ and that ‘the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding

145 ICID Report, supra note 143, at para.640.
146 Ibid., at paras.640ff.
147 Ibid., at paras.647f.
148 Ibid., at para.645.
control over the State apparatus, is difficult or even impossible. The Commission, in addition, emphasised that ‘the Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur’.

Only two months after the issuance of the ICID report the SC referred the situation in Darfur, Sudan, to the ICC. The referral of the Darfur situation to the ICC was the first ever referral of the SC under Article 13 (b) RS. On 1 June 2005, the OTP decided that there was a reasonable basis to commence an investigation in accordance with Article 53 (1) RS and Article 104 of the Rules of Procedure and Evidence (RPE). Hitherto, the ICC has initiated proceedings against seven individuals in the context of the Darfur conflict. Four arrest warrants were issued against elements of the government and friendly Janjaweed militias, all of which remain at large at the time of writing. In three cases relating to members of opposition rebel groups, proceedings are pending or have been terminated.

7.4.3. Security Council resolution 1593 and Article 13 (b) RS

As indicated previously, the SC, on 31 March 2005, decided ‘to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court’. The resolution was adopted without dissenting vote by eleven in favour and four

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150 ICID Report, supra note 143, at para.572.
151 Ibid., at para.569.
153 Situation in Darfur, Sudan (ICC-02/05-2), Decision by the Prosecutor to Initiate an Investigation, 01 June 2005.
155 In The Prosecutor v. Abdallah Banda Abakaer Nourain, the opening of the trial has been vacated and another arrest warrant has been issued to ensure the defendant’s presence at trial (The Prosecutor v. Abdallah Banda Abakaer Nourain (ICC-02/05-03/09 OA 5), Judgment on the Appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s Issuance of a Warrant of Arrest, 3 March 2015). In the case The Prosecutor v. Bahar Idriss Abu Garda, the PTC decided not to confirm charges on 8 February 2010 (The Prosecutor v. Bahar Idriss Abu Garda (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010 para.232). In the case The Prosecutor v. Saleh Mohammed Jerbo Jamus, proceedings were terminated on 4 October 2013 after receiving information pointing to his death (The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09), Public Redacted Decision Terminating the Proceedings against Mr Jerbo, 4 October 2013).
abstentions.\textsuperscript{157} Although the resolution does not contain direct reference to Article 13 (b) RS, Paragraph 1, noting that the SC ‘[d]ecides to refer the situation in Darfur’\textsuperscript{158} to the Court, unveils that the resolution is a case of application of Article 13 (b) RS. While the resolution contains a number of controversial clauses, within the present analysis the focus is on the issue of whether resolution 1593 conforms to the legal requirements set forth in Article 13 (b) RS.\textsuperscript{159}

To start with, with the formal adoption of referral resolution 1593 and preambular reference that the Council is ‘[a]cting under Chapter VII of the Charter of the United Nations’\textsuperscript{160}, the formal requirements that the SC referral must be in written form and issued under Chapter VII UNC are fulfilled. At a material level, preambular Paragraph 5 determines the reason for the activation request noting ‘that the situation in Sudan continues to constitute a threat to international peace and security’. In addition, the SC, in Paragraph 1, defines both the temporal and territorial scope of the referral limiting the jurisdiction of the ICC to ‘the situation in Darfur since 1 July 2002’. Although the resolution \textit{prima facie} seems to conform to the requirements set forth in Article 13 (b) RS, it remains to examine whether Paragraph 6 of resolution 1593 was designed to limit the scope of the referral in personal terms. In this paragraph, the SC

\textit{Decides} that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court 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 established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.\textsuperscript{161}

There are two possible readings of this provision. On the one hand, as indicated above, it is possible that the SC intended to limit the scope of the referral, set in Paragraph 1, in personal terms, thereby depriving the ICC from exercising jurisdiction over ‘nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute’. Nationals of other (non-

\begin{thebibliography}{99}
\bibitem{157} The countries abstaining were Algeria, Brazil, China and the U.S. (see ‘Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court’ (Press Release, 31 March 2005) UN Doc SC/8351).
\bibitem{158} Emphasis in the original.
\bibitem{159} For a comprehensive assessment of resolution 1593, Cryer, \textit{supra} note 91; Happold, \textit{supra} note 133; and L. Condorelli and A. Ciampi. ‘Comments on the Security Council Referral of the Situation in Darfur to the ICC’ (2005) 3(3) Journal of International Criminal Justice 590-99.
\bibitem{160} Emphasis in the original.
\bibitem{161} Emphasis in the original.
\end{thebibliography}
contributing) non-party states, according to this formulation, were meant to remain subject to the jurisdiction of the Court.

On the other hand, it would also be conceivable that Paragraph 6 of resolution 1593 has to be interpreted in conjunction with preambular Paragraph 2 of the resolution which ‘recalls’ Article 16 RS. Article 16 RS provides that

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\text{[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.}
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There is some evidence to suggest that Paragraph 6 of resolution 1593 must be understood in relation to Paragraph 1 of the resolution. This understanding implies that the scope of the referral defined in Paragraph 1 is not only limited in geographical and temporal terms, but that it also contains a permanent limitation ratiocina personae. In the first place, this interpretation is supported by the fact that no direct reference to Article 16 RS is contained in Paragraph 6 of resolution 1593. In addition, the formulation used does not contain any indication that the exclusion of peacekeepers or related personnel is limited in temporal terms to a (renewable) period of twelve months, which is a precondition under Article 16 RS. Rather, the exemption is held in general terms and comprehensively and for an indefinite period of time deprives the ICC from exercising ‘jurisdiction with respect to current or former officials or personnel from a contributing State outside Sudan which is not party to the Rome Statute of the International Criminal Court’.

Despite the fact that prima facie, Paragraph 6 does not comply with the requirements of Article 16 RS, it is striking that the ratiocina personae selectivity in this Paragraph bears strong resemblance to the immunity exemptions contained in previous resolutions 1422, 1487 and 1497, of which at least the former two resolutions were examples of SC deferral power. However, in contrast to the

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162 On this possibility, see Cryer, supra note 91, at 209; and Condorelli and Ciampi, supra note 159, at 596.
163 Resolution 1593 not only affects the jurisdiction of the ICC, but also rules that other than the contributing states are excluded from exercising universal jurisdiction over these persons. Such a ruling obviously raises different problems under international law. Instead of many, Condorelli and Ciampi, supra note 159, at 596f.
167 On these resolutions, see infra Chapter 8, sections 8.4.2. and 8.4.3.
exemption in resolution 1593, resolutions 1422 and 1487 were explicitly issued under Article 16 RS and contained a temporal limitation of twelve months. Furthermore, the twelve-month exemption established in resolution 1422 was renewed in resolution 1487 in identical terms. In relation to the situation in Darfur, a renewal of the exemption of peacekeepers and related personnel, by contrast, was not issued in any of the following resolutions addressing the conflict in the Darfur region, a fact that further indicates that Paragraph 6 of resolution 1593 was not issued under Article 16 RS.

It follows from the above arguments that Paragraph 6 of resolution 1593 should not be understood in relation to Article 16 RS. Rather, preambular Paragraph 2 of resolution 1593, which merely ‘recalls’ Article 16 RS, may be considered as a simple recognition of the deferral power conferred to the SC under the RS. Thus, it is possible that this reference was included to show that the SC was principally willing to invoke this Article at a later stage of the peace negotiations in Darfur.\(^{168}\)

Besides a declaratory statement on Article 16 RS, the SC in preambular Paragraph 4 of resolution 1593 also ‘[takes] note of the existence of agreements referred to in Article 98-2 of the Rome Statute’.\(^{169}\) This reference does neither bear any relation to the rest of the resolution, as was emphasised by the representative of Denmark in the statement following the voting on the resolution:

As regards the formulation regarding the existence of the agreements referred to in article 98, paragraph 2, of the Rome Statute, Denmark would like to stress that that reference is purely factual; it is merely referring to the existence of such agreements.\(^{170}\)

To summarise the preceding discussion, it can be concluded that the pick-and-choose approach of the SC exempting certain individuals or groups of persons from the jurisdiction of the ICC is inconsistent with Article 13 (b) RS.\(^{171}\) This is because a SC referral under Article 13 (b) RS should not lead to the (permanent) limitation of the jurisdiction of the Court in personal terms.\(^{172}\) Accordingly, the SC, by exempting a

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\(^{168}\) See, in particular, infra Chapter 8, section 8.4.4.
\(^{169}\) Emphasis in the original.
\(^{170}\) SC Verbatim Record (31 March 2005) UN Doc S/PV/5158 at 6. See also, Condorelli and Ciampi, supra note 159, at 597ff.; Happold, supra note 133, at 231.
\(^{171}\) In a similar vein, Happold, supra note 133, at 231ff.; Condorelli and Ciampi, supra note 159, at 594ff.; and Cryer, supra note 91, at 210ff.
\(^{172}\) See supra section 7.3.2.
well-defined group of persons from the jurisdiction of the ICC, exceeded its referral competence under Article 13 (b) RS.

As we saw in the part on the ICC review competence\textsuperscript{173}, ‘[t]he jurisdiction and functioning of the Court shall be governed by the provisions of this Statute’\textsuperscript{174} and, as a consequence, the Court is not bound by a referral which is at odds with the provisions of the RS. This was confirmed by the PTC in \textit{The Al Bashir Case}:

\begin{quote}
[By referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole.\textsuperscript{175}
\end{quote}

However, absent any contrary manifestation by the OTP or the PTC, it seems that Paragraph 6 was considered as valid, \textit{prima facie}, under Article 13 (b) RS by the ICC authorities.\textsuperscript{176} The omission to challenge the discussed Paragraph 6 of resolution 1593 possibly relates to the fact that this \textit{ratione personae} limitation will most likely not have any practical relevance in the future with regard to the situation in Darfur. This is due to the fact that there is no credible information that crimes falling under the jurisdiction of the ICC have been committed by the entities which are exempted from the jurisdiction of the Court.\textsuperscript{177} However, as Cryer correctly points out: ‘The answer lies not in the likelihood of such charges being brought, but in the establishment of a precedent for "immunity" from the ICC’.\textsuperscript{178} This is exactly the way the U.S. interpreted this exemption-provision in the meeting of the SC after the vote on resolution 1593:

\begin{quote}
The language providing protection for the United States and other contributing States is \textit{precedent-setting}, as it clearly acknowledges the concerns of States not party to the Rome Statute and recognizes that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. \textit{We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-}
\end{quote}

\begin{footnotes}
\item[173] See \textit{supra} section 7.3.3.
\item[174] Article 1 RS.
\item[175] \textit{The Prosecutor v. Omar Hassan Ahmad Al Bashir} (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 at para.45.
\item[176] See Cryer, \textit{supra} note 91, at 214.
\item[177] See ibid., at 214.
\item[178] Ibid., at 214.
\end{footnotes}
party States should come only pursuant to a decision by the Security Council. [...] Protection from the jurisdiction of the Court should not be viewed as unusual.  

As becomes clear with this statement, the U.S. not only derives from the language adopted in resolution 1593 that the SC can interpret the notion ‘situation’ in personal terms, but at the same time considers the resolution as a precedent that the ICC shall not be able to deal with nationals of non-party states without the consent of the state of the defendants’ nationality. This, of course, is a completely unfounded assertion as the jurisdiction of the ICC over nationals of non-party states following a referral under Article 13 (b) RS should not be confused with the jurisdiction against such nationals on the basis of Article 12 (2)(a) RS.  

7.5. Application of Article 13 (b) RS in the context of the conflict in Libya

7.5.1. The conflict situation in Libya: background information

On 26 February 2011, the SC decided ‘to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court’. The referral decision was a consequence of the massive violence exercised by Gaddafi-led government forces against peaceful demonstrations in February 2011 and the national uprising that followed right after.  

The February 2011 escalation followed a relatively stable period in which the Libyan government gradually normalised its relationships with the international community after it had assumed responsibility for the 1988 ‘Lockerbie bombing’ in the year 2003. However, despite this normalisation, dissatisfaction among the Libyan population remained constantly high during this period, as the Libyan government did not meet its promise of thorough internal economic and political reforms. Within days after the violent suppression of the mid-February 2011 demonstrations, the protests spilled over to parts of Eastern Libya, where security forces were unable to

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179 SC Verbatim Record (31 March 2005) UN Doc S/PV/5158 at 3 (emphasis added).
180 See supra Chapter 5, section 5.2.3.1.
182 In preambular Paragraph 2 of resolution 1970, the SC ‘[deplored] the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government’ (emphasis in the original).
184 See ibid.; and Amnesty International: ‘The Battle for Libya’ (September 2011) at 14f.
cope with the situation.\textsuperscript{185} Massive use of firepower against the demonstrators rapidly triggered solidarity movements in other regions of the country including Tripoli, Misratah and the Nasufa Mountains.\textsuperscript{186} The uprising rapidly turned into a serious armed conflict, as anti-government elements themselves took up arms against the government machinery.\textsuperscript{187} On 2 March 2011, the opposition forces formally established the National Transitional Council which ‘declared itself to be the sole legitimate representative of the Libyan People’.\textsuperscript{188}

In response to the excessive use of firepower against the protesters and to large-scale human rights violations, the Security Council on 26 February 2011, in addition to the referral, issued a catalogue with wide-ranging measures intended to isolate the Libyan government by freezing assets and imposing both an arms embargo and a travel ban, pursuant to resolution 1970.\textsuperscript{189} Only one day prior to the release of resolution 1970, the United Nations Human Rights Council (HRC) had established the International Commission of Inquiry on Libya (ICIL) to investigate the situation.\textsuperscript{190} As fighting continued with increasing intensity, the SC, on 17 March, decided to establish a no-fly zone over Libya\textsuperscript{191}, while authorising the member states ‘to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’.\textsuperscript{192} While initial military initiatives after the issuance of resolution 1973 were conducted jointly by the U.S., the U.K. and France\textsuperscript{193}, the North Atlantic Treaty Organization (NATO) seized control over the international forces on 31 March 2011.\textsuperscript{194} By the end of August, the opposition forces, with the support of NATO, had gained control over most of the Libyan territory except for some Gaddafi strongholds.\textsuperscript{195} Following the death of Muammar Gaddafi in October 2011 and the complete victory of the opposition forces, NATO, after seven

\begin{footnotes}
\footnotetext[185]{See Vandewalle, supra note 183, at 204; Amnesty International, supra note 184, at 16.}
\footnotetext[186]{Ibid., at 16.}
\footnotetext[187]{See ibid., at 17.}
\footnotetext[188]{Ibid., at 17.}
\footnotetext[189]{S/RES/1970 (2011).}
\footnotetext[190]{HRC Res S-15/1 (25 February 2011) UN Doc A/HRC/S-15/1, at para.11}
\footnotetext[192]{Ibid., at para.4.}
\footnotetext[194]{See K. Mačák and N. Zamir. 'The Applicability of International Humanitarian Law to the Conflict in Libya' (2012) 14(4) International Community Law Review at 416f.}
\end{footnotes}
months of operations, proclaimed the end of the military mission in Libya on 31 October 2011.196

Only one week after the SC referral to the Court, the OTP formally announced to open an investigation in Libya.197 By now, the OTP has issued three Arrest Warrants in the context of the Libyan conflict. While the case file concerning Muammar Gaddafi was closed in November 2011 due to his killing, the case against Abdullah Al-Senussi was declared inadmissible in an Appeals Chamber decision on 24 July 2014.198 The third accused, Saif Al-Islam Gaddafi199, is held in custody in Libya at the time of writing.200

7.5.2. Security Council resolution 1970 and Article 13 (b) RS

Referral resolution 1970 from 26 February 2011 was adopted unanimously by the 15 members of the SC.201 Although the resolution did not contain explicit reference to Article 13 (b) RS, the wording of Paragraph 4, noting that the SC ‘[d]ecides to refer the situation in the Libyan Arab Jamahiriya’ to the ICC clearly reveals that the referral was issued under that article.202 It is striking that in contrast to the adoption of resolution 1593, which was issued roughly two years after the escalation of the conflict, the Libyan referral decision was adopted only a few days after anti-government insurgency groups took up arms in response to the violent suppression of protests by government forces. Moreover, the referral was issued even prior to the release of the report of the ICIL in early March 2011.203 However, as Carsten Stahn

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199 The admissibility of the case The Prosecutor v. Saif Al-Islam Gaddafi (ICC-01/11-01/11) was confirmed by the Appeals Chamber on 21 May 2014 (The Prosecutor v. Saif Al-Islam Gaddafi (ICC-01/11-01/11 OA 4), Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013 Entitled "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi, 21 May 2014)
201 SC Verbatim Record (26 February 2011) UN Doc S/PV/6491 at 8.
202 Emphasis in the original.
203 See Report of the ICIL, supra note 195.
has commented, ‘this quick response came at a price’.204 The five paragraphs specifying the referral are almost identical to corresponding paragraphs in resolution 1593.205 A consequence of this copy-paste approach, it does not come as a surprise, is that resolution 1970 contains the same legal shortcomings as resolution 1593.

Similarly to resolution 1593, resolution 1970 fulfils the formal requirements that the referral must be in written form and contain reference that the SC is acting under Chapter VII UNC.206 As opposed to the Sudan referral, the SC, in resolution 1970, not only refers to Chapter VII UNC but explicitly notes that the measures taken in resolution 1970 are measures under Article 41 UNC.207 In material terms, preambular Paragraph 6 contains the reason for the referral noting ‘that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity’. Paragraph 4, in addition, defines the temporal and territorial limitations of the referral, declaring that the ICC may exercise jurisdiction with respect to crimes committed in the ‘Libyan Arab Jamahiriya since 15 February 2011’. So far, the referral complies with the requirements set forth in Article 13 (b) RS.

Again, the referral resolution in Paragraph 6 contains an exemption for nationals of contributing states not party to the RS:

[N]ationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.

In contrast to the corresponding immunity provision in resolution 1593, which was issued with regard to UN and AU peacekeeping operations, Paragraph 6 of resolution 1970 must be understood against the background of the military

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205 See supra section 7.4.3.
207 Ibid.
208 Ibid., at para.6.
involvement of the West in the conflict of Libya. As Stahn has observed, ‘the ICC mandate co-existed side by side with the military enforcement mandate’.\textsuperscript{209}

As was the case in the context of the immunity exemption in resolution 1593, there is no substantial evidence that Paragraph 6 of resolution 1970 should be interpreted as an exercise of SC deferral power under Article 16 RS. Again, the reference to Article 16 RS was not included in this paragraph but only in the preamble of the resolution.\textsuperscript{210} In addition, none of the SC resolutions subsequently adopted concerning the conflict situation in Libya contains a (temporally limited) renewal of the immunity exemption of resolution 1970 which would indicate that the SC had understood Paragraph 6 as an exercise of its deferral powers under Article 16 RS. Again, thus, it appears that that preambular reference to Article 16 RS was merely included to point out the possibility that Article 16 RS could come into play at a later point in the process of building peace in Libya.\textsuperscript{211} This conclusion, as we already noted in the context of the Darfur referral, is supported by the historical, literal and systematic interpretation of Articles 13 (b) and 16 RS respectively.\textsuperscript{212}

It follows from the non-applicability of Article 16 RS that Paragraph 6 of resolution 1970 must be interpreted in relation to the scope of the ‘situation’ referred to the ICC under Paragraph 4. In other words, the SC referred to the ICC the situation in Libya minus ‘nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court’. By doing so, it (unjustifiably) limited the personal scope of the jurisdiction of the ICC because a well-defined group of persons is permanently exempted from the jurisdiction of the ICC while others remain potential subjects to ICC prosecution. In the context of the war in Libya, this is highly relevant because other non-party states (than Libya) actively participated in the conflict alongside the opposition forces. This raises several problems because the exemption in Paragraph 6 of resolution 1970 creates immunity from ICC prosecution for some of the conflicting parties. In contrast to the situation in the Sudan, where the OTP remained silent on this issue, however, the prosecutor emphasised with respect to the situation in Libya that

\textsuperscript{209} Stahn, supra note 204, at 326.
\textsuperscript{212} See, in particular, infra Chapter 8, section 8.4.4.
[t]here are allegations of crimes committed by NATO forces, allegations of crimes committed by NTC-related forces, including the alleged detention of civilians suspected to be mercenaries and the alleged killing of detained combatants, as well as allegations of additional crimes committed by pro-Gaddafi forces. These allegations will be examined impartially and independently by the Office.213

With this statement, the OTP clarified that merely belonging to a ‘[s]tate outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court’214 does not suffice to be exempted from the jurisdiction of the ICC. In other words, the OTP, noting that ‘these allegations will be examined impartially and independently by the Office’, implicitly challenges the (personal) scope of the referral in that it does not consider itself bound by Paragraph 6 of resolution 1970. However, although for other reasons than in the context of the Darfur referral, it is unlikely that NATO elements will be held accountable for their conduct in the conflict in Libya. Notably, it is conceivable that the SC will defer (possible) ICC proceedings against nationals of non-party states which have participated in an operation authorised by the SC under Article 16 RS.215 Nevertheless, this manifestation of the Prosecutor sets a precedent that the SC may not impose limitations ratione personae upon the Court when referring a situation to the prosecutor under Article 13 (b) RS. This is the first time that the OTP has clarified that such an over-inclusive interpretation of the term ‘situation’ on the part of the SC is not in line with Article 13 (b) RS.216

7.6. Article 13 (b) RS and legal neo-colonialism

7.6.1. Introductory remarks

Thus far, the present chapter aimed at comprehensively analysing Article 13 (b) RS. Besides a legal analysis of the provision, including an assessment of the referral practice of the SC under Article 13 (b) RS, the drafting history of the provision was explored in order to understand the historical context of the norm. The analysis will

215 On Article 16 RS, see infra Chapter 8.
216 However, the prosecutor, we recall, had already clarified the scope of the term ‘situation’ in the context of the (self-referred) situation in Uganda, where it announced that investigations and prosecutions by the ICC might go beyond elements of the LRA (see Situation in Uganda (ICC-02/04-01/05), Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, 2 December 2005 para.5).
now be complemented by incorporating Article 13 (b) RS into the previously elaborated understanding of neo-colonialism. The complexities inherent to Article 13 (b) RS, as was indicated in the introductory section to this chapter, suggest approaching this task in a twofold manner.

In a first step, the focus is placed on the issue whether Article 13 (b) RS, in abstract terms, creates a two-class enforcement system due to the fact that the P-5 states, through their power of veto, are able to prevent the referral of a situation in their own or a friendly country to the ICC under Article 13 (b) RS. In other words, it is assessed whether Article 13 (b) RS internalises an unjustified *de facto* immunity for nationals of certain non-party states from ICC prosecution, while others continue to be exposed to the risk of being referred to the Court by the Council. The label ‘*de facto* immunity’, thus, insinuates that although it is theoretically possible that a referral takes place with regard to P-5 or allied states, the structure of Article 13 (b) RS virtually rules out the possibility that this will ever happen. While this assessment in the first place focuses on the superior position of the P-5 within the system of the UNC and the system of Article 13 (b) RS respectively, it is also relevant how far this power can be extended to other states on the basis of patron-client relationships.

In a second step, emphasis is placed on the scope of the provision and the extent to which the SC is allowed to act. Although we already know that Article 13 (b) RS in principle does not allow the SC to define a referral in personal terms, the Council has included in both hitherto issued referral resolutions an exemption for nationals of contributing non-party states. As opposed to *de facto* immunity, the concept of *de jure* immunity refers to the manipulation of the Court after a referral has been issued. In other words, the SC seeks to immunise certain categories of nationals on the basis of a legal instrument (referral resolution) and impose a limitation on the legal process of the ICC. Can such *de jure* immunity exemptions from the jurisdiction of the ICC be seen as an exercise of legal neo-colonialism?

In terms of methodology, a two-tier structure is used to assess whether Article 13 (b) RS can be used for the (re-)production of neo-colonial inequalities. First, it is essential to assess how the above mentioned *de facto* and *de jure* immunities relate to the exercise of structural power. Second, it must be examined whether the (non-)application of Article 13 (b) RS gives rise to claim an unjustified, neo-colonialist asymmetry in the enforcement regime of the ICC.
7.6.2. *De facto* immunities under Article 13 (b) RS

7.6.2.1. The structure of Article 13 (b) RS

The above discussion on how the RS was negotiated revealed that the referral power of the SC is deeply rooted in the history of the Court. The prominent position of the SC – and the P-5 in particular – in the negotiations of the RS, we saw, is based on the central position this body occupies within the system of maintenance of international peace and security under Chapter VII UNC.\(^{217}\) In view of the fact that a permanent international criminal tribunal from the outset was designed to deal only with the most serious crimes of international concern\(^{218}\), the involvement of the SC, in one form or another, was thus virtually inevitable. The position of the members of the SC in the negotiations was further strengthened by the decision of the SC to establish the ad hoc tribunals in the context of the conflicts in the Former Yugoslavia and Rwanda, in 1993 and 1994 respectively, as a measure not involving the use of armed force under Article 41 UNC.\(^{219}\) The SC, by interpreting its powers under Chapter VII in this way, has accentuated the mutual character of the concepts of international peace and security on the one hand and international criminal justice on the other. At the same time, with establishing these instruments, the Council set a precedent for its referral competence under Article 13 (b) RS. Although the ad hoc approach has been criticised as an exercise of selective justice of the members of the P-5\(^{220}\), it should be accounted for that it was simply not practicable to respond to all other situations involving a threat to, or breach of international peace at that time in a similar vein.\(^{221}\) In the context of the ICC, in contrast, the power of the SC to refer situations to the Court is not limited by such practical constrains.\(^{222}\) Rather, the only task of the SC vis-à-vis the ICC under Article 13 (b) RS consists in authorising the

\(^{217}\) Article 24 UNC. See also, *supra* section 7.2.

\(^{218}\) See *supra* Chapter 4, section 4.4.

\(^{219}\) See *The Prosecutor v. Dusko Tadic*, *supra* note 85, at para.36. See also, *supra* section 7.2.


\(^{221}\) See *supra* Chapter 6, section 6.2.3.2.

\(^{222}\) This was similarly emphasised by the SC in referral resolutions 1593 and 1970: ‘[N]one 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 and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily’ (S/RES/1593 (2005), at para.7; S/RES/1970 (2011), at para.8). For a discussion of the legality of this provision, Cryer, *supra* note 91, at 206ff.
ICC to become active with regard to Chapter VII situations.\textsuperscript{223} This is highly relevant because the Council’s decision to refer situations is not governed by resource or other feasibility considerations. In the absence of such limiting conditions, accordingly, the exercise of referral power under Article 13 (b) RS can be analysed in purely abstract terms.

Following from the structure of Chapter VII UNC, we saw that the exercise of Article 13 (b) RS is a measure not involving the use of armed force under Article 41 UNC. This provision, similarly to Article 39 UNC, leaves wide discretion to the SC in deciding what response should be taken against a threat to international peace and security. However, when analysing the referral practice of the SC, it is eye-catching that the Council has justified its referral decisions in terms of the nature and gravity of criminal conduct, an approach that is also guiding the OTP’s considerations with regard to situations and cases before the ICC.\textsuperscript{224} In the context of the situation in Darfur, the SC ‘[took] note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur’.\textsuperscript{225} In the context of the Libya referral, the SC explained the legal merits of the referral decision in the resolution itself by

\begin{quote}
[deploring] the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government, […] Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.\textsuperscript{226}
\end{quote}

However, despite the fact that the SC justified these referral decisions in such a way, we learned that the Council is under no legal obligation to respond in a similar way to other situations in which crimes of comparable severity are committed, a fact that recently became evident in the context of the situation in Syria, which is discussed in more detail further below.

\textsuperscript{223} It was indicated previously that although Article 13 (b) RS in principle also allows the SC to become active with regard to situations in states parties to the RS, it is more likely that it will only refer Chapter VII situations in non-party states to the ICC (see supra Chapter 5, section 5.2.2.).
\textsuperscript{224} See supra Chapter 6, section 6.1.4.
\textsuperscript{225} S/RES/1593 (2005), at preambular para.1 (emphasis in the original). On the findings of the Commission of Inquiry, supra section 7.4.3.
\textsuperscript{226} S/RES/1970 (2011), at preambular paras.2,6 (emphasis in the original).
In respect to both situations, Libya and Sudan, the jurisdiction of the ICC was extended to situations in non-party states which would otherwise not have been dealt with by the Court due to a lack of competence. In these cases, structural power was collectively exercised by the 15 members of the SC to enlarge the scope of the ICC over nationals of states that have not accepted the RS. The requirement that the SC must take an affirmative vote reduces the structural power of the P-5 states in that non-permanent members of the SC are similarly of importance when it comes to deciding whether a situation is referred to the ICC by the Council.²²⁷ In sum, the requirement of collective action diminishes the probability that the SC exercises its referral powers because, in addition to the concurring votes of the P-5, a total of nine members have to vote in favour of a referral resolution under Article 13 (b) RS.²²⁸ Be that as it may, it was outlined previously that the mere exercise of structural power under Article 13 (b) RS is not illegitimate in the sense of the present study because perpetrators of universally condemned international crimes are brought to judicial review.²²⁹ In other words, the application of Article 13 (b) RS implies that crimes of international concern do not go unpunished, an ambition that can be found in the preamble of the RS, as well as in various AU decisions on the principle of universal jurisdiction and the ICC, or in the Constitutive Act of the AU.²³⁰

In order to be considered neo-colonial, it is required, in addition to the exercise of structural power, that the power exercised serves the production of unjustified inequalities.²³¹ In the context of the application of universal core crimes an unjustified asymmetry is established when a) the law is not applied even-handedly to all perpetrators and b) the non-application in a specific case is the outcome of the structural power that mighty states can wield in order to protect themselves and their clients. This leads us to the ‘de facto immunity claim’.

The structure of Article 13 (b) RS technically also has a limiting effect on the jurisdiction of the ICC because it de facto implies immunity of the veto-wielding states of the SC, three of which – Russia, China and the U.S – are not party to the RS. In other words, even if the SC was to consider the possibility of referring a situation in

²²⁷ See Article 23 UNC.
²²⁸ See Article 27 (3) UNC. On the exercise of collective structural power see also, infra Chapter 8, section 8.6.2.
²²⁹ See supra Chapter 5, section 5.2.3.2.
²³⁰ See supra Chapter 4, section 4.4.
²³¹ See supra Chapter 2, section 2.2., supra Chapter 3, section 3.3.2. and supra Chapter 6, section 6.1.4.
one of the P-5 states to the ICC, any of these states would have the power to block such a decision. The right to veto, we recall, relates to the privileged position of these states within the system of the UNC which dates back to the Second World War and which is based on the division between the victors and the losers of this war. As a consequence of this privilege, it is virtually inconceivable that a referral decision with regard to one of these states will be taken by the SC without the outright opposition of the affected veto-wielding state. In the context of the non-application of Article 13 (b) RS, the structural power exercised thus relates to the capability of the aforementioned non-party states to prevent the extension of the RS to themselves merely due to their status as a P-5 member of the SC. The fact that these states are practically immune from ICC prosecution on the basis of Article 13 (b) RS serves the production of an *ab initio* inequality because other states, such as Libya or Sudan, are not vested with such power to prevent a referral decision.

In the hypothetical case that the SC puts to the vote a referral to the ICC under Article 13 (b) RS in the context of the U.S., China, or Russia, the exercise of veto by these states, however, will typically not be taken on the basis of gravity considerations, as was the case in the situations in the Sudan and Libya. Rather, it is likely that these states would oppose a referral on the basis of their right to veto, to prevent ICC interference into their sovereignty. This presumption is corroborated by the fact that states are often reluctant to prosecute high-level officials of their own states, a fact already highlighted in the chapter on national amnesties. In this context, it is worth recalling a statement of U.S. President Obama from April 2009 on the possibility to prosecute officials of the Bush administration for widespread torture, which was already presented in the section on amnesties:

This is a time for reflection, not retribution. I respect the strong views and emotions that these issues evoke. We have been through a dark and painful chapter in our history. But at a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past.

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232 See *supra* Chapter 5, section 5.1.
Marcella David has noted in a similar vein: ‘The American track record on judging whether the actions of its military in combat settings constitute war crimes or crimes against humanity does not inspire confidence in its impartiality and fairness. American courts have demonstrated willingness to defer to military judgment on matters implicating security’ (M. David. ‘Grotius Repudiated: The American
The statement illustrates that states, in regard to their own conduct, are often more lenient in their judgment as to whether criminal prosecution is a necessary factor in dealing with their own past. In this sense, the structural power of the P-5 states which are not party to the ICC defeats the principle of equality before the law because an extension of the RS, even when crimes subject to the Statute are committed, is excluded a priori. This de facto immunity of the non-party states of the P-5 of the SC thus effectuates an unjustified asymmetry vis-à-vis other non-party states which are not vested with such power and with regard to which a referral has been issued.

7.6.2.2. The concept of patronage

Structural power not only favours those who possess a privileged position within a legal framework but similarly those who are affiliated with the privileged. This phenomenon was explained in Chapters 2 and 6 on the basis of so-called patron-client relationships. Applied in the context of Article 13 (b) RS, the main argument is that the P-5 states can exercise patronal power on the basis of their structural power and thus prevent the extension of the RS to so-called client states, even when a referral would be desirable from a legal perspective. In the context of Article 13 (b) RS, in other words, the concept of patronage extends the structural power exercised by the P-5 states to friendly client nations. This dynamic illustrates that patron-client dyads are not merely one-sided but similarly trigger positive effects for client states.

The reason that certain states enjoy protection by the P-5 states is typically not located within the legal sphere and does not relate to the scale or gravity of the crimes committed within these territories. Rather, the protection is likely to relate to economic, strategic, or geopolitical goals of the patron which are possibly considered at stake when a situation is referred to the ICC. It is thus conceivable that the referral of a situation in a client state is vetoed by a P-5 state, for instance, to prevent the ousting of friendly governments as a consequence of ICC prosecution. Due to the focus of the ICC on high-level perpetrators, it is likely that ICC prosecutions often concern government officials which are involved in state decision-making processes.


234 See supra Chapter 2, section 2.3. and supra Chapter 6, section 6.2.2.

This presumption is corroborated by the fact that the ICC, up to this point, has instituted proceedings against five current or former Head of States or Deputy Head of States. In any case, client states may only receive protection when the patron state considers the benefits of a non-referral of greater weight than potential negative consequences of such protection. As was indicated previously, although there can be situations in which legal considerations would justify a referral to the ICC under Article 13 (b) RS, the P-5 states do not run the risk of being held accountable for their decision to veto a referral to the ICC. This, we saw, is owed to the wide discretion of the SC under Article 41 UNC. In addition, the SC is under no obligation to justify its decisions in strictly legal terms.

The Syrian situation provides evidence in favour of the hypothesis that structural power may be used to extend protection from ICC prosecution to a friendly client state. As was indicated in the introductory part of this chapter, the SC put to the vote a resolution on the referral of the situation in Syria to the ICC on 22 May 2014. The draft resolution was vetoed by Russia and China, while all other members voted in favour of the draft resolution. There is little doubt that the SC considers itself competent to deal with the situation in Syria under Chapter VII of the UN. In resolution 2139, issued on 22 February 2014, the SC has even ‘[stressed] that some of these violations [violations of international humanitarian law and violations and abuses of human rights] may amount to war crimes and crimes against humanity’ and that ‘those who have committed or are otherwise responsible for such violations and abuses in Syria must be brought to justice’. Responding to the Russian and

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236 At the time of writing, the ICC has issued arrest warrants against the Sudanese President Al-Bashir (see Prosecutor v. Omar Hassan Ahmad Al Bashir, supra note 154). In addition, the ICC has instituted proceedings against the Kenyan President Kenyatta and Deputy President Ruto (see infra Chapter 8, section 8.5.3.). However, as will be shown in the following Chapter, the charges against Kenyatta were withdrawn in early 2015 (The Prosecutor v. Uhuru Muigai Kenyatta (ICC-01/09-02/11), Decision on the Withdrawal of Charges against Mr Kenyatta, 13 March 2015). In addition, the ICC had also accused Muammar Gaddafi. This case file, as we have seen, was closed in November 2011 due to his death (see supra section 7.5.1.). In the context of the Ivory Coast, the ICC has confirmed charges against the former President Laurent Gbagbo (The Prosecutor v. Laurent Gbagbo (ICC-02/11-01/11), Decision on the Confirmation of Charges, 12 June 2014).


238 See SC Draft Resolution (22 May 2014) UN Doc S/2014/348.


242 Ibid., at para.13.
Chinese use of veto power, we saw that the U.S. accused the Russian side of backing ‘the Syrian regime not matter what it does’. In the same session, the U.S. representative added:

Why should the International Criminal Court pursue accountability for the atrocities in Africa but not those in Syria, where the worst horrors of our time are being perpetrated? For those who have asked the Security Council that very reasonable question, today they have their answer — the Russian and Chinese vetoes.

In other words, the gravity of crimes in the context of Syria, which was previously acknowledged by the Council in resolution 2139, is irrelevant to the decision of Russia and China not to refer the situation to the ICC. However, while an overview over the (possible) motives of Russia and China in opposing this referral decision can be found elsewhere; here, we note that it is striking that Russia had exercised its veto power for the fourth time in a row in the context of the conflict of Syria, so as to avoid negative repercussions for the regime of President Assad. A similar vetoing-pattern, for example, can be identified in the context of resolutions on Israel, which are frequently vetoed by the U.S. What further points to the validity of the concept of patronal protection in the context of Syria is that the U.S. allegedly only endorsed the referral of the Syrian situation to the ICC under the condition that ‘Israel would be protected from any possible prosecution at the ICC related to its occupation of the Syrian Golan Heights’. The voting behaviour of these patronal powers thus indeed strongly indicates that their votes are not primarily contingent on the existence of a Chapter VII situation or the perpetration of international crimes which are subject to the RS. Rather, it appears that patronal powers veto resolutions of the SC which could have negative effects for a friendly client state.

In further consequence, it can be concluded that the passing of a referral resolution does not in the first place require the existence of a threat to peace or

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243 SC Verbatim Record (22 May 2014) UN Doc S/PV/7180 at 4.
244 Ibid., at 5.
247 See ibid.
248 I. Black. ‘Russia and China veto UN move to refer Syria to international criminal court’ The Guardian (22 May 2014) <http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court> accessed 23 June 2015. The Draft referral resolution supports this assertion in that the personal scope of the referral appears to be limited in personal terms to Syrian authorities, pro-government militias and non-State armed groups (see paras.1/2 SC Draft Resolution (22 May 2014) UN Doc S/2014/348).
security. Rather, an Article 13 (b) referral is predicated on the unanimous agreement between the P-5 and the absence of a dissenting vote by one of these states. This, obviously, adds another dimension of structural power because a minority vote defeats the majority opinion merely on the basis of a historical privilege.

The previous analysis also provides a (cynical) answer to the question raised by the U.S. representative, about why the ICC conducts prosecutions in Africa – i.e. in the Sudan and in Libya – but not in Syria: obviously this is because neither Sudan nor Libya were important enough for the P-5 states to veto a referral to the ICC under Article 13 (b) RS. Put in a different way, despite the existence of a Chapter VII situation and despite the commission of crimes subject to the RS, the SC was not able to reach a common understanding with regard to a referral to the ICC because of the protection of Syria on the basis of a patron-client dyad. While the situation in Syria is the most recent example of patronal protection in the context of the ICC, one should bear in mind that these patterns of patronage are not limited to Russia and China, but can similarly be applied, as we saw, in the context of U.S. relationships with Israel, amongst others.\(^{249}\) This presumption is supported by the previous statement which implies that the U.S. would also have vetoed a referral with regard to the situation in Syria which would have put Israeli nationals at risk of being prosecuted by the ICC.\(^ {250}\) In assessing the performance of the ICC in the first decade of activity, Richard Dicker, with regard to the use of patronal power in the context of the ICC, has provocatively commented: ‘The use of this shielding power affects the global terrain on which the I.C.C. works, scarring it with an ugly unevenness where the same law does not apply to all’.\(^ {251}\) In other words, the extension of structural power through the concept of patronage under Article 13 (b) RS means that client states of P-5 members are ‘accountability free zones’ which enjoy an ‘above the law status’.\(^ {252}\)

However, in assessing such systems of patronage, one should bear in mind that patron-client relationships are not permanent in character. Rather, as was explained in more detail in Chapter 6, patron-client relationships are dependent on a variety of


\(^{250}\) See Black, supra note 248.

\(^{251}\) Dicker, supra note 249.

\(^{252}\) See ibid.
internal and external parameters that define the patronal relationship. Accordingly, it is possible that the changing of parameters within the relationship between the patron and a client can result in a loss of the protection of the client from ICC prosecution at a later time. This in turn, could clear the way for a referral at a later stage.

7.6.2.3. *De facto* immunities under Article 13 (b) RS and legal neo-colonialism

We saw that the legal framework of the RS provides the P-5 of the SC with the power to extend the applicability of the RS to other non-party states under Article 13 (b) RS. At the same time, the structural conditions inherent in the system of the UNC, providing for veto power of the P-5, effectively prevent a referral from being issued with regard to one of the P-5 states which are not party to the RS, notably Russia, China or the U.S. In other words, the historical privilege these states possess within the world community, combined with their power as a requesting source of ICC proceedings, confers on them a status which is above the law. What is more, we saw that the structural power of these states in the context of Article 13 (b) RS can be extended to friendly client states which are not party to the RS. As a consequence, Article 13 (b) RS is likely to be invoked only against non-party states which neither form part of the P-5 nor are protected by one of these states on the basis of patron-client relationships. With the adoption of Article 13 (b) RS and the resulting influence of the SC on the triggering procedure of the ICC, an *ab initio* limitation *ratione personae* of the jurisdiction of the ICC was thus deliberately accepted within the framework of the RS. However, while the P-5 are protected permanently from being referred to the ICC under Article 13 (b) RS, we learned that the extension of the RS to client states is only opposed by one of the P-5 as long as the benefits of protecting nationals of client states outweigh the negative consequences of a non-referral. *De facto* immunity of client states which are not party to the RS therefore only exists on an *ad hoc* basis.

With the implementation of such *de facto* immunity, Article 13 (b) RS fosters an asymmetry in the enforcement regime of the ICC. This is because some non-party states are treated differently than others within the system of Article 13 (b) RS. The fact that the unequal treatment between different non-party states is based on (immutable) structural conditions within the system of the RS and the UNC

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253 See, in particular, *supra* Chapter 6, section 6.2.2.
respectively makes the underlying differentiation in treatment unjustified in the sense of the present study. Thus, the production of inequality under Article 13 (b) RS relates to the historical status of the P-5 after the Second World War. In other words, the system of Article 13 (b) RS accommodates traditional structural inequalities by granting the P-5 states the power to prevent the extension of the RS to themselves and allied nations merely on the basis of their privileged historical position and in isolation of any legal considerations. In this sense, Article 13 (b) RS de facto fosters a two-class enforcement system which promotes legal neo-colonialism through the reproduction of long-standing traditional inequalities.

7.6.3. De jure immunities under Article 13 (b) RS

7.6.3.1. The scope of Security Council referral power

In the context of referral resolutions 1593 and 1970, we saw that the SC has attempted to create de jure immunity from the jurisdiction of the ICC for nationals of some non-party states other than those targeted by the referral of the SC. With respect to the situation in Libya, we recall, Paragraph 6 of resolution 1970\textsuperscript{254} [d]ecides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State.\textsuperscript{255}

A virtually identical phrasing was used in the context of the situation in Darfur.\textsuperscript{256} In both cases, as became evident within the above analyses of SC referral resolutions 1593 and 1970, the SC aimed at limiting the scope of the referral permanently by exempting ‘nationals, current or former officials or personnel’ from a state outside of Sudan and Libya which is not party to the RS from the jurisdiction of the Court. While in the context of the Sudan the exemption was included to prevent prosecution against nationals of non-party states which were contributing to peacekeeping


\textsuperscript{255} Emphasis in the original.

\textsuperscript{256} See S/RES/1593 (2005), para.6.
operations, with respect to Libya the exemption was implied to protect non-party nationals which were engaged in the NATO mission in the Libyan conflict.\textsuperscript{257}

In view of the fact that the ICC is the sole arbiter on the jurisdiction of the Court, we saw that it remains within the competence of the Court to review whether the referral complies with the provisions of the Statute.\textsuperscript{258} The crucial point about the referral resolutions 1593 and 1970 is how the notion ‘situation’ is understood. The SC, after all, has interpreted the term ‘situation’ in a broad sense in that it considers itself competent to narrow down the jurisdiction of the ICC in personal terms. In other words, in resolutions 1593 and 1970 the SC has extended ICC jurisdiction over the situations in Libya and Sudan minus nationals of other non-party states outside of Libya and Sudan which participate in joint UN peacekeeping or military missions. The SC therewith aims at the creation of \textit{de jure} immunity of a defined group of nationals from the jurisdiction of the Court in that it imposes a limitation \textit{ratione personae} on the ICC. However, we learned that the inclusion of personal parameters is not without difficulties as such an interpretation of the notion ‘situation’ makes it possible to exclude certain nationalities \textit{permanently} from the jurisdiction of the ICC. While the U.S. has publicly conceded that they consider such a tailor-made approach lawful\textsuperscript{259}, the above assessment of this matter has clarified that the historical, literal and systematical interpretation of Article 13 (b) RS do not permit the SC to limit the jurisdiction of the ICC in personal terms.\textsuperscript{260} Both the OTP and the ICC PTC have confirmed the view that a \textit{ratione personae} limitation of the jurisdiction of the Court under Article 13 (b) RS is not envisaged in this provision.\textsuperscript{261}

7.6.3.2. The concept of patronage

In the context of \textit{de facto} immunities from ICC prosecution, we saw that the concept of patronage relates to the exercise of veto power by individual members of the P-5. Patronage, in that case, is the reflection of a particular relationship between a member of the P-5 and a client state which receives protection from ICC prosecution from the P-5 patron. In the context of the \textit{de jure} immunity exemptions established in resolutions 1593 and 1970, by contrast, the concept of patronage was included in the

\textsuperscript{257} See supra sections 7.4. and 7.5.

\textsuperscript{258} Articles 1, 19 (1) and 12 (1)(a) RS. On the review power of the Court, see, in particular, supra section 7.3.3.

\textsuperscript{259} See SC Verbatim Record (31 March 2005) UN Doc S/PV/5158 at 3.

\textsuperscript{260} See supra section 7.3.2.

\textsuperscript{261} See ibid.
referral text and is not contingent on the exercise of veto power by one of the P-5. Rather, the SC collectively decided that nationals of a defined group of non-party states shall enjoy immunity from ICC prosecution. Thus, in return for their participation in inter-state peacekeeping and military operations, resolutions 1593 and 1970 have collectively exempted ‘nationals, current or former officials or personnel’\textsuperscript{262} of contributing states not party to the RS from the jurisdiction of the Court. This type of collective patronage, as will be shown in more detail in the following chapter, is particularly relevant in the context of Article 16 RS.\textsuperscript{263} The granting of collective protection to client states is atypical inasmuch as the patron is not a single state but a collective entity.

While in the context of traditional peacekeeping operations, as is the case in Darfur, it is unlikely that the immunity exemption does have practical consequences\textsuperscript{264}, the situation in Libya is somewhat more complex, because elements of other non-party states have actively engaged in the war, under the lead of NATO.\textsuperscript{265} Obviously, this active participation in the conflict increases the likelihood that international crimes committed by (immunised) nationals go unpunished. This is the case provided that the prosecutor of the ICC does not consider the over-inclusive SC interpretation of Article 13 (b) RS regarding the term ‘situation’ inconsistent with the ICC regime. In doing so, she would accept \textit{de jure} immunity of nationals of certain states and thus exercise the powers of the ICC under the RS in an asymmetric manner. This is because in such a situation, the Court exercises jurisdiction only over nationals previously designated by the SC, even though other nationals similarly participated in the very same conflict situation. In further consequence, a defined category of non-party nationals is treated differently from those nationals with regard to whom the referral has been issued and those nationals of non-party states not participating in UN approved operations. Such a limitation \textit{ratione personae} of the Court’s jurisdiction violates the principle of equality before law, because not all of the nationalities from states not party to the RS engaging in the very same situation are treated alike before the jurisdiction of the ICC.

\textsuperscript{263} See infra Chapter 8, section 8.6.2.
\textsuperscript{264} See Cryer, \textit{supra} note 91, at 214.
\textsuperscript{265} See \textit{supra} section 7.5.1.
7.6.3.3. De jure immunities under Article 13 (b) RS and legal neo-colonialism

Following the discussion of de facto immunities, it remains to clarify whether de jure immunities established by the SC are also an exercise of legal neo-colonialism. In this regard, we saw in Chapter 6 that an asymmetric treatment of different non-party states is not necessarily tantamount to an unjustified asymmetry in the sense of the present study. This is notably because in order to subsume a practice under our notion of neo-colonialism, we require as an additional precondition that the differentiation in treatment is founded upon a structural element.

On the basis of the analyses of the historical, literal and contextual scope of Article 13 (b) RS, it has been concluded that the provision does not allow the SC to limit the jurisdiction of the ICC in personal terms and therewith establish (permanent) de jure immunity for a defined category of individuals. In case that the SC nonetheless includes a ratione personae limitation in a referral resolution, as the Council did in resolutions 1593 and 1970, we saw that the Court is not bound by such a personal limitation. The power of the Court to declare unlawful such de jure immunity exemptions thus defeats the power of the SC to limit the ratione personae jurisdiction of the ICC and to exempt nationals of some non-party states from the jurisdiction of the Court. Accordingly, Article 13 (b) RS does not empower the member states of the SC to shield their own nationals or nationals of friendly client states from the jurisdiction of the Court. In further consequence, the provision does not foster the establishment of traditional, long-standing inequalities which are related to the exercise of structural power by the SC. This holds true even in the (hypothetical) case of the Court's considering the over-inclusive ratione personae interpretation of the SC a lawful limitation of its own powers. This is because the misinterpretation of a provision of the RS by the OTP cannot be attributed to the structural power of the SC.

Chapter 8


8.1. Introductory remarks

After the assessment of Article 13 (b) RS, the following chapter focuses on the deferral regime under Article 16 RS. This provision gives the SC the power to defer ICC investigations or prosecutions for a (renewable) period of twelve months.\(^1\) Similarly to the referral power under Article 13 (b) RS, it is required that the SC acts under Chapter VII UNC when it wishes to defer ICC proceedings.\(^2\) Debates relating to the deferral mechanism under Article 16 RS are in many ways a reflection of the misgivings voiced in connection with the exercise of the referral power of the SC under Article 13 (b) RS. In both cases, the allegations imply that the provisions are applied in a manner that neglects the interests of African states. A statement made by the Rwandan representative to the SC after the failed vote on the application of Article 16 RS in the context of the situation in Kenya in November 2013, stands exemplarily for these allegations:

May I request that all members of the Council recall why article 16 of the Rome Statute was proposed, more than 10 years ago. That article was not proposed by an African State — not at all. It was proposed by some of the Western Powers present at the Council table to be applied solely in their interest. In other words, article 16 was never meant to be used by an African State or any of the developing countries. It seems to have been conceived as an additional tool for the big Powers to protect themselves and protect their own. Is that not so? That is how it appears here today.\(^3\)

As is the case with Article 13 (b) RS, the above statement suggests that the SC, in relation to Article 16 RS, establishes a two-class enforcement system which is to the sole favour of a number of (Western) states. However, despite this common background of Articles 13 (b) and 16 RS, it is necessary to treat these two provisions separately due to fundamental conceptual and structural dissimilarities. While Article 13 (b) RS provides the SC with the positive power to establish jurisdiction of the ICC

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1. Article 16 RS reads as follows: ‘No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions’.

2. On the Chapter VII requirement in the context of Article 13 (b) RS, *supra* Chapter 7, section 7.3.1.

3. SC Verbatim Record (15 November 2013) UN Doc S/PV/7060 at 11.
in situations where the Court would not be competent otherwise, Article 16 RS, by contrast, endows the SC with the negative power to temporarily terminate the jurisdiction of the ICC over a situation or case at hand.

The following analysis of Article 16 RS will specifically focus on two interrelated but distinct issues. On the one hand, the legal practice of the SC with respect to Article 16 RS is scrutinised. At the time of writing, the ICC has never been requested by the SC to terminate on-going investigations or prosecutions under Article 16 RS retroactively. However, in a number of resolutions, the Council proactively integrated a paragraph with (personal) limitations barring the ICC from commencing or proceeding with investigations and prosecutions against a well-defined category of persons. With respect to these resolutions, the extent to which the SC is allowed to establish de jure immunities which prevent the Court from exercising jurisdiction over nationals of a defined group of states is assessed. To complete the picture, it is examined whether the non-application of Article 16 RS, just as in the aforementioned case of Kenya, may be labelled an exercise of unjustified (neo-colonial) asymmetry. In this part, besides the Kenyan case, focus is placed on the SC refusal to apply Article 16 RS in the context of the proceedings against the Sudanese President Al-Bashir.

In methodological terms, similarly to the analysis of Article 13 (b) RS, the following assessment first focuses on the drafting history of Article 16 RS, in order to shed light on the historical evolution of the provision. Then, Article 16 RS is interpreted and reference to the deferral practice of the SC is made. In a final part, the findings obtained in the course of the present chapter are subsumed under the notion of legal neo-colonialism in order to find out whether Article 16 RS promotes a neo-colonial dimension.

8.2. Drafting process of Article 16 RS

8.2.1. ILC Draft Statute

As has been explained in detail in the previous chapter, the relationship between the SC and an independent and impartial court was central to the whole endeavour of conceptualising a permanent international criminal tribunal. However, we learned that initial discussions in the ILC on the role of the SC, between 1990 -1993, were rather

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4 See, in particular, infra section 8.4.
5 See infra section 8.5.
general and not itemised along the lines of the compromise later found, which envisages a twofold role of the SC under Articles 13 (b) and 16 RS. In light of the paramount position granted to the Council within the system of the UNC, we saw that the 1994 ILC Draft Statute envisaged that the SC should be given priority with regard to any matter falling within its Chapter VII competence. Article 23 (3) of the ILC Draft Statute, which is the provision that comes closest to the solution later adopted in Article 16 RS, placed the SC in a superior position to the Court and principally deprived it from exercising jurisdiction over Chapter VII situations against the will of the SC:

No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.7

What is striking about this provision is that in situations that are ‘being dealt with by the Security Council’, it remains within the competence of the Council to decide whether the Court can exercise jurisdiction over a Chapter VII situation. In other words, this structure requires positive (and collective) action on the part of the Council to furnish the ICC with jurisdiction, a requirement that implies that the veto of one of the P-5 states would suffice to prevent that a Chapter VII situation is being dealt with by the Court. This ILC proposal was received with great reluctance by the Ad Hoc Committee and opinions regarding the hierarchical order envisaged in Article 23 (3) Draft Statute deviated substantially from each other.8 Unsurprisingly, the P-5 states in particular were positive about the designed provision ‘to prevent the risk of interference in the Security Council’s fulfilment of its primary responsibility for the maintenance of international peace and security’.9 Many delegations, by contrast, were concerned that the primacy of the SC would unduly politicise the work of the Court. It was claimed that ‘the judicial functions of the court should not be subordinated to the action of a political body’10 because the Court, in this way, ‘could be prevented from performing its functions through the mere placing of an item on the

6 See supra Chapter 7, section 7.2.1.
10 Ibid., at para.125.
Council’s agenda and could remain paralysed for lengthy periods’.\textsuperscript{11} The fear that the SC would be able to paralyse the future court must be seen in relation to the jurisdictional scope of the Court, which is limited to ‘the most serious crimes that might threaten international peace and security’.\textsuperscript{12}

8.2.2. The Preparatory Committee on the Establishment of an International Criminal Court

The issue of whether the SC should be given priority over the Court with respect to any Chapter VII situation was disputed throughout the sessions of the PrepCom. At the first session, three different positions surfaced with respect to Article 23 (3) ILC Draft Statute. SC-friendly circles not only campaigned for retaining the provision but demanded that priority of the SC vis-à-vis the future court should not only include ‘Chapter VII situations, but all situations which were being dealt with by the Council’.\textsuperscript{13} Other delegations were critical of the provision, as they saw the independence of the Court at stake. Many of these states were of the opinion that it was necessary to amend the provision with safeguards, in order to prevent the SC from making unlimited use of its powers to intervene in proceedings before a permanent international criminal tribunal.\textsuperscript{14} Others opposed the provision altogether and demanded deletion. Otherwise, so the argument went, the Court would be excluded from exercising jurisdiction in any situation where the SC considered itself competent under Chapter VII of the Charter to deal with a situation, irrespective of whether the SC had indeed taken any effective action.\textsuperscript{15} A rapprochement between these diverging positions came at the fourth session of the PrepCom. Singapore submitted a proposal which suggested a reversal of the hierarchical order inherent in Article 23 (3) ILC Draft Statute. This proposal required the SC, acting under Chapter VII, to \textit{actively request} the Court to suspend, or abstain from its right to exercise jurisdiction with regard to a situation or an individual case at hand: ‘No investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations,

\textsuperscript{11} Ibid., at para.125.
\textsuperscript{12} Ibid., at para.120.
\textsuperscript{14} Ibid., at para.143.
\textsuperscript{15} Ibid., at para.142.
given a direction to that effect’. The submitted proposal generated considerable support among the states’ delegations. The Singapore compromise was then combined with two other proposals suggesting that the decision of the SC to defer proceedings should be ‘formal and specific’ and limited to a ‘period of twelve months’. Of crucial importance for the later success of the compromise proposal was the defection of the U.K. from the P-5 position that the SC should be given absolute primacy over the Court in Chapter VII matters towards the end of the PrepCom sessions. The U.K. not only expressed its support for the Singapore compromise proposal but submitted an own draft version of the provision which was included in the further Option for Article 10 of the PrepCom Draft Statute.

No investigation or prosecution may be commenced or proceeded with under this Statute [for a period of twelve months] after the Security Council [, acting under Chapter VII of the Charter of the United Nations,] has requested the Court to that effect; that request may be renewed by the Council under the same conditions. Ultimately, Article 10 of the PrepCom Draft Statute (former Article 23 (3) ILC Draft) contained three options: the above U.K. proposal, one version along the lines of the Singapore compromise and a third based on the ILC draft.

Just before the Conference, the Ministerial Meeting of the Coordinating Bureau of the Non-Aligned Movement (NAM), which also played an active role in the

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18 See W. A. Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press, 2010) at 326. A version of this revised paragraph can be found in: ‘Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997’ (14 August 1997) UN Doc A/AC.249/1997/L.8/Rev.1 at 8 (compare Option 2 Article 23 (3)).
21 ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court [hereinafter PrepComDraft Statute]’ (14 April 1998) UN Doc A/Conf.183/2/Add.1, at 39 (further option on Article 10(2)).
22 Ibid., at 35 (Article 10 (7), Option 2).
23 Ibid., at 35 (Article 10 (7), Option 1).
24 The NAM is an amalgamation of (developing) countries which is aims at promoting the interests of these states. The organisation was established in 1955 against the background of the great power politics in the post-colonial period (for more information, http://www.nam.gov.za/).
PrepCom\textsuperscript{25}, released a statement that well illustrates the concerns of developing states on the matter:

the Court should be impartial and independent, especially from political influence of any kind, including that of the UN organs, in particular the Security Council, which should not direct or hinder the functioning of the court nor assume a parallel or superior role to the Court.\textsuperscript{26}

This position unsurprisingly reveals misgivings that the future court could be unduly influenced by the SC in that it becomes a highly political instrument which is under the tutelage of a few powerful states.

The NGO coalition, along with most of the participating states during the PrepCom meetings, considered the subordination of the Court to the SC under Article 23 (3) ILC Draft Statute an unacceptable encroachment on the judicial independence of the future court and therefore supported the deletion of this provision.\textsuperscript{27} As Human Rights Watch observed:

[T]his provision reduces the ICC from an independent judicial body to a subordinate body of the Security Council and will render justice hostage to Security Council vetoes. Indeed, leaving the Court’s jurisdiction a negotiable element in any potential peace agreement brokered by the Council would inevitably diminish the Court’s stature and politicize its role.\textsuperscript{28}

In addition, it was also claimed that the provision would ‘underline the inequality between the council’s permanent and non-permanent members, as well as states members of the council and those not serving on that body’.\textsuperscript{29} Even the more moderate version of the provision along the lines of the Singapore compromise which provided the basis for the final Article 16 RS did not attract the goodwill of the coalition because ‘[e]ven a 12-month, one-time delay by the Security Council of an

\textsuperscript{28} Human Rights Watch, supra note 27, at 9.
\textsuperscript{29} Lawyers Committee for Human Rights, supra note 27, at 8.
investigation or prosecution would be contrary to the international law obligation to bring to justice those responsible for genocide, other crimes against humanity and war crimes.\(^{30}\)

### 8.2.3. Rome Conference

The following analysis of the negotiation process of Article 16 RS at Rome will be structured like the drafting history of Article 13 (b) RS above. Thus, it is assessed how the states’ opinions with respect to Article 16 RS developed during the same three negotiation stages of the Rome Conference: the negotiations prior to the release of the Bureau Discussion Paper, between the releases of the Bureau Discussion Paper and the Bureau proposal and after the issuance of the Bureau Proposal.\(^{31}\)

Already during the first plenary meetings, as we saw in the preceding chapter, it became apparent that there would be sufficient endorsement for the proposal that the SC should be given the right to refer situations to the Court.\(^{32}\) However, the issue of how far the SC should be granted the power to suspend ICC proceedings was far more contested. During the first plenary meetings, the discussions of the deferral issue and the leverage of the SC on the yet to be established court almost exclusively concentrated on a solution along the lines of the Singapore proposal.\(^{33}\)

The ILC draft proposal, by contrast, was not anymore considered as an alternative by the reporting states in these meetings.\(^{34}\) Prior to the release of the Bureau Discussion Paper, 33 states, 17 from Europe, five from the Americas and Africa, four from Asia and two from Oceania were principally sympathetic to the proposal that the SC should be given limited powers to suspend proceedings under Chapter VII UNC within the limits of the Singapore compromise.\(^{35}\) However, at that early point of the


\(^{31}\) See supra Chapter 7, section 7.2.4.

\(^{32}\) Ibid.

\(^{33}\) See Schabas, supra note 18, at 327.

\(^{34}\) Ibid., at 327.

\(^{35}\) See ‘Summary Record of the 2nd Plenary Meeting’ (15 June 1998) UN Doc A/CONF.183/SR.2, at para.55 (Sweden); ‘Summary Record of the 5th Plenary Meeting’ (17 June 1998) UN Doc A/CONF.183/SR.5, at para.52 (Republic of Moldova); ‘Summary Record of the 6th Plenary Meeting’ (17 June 1998) UN Doc A/CONF.183/SR.6, at paras.63 (New Zealand), 78 (France); ‘Summary Record of the 8th Plenary Meeting’ (18 June 1998) UN Doc A/CONF.183/SR.8, at para.39 (Belarus); ‘Committee of the Whole, Summary Record of the 10th Meeting’ (22 June 1998) UN Doc A/CONF.183/C.1/SR.10, at paras.51 (Hungary), 56 (Slovenia), 58 (Sweden), 60 (Norway), 63 (Malawi), 64 (Belgium) 65 (Jordan), 66 (Canada), 68 (Costa Rica), 70 (Germany), 73 (Kenya), 74 (Portugal), 75 (Netherlands), 81 (Czech Republic), 88 (Brazil), 90 (Egypt), 91 (New Zealand), 93
conference the understanding among these states as to the exact form of the provision still diverged. Moreover, many delegations made clear that the provision required further amendments to receive their support at a later stage of the negotiations. It is particularly noteworthy that France, being the second of the P-5 after the U.K. to express an inclination in this direction, also showed its willingness to support a solution along the lines of the Singapore proposal. Both Russia and China, by contrast, remained rather vague in their statements, generally emphasising that the future court should operate in ‘close combination with the Security Council’.

A significant number of states were rather sceptical on the envisaged scope of SC deferral power, fearing that such broad influence of the Council would undermine the independence of the Court. In total, 28 states, 11 from Africa, eight from Asia, six from Europe, two from the Americas and one from Oceania opposed the proposal to grant deferral power to the SC altogether. It is further noticeable that both the U.S. and the U.K. showed interest in a solution that the Council should not only be allowed to defer proceedings in case it was acting under Chapter VII but also in relation to other situations dealt with by the Council.

The Bureau Discussion Paper contained the same version that was proposed by the U.K. towards the end of the PrepCom (with the exception that the previously

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36 See, in particular, Summary Record of the 6th Plenary Meeting, supra note 35, at para.78.
37 Summary Record of the 8th Plenary Meeting, supra note 35, at para.22 (Russia). In a similar vein, China noted that ‘the role of the United Nations, and in particular of the Security Council’ should not be compromised (‘Summary Record of the 3rd Plenary Meeting’ (16 June 1998) UN Doc A/CONF.183/SR.3, at para.35).
38 Summary Record of the 2nd Plenary Meeting, supra note 35, at paras.16 (South Africa (whose representative was speaking on behalf of the Southern African Development Community (SADC), 72 (Lesotho); Summary Record of the 3rd Plenary Meeting, supra note 37, at paras.16 (Indonesia), 53 (Lithuania), 92 (Pakistan); ‘Summary Record of the 4th Plenary Meeting’ (16 June 1998) UN Doc A/CONF.183/SR.4, at paras.18 (Syria), 34 (Burkina Faso), 57 (Namibia), 60 (Afghanistan); Summary Record of the 5th Plenary Meeting, supra note 35, at paras.37 (Poland), 47 (Estonia); Summary Record of the 6th Plenary Meeting, supra note 35, at paras.31 (Finland), 80 (Libyan Arab Jamahiriya), 96 (Gabon); ‘Summary Record of the 7th Plenary Meeting’ (18 June 1998) UN Doc A/CONF.183/SR.7, at paras.62 (Samoa), 77 (Niger), 87 (Nigeria), 93 (Democratic Republic of Congo); Summary Record of the 8th Plenary Meeting, supra note 35, at para.36 (Yemen); Committee of the Whole, Summary Record of the 10th Meeting, supra note 35, at paras.53/4 (India), 67 (Morocco), 72 (Oman), 77 (Libyan Arab Jamahiriya), 80 (Venezuela), 82 (Nigeria), 86 (Denmark), 99 (Greece); Committee of the Whole, Summary Record of the 11th Meeting, supra note 35, at paras.1 (Senegal), 6 (Columbia), 10 (Syria), 13 (Kazakhstan), 17 (Pakistan).
39 Committee of the Whole, Summary Record of the 10th Meeting, supra note 35, at para.96 (U.K.); Committee of the Whole, Summary Record of the 11th Meeting, supra note 35, at para.16 (U.S.).
existing square brackets were removed\textsuperscript{40} and a revised version of this provision\textsuperscript{41}. The draft proposal that was based on the ILC Draft Statute was no longer included in the discussion paper released by the Bureau. Overall, 34 states, of which more than half were from Europe, indicated that they would accept a deferral power under the conditions that it would be limited to a renewable period of twelve months and subjected to the formal decision making procedure of the SC.\textsuperscript{42} 24 states, although demonstrating their willingness to compromise on this issue, urged that the provision should be further amended to receive acceptance later on.\textsuperscript{43} Most of these countries were of the opinion that the twelve-month period should be reduced or, at least, that the deferral should \textit{not} be open for renewal.\textsuperscript{44} By contrast, the Russian and the U.S. delegates considered the time limit of twelve months as an encroachment on the powers of the SC under Chapter VII of the Charter.\textsuperscript{45} Moreover, 18 states, predominantly from Asia and Africa, opposed the provision altogether and the majority of them demanded complete deletion.\textsuperscript{46}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{40} 'Committee of the Whole, Discussion Paper Bureau' (6 July 1998) UN Doc A/CONF.183/C.1/L.53, at 13 (Article 10(2) Option 1).
\item \textsuperscript{41} Ibid., at 14 (Article 10(2) Option 2).
\item \textsuperscript{42} See 'Committee of the Whole, Summary Record of the 29th Meeting' (9 July 1998) UN Doc A/CONF.183/C.1/SR.29, at paras.14 (U.K.), para.21 (France), para.36 (Japan), para.40 (Argentina), para.84 (Australia), para.89 (Netherlands), para.95 (Lichtenstein), para.110 (New Zealand), 140 (Malta), 146 (Romania), 151 (Swaziland), 160 (Jordan), 166 (Republic of Korea), 187 (Germany); 'Committee of the Whole, Summary Record of the 30th Meeting' (9 July 1998) UN Doc A/CONF.183/C.1/SR.30, at paras.10 (Sweden), 12 (Belgium), 21 (Portugal), 25 (Austria), 45 (Slovenia), 48 (Slovakia), 56 (Ireland), 66 (Ivy Coast), 69 (Greece), 86 (Brazil), 94 (Israel), 103 (Turkey), 108 (Uruguay), 126 (Thailand), 132 (Norway); 'Committee of the Whole, Summary Record of the 31st Meeting' (9 July 1998) UN Doc A/CONF.183/C.1/SR31, at paras.5 (Togo), 8 (Czech Republic), 9 (Bangladesh), 26 (Bosnia and Herzegovina), 43 (Hungary).
\item \textsuperscript{43} See Committee of the Whole, Summary Record of the 29th Meeting, supra note 42, at paras.26 (Trinidad and Tobago), 30 (Switzerland), 48 (U.S.), 63 (Sierra Leone), 73 (Azerbaijan), 80 (China), 155 (Mali), 172 (Guinea-Bissau); Committee of the Whole, Summary Record of the 30th Meeting, supra note 42, at paras.29 (Senegal), 61 (Ukraine), 73 (Benin), 88 (Egypt), 98 (Finland), 117 (Spain), 122 (Italy), 128 (Oman); Committee of the Whole, Summary Record of the 31st Meeting, supra note 42, at paras.2 (Burkina Faso), 17 (Congo), 24 (Armenia); 27 (Afghanistan), 28 (Ethiopia), 34 (Kenya), 36 (Mexico), 38 (Croatia).
\item \textsuperscript{44} See Committee of the Whole, Summary Record of the 29th Meeting, supra note 42, at paras.25 (Trinidad and Tobago), 63 (Sierra Leone), 73 (Azerbaijan); Committee of the Whole, Summary Record of the 30th Meeting, supra note 42, at para. 29 (Senegal); Committee of the Whole, Summary Record of the 31st Meeting, supra note 42, at paras.24 (Armenia), 29 (Ethiopia), 34 (Kenya).
\item \textsuperscript{45} See Committee of the Whole, Summary Record of the 29th Meeting, supra note 42, at paras.48 (U.S.), 115 (Russia).
\item \textsuperscript{46} See Committee of the Whole, Summary Record of the 29th Meeting, supra note 42, at paras.58 (Columbia), 100 (India), 105 (Gabon), 115 (Russia), 137 (Denmark), 176 (United Republic of Tanzania), 181 (Venezuela); Committee of the Whole, Summary Record of the 30th Meeting, supra note 42, at paras.16 (Jamaica), 31 (Nigeria), 35 (Libyan Arab Jamahiriya), 37 (Burundi), 77 (Algeria), 82 (Yemen); Committee of the Whole, Summary Record of the 31st Meeting, supra note 42, at paras.11 (Sri Lanka), 18 (Pakistan), 21 (Iraq), 30 (United Arab Emirates), 41 (Iran).
\end{itemize}
\end{footnotesize}
The Bureau Proposal contained two slightly divergent options. Option 1 of Article 10 was virtually identical to Article 16 RS which was finally adopted but also remarked that it was necessary to further discuss the ‘the need for preservation of evidence’. The only difference between Option 1 and the equivalent provision in the Bureau Discussion Paper was that the SC was under an obligation to issue a deferral decision in form of a resolution. Option 2, which did not gather much support during the final sessions, was couched in different terms and did not contain a temporal limitation of the deferral. While 43 countries expressed support for Option 1, 14 states still preferred further amendment or expressed their preference for Option 2, among them, the U.S., Russia and China. The same number opposed the proposal altogether, requesting deletion of the provision. Among the countries opposing any deferral power were five from Africa, four from the Americas and Asia and one from Europe. However, some of the delegations emphasised that their agreement was not, in the first place, a consequence of the provision itself, but rather based on their willingness to compromise on the whole draft package. A statement by Sivu

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48 See, e.g., 'Committee of the Whole, Summary Record of the 34th Meeting' (13 July 1998) UN Doc A/CONF.183/C.1/SR.34, at paras. 84 (Russia), 87 (Thailand).
49 'Committee of the Whole, Summary Record of the 33rd Meeting' (13 July 1998) UN Doc A/CONF.183/C.1/SR.33, at paras.16 (Austria, speaking on behalf of the European Union and its member states), 21 (Switzerland), 71 (Germany), 76 (Samoa), 82 (U.K. and Northern Ireland), 85 (Croatia); Committee of the Whole, Summary Record of the 34th Meeting, supra note 48, at paras. 7 (Sweden), 13 (Trinidad and Tobago), 24 (New Zealand), 36 (Spain), 59 (South African on behalf of the SADC), 78 (Columbia), 87 (Thailand), 91 (Brazil), 100 (Poland), 102 (Australia); 'Committee of the Whole, Summary Record of the 35th Meeting' (13 July 1998) UN Doc A/CONF.183/C.1/SR.35, at paras.9 (Sierra Leone), 11 (Greece), 21 (Burundi), 32 (Algeria), 39 (Finland), 46 (Sri Lanka), 48 (United Republic of Tanzania), 52 (Lichtenstein), 60 (Lithuania), 66 (Canada), 72 Nicaragua, 75 (Hungary), 76 (Estonia), 77 (Romania), 78 (Swaziland), 79 (Solomon Islands), 82 (Ireland), 85 (Botswana); 'Committee of the Whole, Summary Record of the 36th Meeting' (13 July 1998) UN Doc A/CONF.183/C.1/SR.36, at paras.5 (Norway), 10 (Angola), 26 (Malta), 31 (Slovenia), 37 (Costa Rica), 39 (Andorra), 40 (Bosnia and Herzegovina), 44 (Cameroon), 49 (Slovakia), 50 (Latvia).
50 Committee of the Whole, Summary Record of the 33rd Meeting, supra note 49, at paras.28 (U.S.), 42 (China), 66 (Ghana); Committee of the Whole, Summary Record of the 34th Meeting, supra note 48, at 84 (Russia), 96 (Sudan); Committee of the Whole, Summary Record of the 35th Meeting, supra note 49, at paras. 18 (Tunisia), 29 (Afghanistan), 43 (Venezuela), 58 (Philippines), 71 (Mozambique); Committee of the Whole, Summary Record of the 36th Meeting, supra note 49, at paras.16 (Congo), 17 (Chile), 21 (Oman), 23 (Peru).
51 Committee of the Whole, Summary Record of the 33rd Meeting, supra note 49, at para.30 (Syria); Committee of the Whole, Summary Record of the 34th Meeting, supra note 48, at 18 (Jamaica), 44 (Azerbaijan), 67 (Iran), 68 (Cuba); Committee of the Whole, Summary Record of the 35th Meeting, supra note 49, at paras.5 (Egypt), 7 (Lesotho), 13 (Nigeria), 36 (Indonesia), 55 (Pakistan), 64 (Iraq); Committee of the Whole, Summary Record of the 36th Meeting, supra note 49, at paras.8 (Libyan Arab Jamahiriya), 34 (Zimbabwe), 38 (Bolivia).
52 See, e.g., Committee of the Whole, Summary Record of the 33rd Meeting, supra note 49, at para.21 (Switzerland); Committee of the Whole, Summary Record of the 35th Meeting, supra note 49, at paras.43 (Venezuela); 48 (United Republic of Tanzania).
Maqungo, on the position of the Southern African Development Community (SADC) on the deferral power of the SC under Article 16 RS, exemplifies this approach:

SADC states wanted no role for the UN Security Council in the proceedings of the ICC. The only role that SADC saw for the Security Council was one of referring matters to the prosecutor’s office for investigation and prosecution. Article 16 of the ICC Statute reflects a compromise position that was reached, as states such as the United States preferred the proposal made by the ILC on the role of the Security Council, which was much more intrusive.\(^{53}\)

Other states were not strictly opposed to a deferral mechanism but refused their approval because the crime of aggression was not included in the final version of the Bureau proposal.\(^{54}\)

It remains to be noticed that Article 16 RS no longer contains any reference to the preservation of evidence; otherwise, the provision corresponds word-for-word with Option 1 of the Bureau proposal.\(^{55}\)

8.2.4. Concluding remarks

We saw that the matter as to how the SC should be granted the power to suspend investigations or prosecutions of the future court, in contrast to the previously discussed referral power, was highly disputed before and during the Rome Conference. The drafting history of Article 16 RS particularly illustrates the political environment in which the Statute was adopted. In this environment, it was impossible that every state could have expected all of its preferences to be implemented in the final solution, a fact which is underlined by the above statement on the position of the SADC in relation to the SC deferral power.\(^{56}\) Accordingly, many states compromised on a number of issues in the spirit of an acceptable overall solution. Again, we should recall that the active role of the SC in establishing the ad hoc ICTY and ICTR made apparent the overlap between international criminal justice and the domain of international peace and security, thereby certainly strengthening the power of the SC in the negotiations of the Statute. As a consequence, we can conclude that the

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\(^{54}\) See, e.g., Committee of the Whole, Summary Record of the 35th Meeting, supra note 49, at para.5 (Egypt); Committee of the Whole, Summary Record of the 36th Meeting, supra note 49, at para.34 (Zimbabwe).

\(^{55}\) See Bureau Proposal, supra note 47, at 11.

\(^{56}\) Maqungo, supra note 53, at 47.
endeavour to establish a permanent international criminal tribunal could only be realised by handing over some competences to the SC. Moreover, prior to the Rome Conference and the defection of the U.K. from the P-5 position of absolute control over ICC proceedings, it seemed that the influence of the SC on the future court would be even more pronounced.

Despite the fact that states were eventually able to find a compromise on this controversial issue, the drafting history of Article 16 RS is proof that only a minimal consensus was achieved with respect to the deferral power of the SC. Thus, in contrast to the referral power of the SC under Article 13 (b) RS, it cannot be claimed that the suspension of ICC proceedings by the SC was deeply rooted in the history of the Court. One of the consequences of this lasting disagreement is that the controversies surrounding the negotiations of Article 16 RS continue to shape discussions on this provision today. The statement of the Rwandan representative presented in the introductory part to this chapter⁵⁷ is a perfect example of the continuing relevance of these underlying controversies to Article 16 RS. Although the negotiations were not generally characterised by a North-South divide, it seems that in the context of Article 16 RS the interests of many states of the Global South were not adequately integrated, as most of these states considered such deferral power to be a threat to the independence of the future court. However, at the same time, the negotiations of Article 16 RS illustrate the efforts of the international community to curtail the hegemonic aspirations of the SC in the context of the ICC. In this sense, the inclusion of a number of safeguards into Article 16 RS is certainly a success of ‘ordinary’ states vis-à-vis the P-5 of the Security Council.

8.3. Article 16 RS analysis and interpretation

According to Article 16 RS,

[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.⁵⁸

⁵⁷ SC Verbatim Record (15 November 2013) UN Doc S/PV/7060 at 11.
⁵⁸ Emphasis added.
As we learned from the previous discussion of the legislative history, Article 16 RS was born out of a compromise balancing the states’ interests regarding the degree of SC involvement vis-à-vis a permanent international criminal tribunal. The provision, specifically, was included to avoid conflicts of competences between the ICC and the SC in matters concerning international peace and security. In contrast to Article 13 (b) RS, which reflects the inter-relationship of international peace and security and international justice, Article 16 RS illustrates the tension which may arise between the prosecution of international crimes and the primary responsibility of the SC under Chapter VII UNC.

The exercise of deferral power must conform to a number of requirements. In formal terms, the decision of the SC to defer an investigation or prosecution must be taken in form of a resolution adopted under Chapter VII UNC. The deferral must be in writing and the adoption of the resolution should take place in accordance with the voting procedure set in Article 27 UNC. In material terms, the deferral request must contain ‘the personal, temporal and territorial parameters that define the situation regarding which the Council requests the Court not to activate its dormant jurisdiction’. The interaction between the SC and the ICC in the case of a deferral is further elaborated in Article 17 (2) of the Relationship Agreement between the Court and the UN:

When the Security Council adopts under Chapter VII of the Charter a resolution requesting the Court, pursuant to article 16 of the Statute, not to commence or proceed with an investigation or prosecution, this request shall immediately be transmitted by the Secretary-General to the President of the Court and the Prosecutor. The Court shall inform the Security Council through the Secretary-General of its receipt of the above request and, as appropriate, inform the Security Council through the Secretary-General of actions, if any, taken by the Court in this regard.

In the preceding discussion of Article 13 (b) RS, it was observed that the provision is a mere request to the Court to examine whether crimes within the Statute have been committed with respect to the situation at hand. An Article 16 deferral,

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60 H. Olásolo, The Triggering Procedure of the International Criminal Court (Martinus Nijhoff, 2005) at 177.
61 See supra Chapter 7, section 7.3.
however, despite the usage of the term ‘request’, creates a legally binding obligation for the Court to suspend, or abstain from investigations and prosecutions under the condition that the deferral is in conformity with the terms of Article 16 RS.\textsuperscript{62}

8.3.1. Resolution adopted under Chapter VII UN Charter

The requirement that a request must be adopted under Chapter VII of the Charter implies that a deferral must pertain to a situation which constitutes ‘a threat to the peace, breach of the peace, or act of aggression’.\textsuperscript{63} The reference to Chapter VII must be sufficiently specified and the determination of a threat to peace and security should not be made in abstract terms.\textsuperscript{64} As we saw in the previous chapter on Article 13 (b) RS, explicit mention of Article 39 or Chapter VII UNC is not required, provided that it is otherwise clear that the resolution is based on Chapter VII.\textsuperscript{65} From the requirement that an Article 16 RS deferral must be issued under Chapter VII UNC, it can be concluded that the deferral of a situation or case by the SC is a measure not involving the use of armed force under Article 41 UNC. Under this provision, as we already learned, the SC is given a wide margin of discretion to decide the measures it deems appropriate to the maintenance of international peace and security.\textsuperscript{66}

Implicitly, the reference to Chapter VII in Article 16 RS connotes that ICC investigations or prosecutions, in one way or another, ‘undermine the Security Council’s efforts to maintain international peace and security in the situation at hand’.\textsuperscript{67} This, however, does not mean that ICC investigative or prosecutorial initiatives, in and of themselves, constitute a threat to international peace and


\textsuperscript{63} Article 39 UNC.


\textsuperscript{65} Krisch, supra note 64, at 1295, para.47.


\textsuperscript{67} Olásolo, supra note 60, at 178.
security. Rather, ‘the SC could refer to a larger factual or political background, related to the proceedings before the Court and placed in one of the categories described in Article 39’.69

8.3.2. Investigation or prosecution

As opposed to Article 13 (b) RS, which employs the term ‘situation’, Article 16 RS confers on the SC the power to prevent or suspend investigations and prosecutions. While the term ‘prosecution’ was already included in the predecessor version of Article 16 RS in the ILC Draft Statute70, the term ‘investigation’ first appeared in the Singapore compromise proposal at the fourth session of the PrepCom.71 The drafting history does not say much about the reasons why these notions were included. Instead, debates in the context of Article 16 RS primarily focused on the extent of SC influence vis-à-vis the future court in general.

However, it is striking that Article 16 RS employs a different terminology compared with Article 13 (b) RS, which declares that the SC has the power to refer ‘situations’ to the Court. The notion ‘situation’, we recall, requires the SC to define a situation in geographical and temporal terms, excluding personal parameters.72 The terminology used in Article 16 RS, to the contrary, is not limited along these parameters. Rather, the term ‘investigation’ includes the ‘totality of investigative actions undertaken by the Prosecutor under the ICC Statute’73 and therefore may be used in connection to both a situation and an individual.74 The notion ‘prosecution’, in addition, comprises ‘actions taken once charges against an individual have been confirmed in accordance with article 61 RS’75 and accordingly only refers to specific individuals.76 Investigative and prosecutorial initiatives are both under the responsibility of the

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68 Ibid., at 178. This opinion departs from what other authors have stated in this regard. As such, Morten Bergsmo and Jelena Pejić have claimed that ‘given that a Chapter VII resolution pertains to threats to peace, breaches of peace and acts of aggression, issuing such a resolution may make the Council acknowledge implicitly that ICC proceedings would be detrimental to the maintenance of international peace and security’ (M. Bergsmo and J. Pejić, ‘Article 16’ in O. Triffterer (ed), Commentary on the Rome Statute of the International Criminal Court: Observer’s Notes, Article by Article (2nd edn Beck, 2008) at 603).
69 Condorelli and Villalpando, supra note 62, at 647.
70 ILC Draft Statute, supra note 7, Article 23 (3) (at 43f.).
72 See supra Chapter 7, section 7.3.2.
73 Bergsmo and Pejić, supra note 68, at 600.
74 Ibid., at 600
75 Ibid., at 601.
76 Ibid., at 600.
and, as we already know, may be prompted by a referral of a state party or the SC to the ICC. Alternatively, the prosecutor may also commence an investigation on her own motion (proprio motu powers). The commencement of an investigation is contingent upon the prosecutor’s determination that there is a ‘reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’. However, the terms ‘investigation’ and ‘prosecution’ do not seem to extend to preliminary examinations conducted by the prosecutor which precede the investigatory stage. While early drafts of Article 16 RS only referred to the term ‘prosecution’ the inclusion of the term ‘investigation’ obviously served to cover a different stage of ICC activity, namely the investigatory phase.

It can be concluded from the above discussion that Article 16 RS offers the SC a two-tier structure to exert influence on ICC proceedings. On the one hand, the SC may defer ICC activity with respect to a situation altogether. On the other hand, the Council is also allowed to defer proceedings against individual defendants. Therefore, the SC, under Article 16 RS, may not only define the territorial and temporal parameters of a situation which is subject to a deferral under Article 16 RS, but is likewise allowed to define a deferral request in personal terms. However, we saw that a deferral of individual cases is only allowed when a specific situation warrants SC action under Chapter VII UNC. In other words, a deferral with respect to individuals must also be sufficiently defined in geographical terms. This view was confirmed by a number of delegates in a meeting of the SC prior to the adoption of resolution 1422, which is discussed in detail further below. The statement of the New Zealand representative well exemplifies these positions:

[Article 16 [...] was intended to be used on a case-by-case basis by reference to particular situations, so as to enable the Security Council to advance the interests of peace where there might be a temporary conflict between the resolution of armed conflict, on the one hand, and the prosecution of offences, on the other.]

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77 See Articles 15 and 53ff. RS.
78 Article 53 (1)(a) RS.
79 Articles 15 (1), (2) and (6) RS.
80 See Bergsmo and Pejić, supra note 68, at 601.
81 See Olásolo, supra note 60, at 177. See also, supra section 8.3.1.
82 See Olásolo, supra note 60, at 177.
83 SC Verbatim Record (10 July 2002) UN Doc S/PV/4568 at 5 (emphasis added). A similar view was adopted by a number of other states during this meeting (see ibid, at 4 (Canada), at 22 (Brazil), at 25 (Mauritius)).
8.3.3. Renewable period of 12 months

Although the period of the deferral should not exceed twelve months, the SC may decide that the period can be shorter.\(^{84}\) Is the ICC to be barred from investigations or prosecutions after this period, the SC is allowed to renew its deferral decision under the same formal and material preconditions as was the case with respect to the initial deferral. This requires that a new Chapter VII resolution, subject to a new vote, must be issued by the Council after the twelve-month period has elapsed. Otherwise, the ICC is authorised to start, or continue with investigations or prosecutions with respect to the situation or individual in question.\(^{85}\) Despite the fact that Article 16 RS, in theory, is renewable indefinitely on an annual basis, the provision is not meant to enable the SC to permanently prevent the ICC from exercising jurisdiction over a situation or case.\(^{86}\) Instead, the twelve-month period was specifically included to prevent the SC from permanently terminating the jurisdiction of the ICC with regard to specific cases.\(^{87}\) This interpretation is supported by the drafting history of the provision which showed that most of the states were critical of the renewal clause.

8.3.4. Legal review of Security Council deferral decisions by the ICC

As was indicated above with respect to Article 13 (b) RS, the ICC may only exercise jurisdiction over a specific situation or case when it has satisfied itself that the exercise of jurisdiction takes place in accordance with the provisions of RS.\(^{88}\) Therefore, the Court is allowed to assess whether the non-initiation of investigations or the temporary termination of proceedings following a SC deferral request is in compliance with the formal and material requirements set in Article 16 RS.\(^{89}\) The arguments advanced with regard to the judicial review by the ICC under Article 13 (b) RS apply, \textit{mutatis mutandis}, in the context of the present section.\(^{90}\)

As a consequence, the Court is only allowed to review that a deferral resolution was formally adopted under Chapter VII UNC.\(^{91}\) It is, by contrast, not qualified to review Chapter VII determinations in substance.\(^{92}\) On the basis of the fact that the

\(^{84}\) Bergsmo and Pejić, \textit{supra} note 68, at 603.
\(^{85}\) Ibid., at 604.
\(^{86}\) See Olásolo, \textit{supra} note 60, at 180.
\(^{87}\) See \textit{supra} section 8.2.3.
\(^{88}\) Articles 1, 19 (1) and 21 (1)(a) RS. See also, \textit{supra} Chapter 7, section 7.3.3.
\(^{89}\) See Oosthuizen, \textit{supra} note 59, at 331.
\(^{90}\) See \textit{supra} Chapter 7, section 7.3.3.
\(^{91}\) Ibid.
\(^{92}\) Ibid.
SC has a wide margin of discretion under Chapter VII with respect to the determination of a threat to the peace, it also remains within the competence of the Council to decide ‘on the course of action and evaluat[e] the appropriateness of the measures to be taken’. Accordingly, the ICC is not allowed to question whether there exists a threat to the peace and security and if the exercise of Article 16 RS is an appropriate way to cope with such a threat.

8.4. Proactive exercise of Article 16 RS

8.4.1. Introductory remarks
After having introduced the negotiation history and scope of Article 16 RS, we will now assess how the provision was dealt with by the SC in practice. As was indicated in the introductory section to this chapter, the SC, thus far, has only made use of Article 16 RS in a proactive way, meaning that the ICC was pre-emptively denied from commencing proceedings against a well-defined category of persons in the hypothetical case that crimes subject to the RS are committed by these individuals. As was the case in the context of resolutions 1593 and 1970, the proactive exemptions discussed below are concerned with the protection of peacekeeping personnel from contributing non-party states from the jurisdiction of the ICC. In order to prepare for the later assessment on the question of whether Article 16 RS allows for the exercise of legal neo-colonialism, the present section will analyse the conformity of these deferral resolutions with Article 16 RS.

8.4.2. Security Council resolutions 1422 and 1487
It took the SC only a few days after the entry into function of the ICC on 1 July 2002 to invoke Article 16 RS for the first time. On 12 July 2002, the SC adopted resolution 1422, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not Party to the RS over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting

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93 See supra section 8.3.1.
94 The Prosecutor v. Dusko Tadic, supra note 66, para.31. See also, Krisch, supra note 66, at 1311, paras.12f.
1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.96

Operative Paragraph 2 of resolution 1422, in addition, anticipated a renewal of the immunity exemption on a yearly basis.97 Resolution 1422 was adopted against the background of the pending extension of the UN peacekeeping mission in Bosnia and Herzegovina (UNMIBH). Although many states were highly critical of a blanket immunity for UN servicemen of non-party states to the RS from the jurisdiction of the ICC, resolution 1422 was adopted unanimously by the SC on 12 July 200298 after the U.S. had threatened ‘to oppose any future U.S. military participation in UN peacekeeping operations’.99 Despite this affirmative vote, a number of states expressed serious misgivings with regard to the legality of such an immunity exemption and the ‘generalized preventive usage of Article 16 RS.’100 With adoption of resolution 1487 on 12 June 2003101, the immunity exemption established in resolution 1422 was renewed for another period of twelve months with twelve votes in favour and three abstentions.102 Allegedly as a consequence of the serious allegations concerning the misuse of prisoners in Iraq and Guantanamo, the U.S. was no longer able to gather sufficient support among the SC members for another extension of the peacekeeper-immunity in June 2004.103

Resolution 1422 was obviously aimed at limiting the jurisdiction of the ICC with regard to peacekeeping personnel of contributing non-party states in situations where international crimes are committed in the context of operations established by the UN on the territory of a state party or against a national of such a state.104 The deferral

96 Ibid. at para. 1 (emphasis in the original).
97 In Paragraph 2 of resolution 1422, the SC ‘[e]xpresses the intention to renew the request in Paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary’.
100 See SC Verbatim Record (10 July 2002) UN Doc S/PV/4568 at 23 (Switzerland). Other critical statements were issued during the session by the following delegates: at 2-4 (Canada), at 5-6 (New Zealand), at 14-15 (Costa Rica), at 15-16 (Iran), at 21-22 (Brazil), at 26-27 (Mexico).
104 Article 12 (2) RS.
request was issued in the form of a SC resolution and makes explicit reference to Article 16 RS.\textsuperscript{105} In addition, the resolution was adopted under Chapter VII UNC and contains a temporal limitation of twelve months, starting on 1 July 2002.\textsuperscript{106} Although \textit{prima facie} in conformity with Article 16 RS, two particular issues deserve closer attention. On the one hand, it is questionable whether the reference to Chapter VII UNC is sufficient to justify a deferral under Article 16 RS. On the other hand, it has to be examined whether a general immunity for nationals of contributing non-party states is covered by Article 16 RS.

In view of the fact that resolutions 1422 and 1487 were issued in the same context and are similar in style and content, the findings of the following analysis of resolution 1422 are equally valid for resolution 1487.

8.4.2.1. Chapter VII determination

Although resolution 1422 was formally adopted by the SC ‘acting under Chapter VII of the Charter of the United Nations’\textsuperscript{107}, we learned that mere reference to Chapter VII does not suffice as it is required that the deferral is made with respect to a \textit{specific} situation which constitutes ‘a threat to the peace, breach of the peace, or act of aggression’.\textsuperscript{108} Preambular Paragraphs 6 and 7 of resolution 1422 specify the threat to the peace underlying the deferral request and therewith serve as justification for the activation of the immunity exemption. The Council therein determines ‘that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and Security’\textsuperscript{109} and ‘that it is in the interests of international peace and security to facilitate Member States’ ability to contribute to [these] operations’\textsuperscript{110}. The formulation of this Chapter VII determination is held in general terms and leaves room for interpretation.

Above all, it appears that the SC sees a threat to the peace in the prosecution of UN personnel before the ICC.\textsuperscript{111} However, the logic inherent to preambular Paragraphs 6 and 7 is self-contained and no indication is provided in the resolution as to how the investigation and prosecution of personnel of contributing states before

\begin{footnotes}
\item[105] S/RES/1422 (2002), at para.1.
\item[106] Ibid., preambular para.8 and para.1.
\item[107] Ibid., preambular para.8.
\item[108] Article 39 UNC. On the Chapter VII requirement, \textit{supra} section 8.3.1.
\item[110] Ibid., preambular para. 7.
\end{footnotes}
the ICC effectively amounts to a threat to international peace and security. Another possible reading of resolution 1422 relates to the fact that the resolution was adopted against the background of the extension of the UNMIBH. Thereby, it is possible that the SC, in the face of the threat of the U.S. to veto an extension of the mission, saw a threat to the peace in the imminent termination of the UNMIBH. However, resolution 1422 was not explicitly issued in the Bosnia and Herzegovina context and it would be far-fetched to limit resolution 1422 in this way. Rather, resolution 1422 should be understood to be applicable to UN peacekeeping missions in general. This conclusion is supported by the fact that the successor of resolution 1422, resolution 1487, was adopted after the UNMIBH had been formally terminated. Accordingly, there is no reason to assume that resolution 1422 should be interpreted exclusively in conjunction with the UNMIBH. Salvatore Zappalà has thus argued that the threat to the peace could be seen ‘in the US’s potential use of veto powers to prevent the adoption of any SC resolution establishing UN operations’. However, although the use of veto power could seriously paralyse the establishment of UN operations in the future, such an announcement does not constitute a specific threat to the peace. Lastly, it could also be the case that the threat to the peace in resolution 1422 is ‘based less on the existence of a specific conflict situation than on the potential inability of the United Nations to address future threats without U.S. military personnel’. By implication, this would mean that the non-deployment of personnel to UN missions in itself constitutes a threat to international peace and security. This interpretation, however, is based on hypothetical considerations and is neither a sufficient Chapter VII determination in terms of the UNC as it ‘would render Article 39 borderless’.

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113 The mission was terminated on 31 December 2002 (see SC Res 1423 (12 July 2002) UN Doc S/RES/1423, para.19).
115 See ibid. at 118.
116 Stahn, supra note 111, at 87.
117 Ibid., at 87.
118 In sum, international lawyers have taken different positions on the legality of resolution 1422 under the UNC. An affirmative view was taken by Deen-Racsmány, supra note 62, at 380; Zappalà, supra note 114, at 118f. Others have declined the existence of a threat to the peace. See White and Cryer, supra note 103, at 470; Stahn, supra note 111, at 86f.; and Mokhtar, supra note 112, at 312ff.
On the basis of the above analysis, the author concludes that the Chapter VII determination of the SC in resolution 1422 does not sufficiently define a specific threat to the peace. Rather, the resolution seeks to establish immunity from ICC prosecution for a well-defined group of nationals on the basis of hypothetical or potential future threats to the peace.\(^{119}\) Despite the wide discretion the SC is given under Chapter VII UNC, thus, the Article 39 determination in resolution 1422 does not conform to the requirements of the UNC. As the Canadian representative noted in the SC meeting preceding the adoption of resolution 1422, ‘in the absence of a threat to international peace and security, the Council’s passing a Chapter VII draft resolution on the ICC of the kind currently circulating would in our view be *ultra vires*’.\(^{120}\) It follows that the preambular references to Chapter VII do not legitimise the SC in immunising a well-defined category of individuals from the jurisdiction of the ICC through an Article 16 deferral.

However, as was discussed previously, the ICC is not allowed to review Chapter VII determinations in substance. As a consequence, the ICC would not have been in a position to decline the application of resolution 1422 on the basis of the flawed Chapter VII determination. In this sense, resolutions 1422 and 1487 are illustrative of how powerful states – notably the members of the SC – can take advantage of their privileged position within the system of the UN to manipulate the jurisdiction of the ICC through ill-defined Chapter VII determinations. This claim will be substantiated in more detail in the last section of this chapter which subsumes the findings of this chapter under our notion of legal neo-colonialism.

8.4.2.2. Scope of the deferral

While resolution 1422 has defined both the personal and temporal parameters of the deferral, it remains to be seen whether it was sufficiently defined in geographical terms. By employing the terms investigation and prosecution, we saw that Article 16 RS can be exercised with respect to both a situation and individual cases.\(^{121}\) However, we also saw that a deferral containing reference to individual cases must be sufficiently specified in terms of the situation to which the deferral applies.\(^{122}\)

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\(^{119}\) See also, Mokhtar, *supra* note 112, at 313.

\(^{120}\) SC Verbatim Record (10 July 2002) UN Doc S/PV/4568 at 3 (emphasis in the original).

\(^{121}\) See *supra* section 8.3.2.

\(^{122}\) Olásolo, *supra* note 60, at 177. See also, *supra* sections 8.3.1. and 8.3.2.
Resolution 1422 is aimed at granting immunity to nationals of contributing non-party states to the RS from the jurisdiction of the ICC.\textsuperscript{123} As the SC is not allowed under Article 16 RS to exclude a certain category of individuals from the jurisdiction of the Court altogether, it is required that the deferral is issued with respect to a specific, geographically defined area.\textsuperscript{124} However, resolution 1422 does not refer to a specific context but rather seems to cover UN peacekeeping operations in general. Operative Paragraph 1 is designed in a manner that makes it impossible for the Court to define the geographical boundaries of this request by the SC. Although the resolution was adopted against the background of the UN peacekeeping mission in Bosnia and Herzegovina, we saw that there is no evidence that the present resolution was limited to this mission.\textsuperscript{125} The mere fact that the resolution was adopted at the time of the extension of the UNMIBH does not suffice to prove that the resolution was limited in this respect. Rather, the wording strongly indicates that UN peacekeeping personnel from non-party states were meant to receive protection against the ICC in general, irrespective of where these missions were carried out. This holds true especially since the U.S. had not only threatened to oppose the extension of the UNMIBH but to boycott future peacekeeping missions altogether.\textsuperscript{126} Thus, the wording adopted in resolution 1422 is too indefinite and the Council’s request to the ICC not to exercise jurisdiction with respect to UN peacekeeping personnel of third states is not sufficiently defined in geographical terms. In consequence, resolution 1422 is not only flawed with respect to Chapter VII UNC but similarly stands in conflict with Article 16 RS.\textsuperscript{127}

Another controversial clause in resolution 1422 is operative Paragraph 2, which ‘[e]xpresses the intention to renew the request in Paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary’. Although Article 16 RS does not bar the SC from renewing the resolution on a yearly basis, Paragraph 2 anticipates the renewal of the exemption of peacekeeping personnel from ICC jurisdiction for an indefinite number of times. Therewith, the impression is raised ‘that the Council’s intention was to use the legal power conferred on it by art.16 RS to exclude, instead of postponing, the ICC’s jurisdictional

\textsuperscript{123} S/RES/1422 (2002), para.1.
\textsuperscript{124} See supra sections 8.3.1. and 8.3.2.
\textsuperscript{125} See White and Cryer, supra note 103, at 468f.
\textsuperscript{126} See Murphy, supra note 99, at 725ff.
\textsuperscript{127} In a similar vein, Olásolo, supra note 60, at 181f.
activity.\textsuperscript{128} A provision providing for a permanent limitation of ICC jurisdiction would run against the spirit of Article 16 RS, which clearly stipulates that the deferral is limited to twelve months and that every renewal must conform to the requirements of Article 16 RS.\textsuperscript{129} The nature of Paragraph 1 and the political character of resolution 1422 do indeed suggest that an automatic renewal was in the intention of the drafters of resolution 1422. Nevertheless, the phrasing ‘for as long as may be necessary’ could also be understood to mean that a renewal may only be possible so long as there is a specific threat to peace and security under Chapter VII UNC. By taking into consideration this addendum, operative Paragraph 2, although designed in a way to provoke doubts on the legality of the provision, is not inconsistent with Article 16 RS.

8.4.3. Security Council resolution 1497

On 1 August 2003, only a few weeks after the adoption of renewal resolution 1487, the SC passed resolution 1497 in support of the Liberian ceasefire agreement which heralded the end of the Second Civil War in this crisis-afflicted country.\textsuperscript{130} Liberia was not party to the RS at the time resolution 1497 was adopted and no referral under Article 13 (b) RS was issued by the SC in order to establish jurisdiction of the ICC in the context of the situation in Liberia. The resolution envisaged the establishment of a multinational force in Liberia\textsuperscript{131} and provided the framework for the subsequent deployment of a UN peacekeeping mission\textsuperscript{132}. Alongside the provisions dealing with the mandate of these forces, resolution 1497 contained in Paragraph 7 a wide-ranging immunity exemption for personnel of contributing states not party to the ICC:

\begin{quote}
[C]urrent or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.
\end{quote}

\textsuperscript{128} See ibid., at 182 (emphasis added).
\textsuperscript{130} SC Res 1497 (1 August 2003) UN Doc S/RES/1497.
\textsuperscript{131} Ibid., at para.1.
\textsuperscript{132} Ibid., at para.2.
The resolution was passed by the SC with twelve affirmative votes and three abstentions. States abstaining from the vote did so to express their opposition to operative Paragraph 7 of resolution 1497. Germany and Mexico complained in particular that the provision deprives national courts from legitimately exercising criminal jurisdiction on the basis of the principles of passive personality and universal jurisdiction. France, without specifying its reasons, expressed the view that it considered the provision incompatible with the RS.

Although the immunity provision contained in resolution 1497, at first glance, seems redundant in view of the general immunity granted to peacekeepers in resolution 1487 just a few weeks before, operative Paragraph 7 of resolution 1497 deviates substantially from resolutions 1422 and 1487. Contrary to these resolutions, resolution 1497 does not contain an explicit reference to Article 16 RS and is not limited in temporal terms. Another difference consists in the fact that resolution 1497 is limited geographically to peacekeeping missions in Liberia and thus does not deal with immunity of international peacekeeping forces in general. In addition, the immunity clause in resolution 1497 not only prevents the ICC from exercising jurisdiction over personnel from contributing states not party to the RS; rather, it also decrees that no other than the contributing non-party state to the RS shall have jurisdiction over cases arising in the context of international operations in Liberia. The ‘exclusive jurisdiction clause’ in resolution 1497 resembles the exemption of nationals of contributing states from foreign national courts in so-called Status of Forces Agreements (SOFAs) which are typically concluded in the context joint international military operations. However, as the present study exclusively focuses on the effects of immunity exemptions on the jurisdiction of the ICC, it will not assess what ramifications the immunity clause has for national jurisdictions.

134 SC Verbatim Record (1 August 2003) UN Doc S/PV/4803 at 2-4.
135 Ibid., at 7.
136 SOFAs typically ‘lay down the conditions under which the sending and the receiving state respectively may exercise their jurisdiction over offences allegedly perpetrated by members of the armed forces of the sending state’ (D. Fleck. ‘Are Foreign Military Personnel Exempt from International Criminal Jurisdiction under Status of Forces Agreements?’ (2003) 1(3) Journal of International Criminal Justice at 656). See also, infra Chapter 9 on bilateral non-surrender agreements.
In contrast to resolutions 1422 and 1487, which only contain a general reference to Chapter VII UNC, the SC in resolution 1497 refers to a specific wartime situation ‘determining that the situation in Liberia constitutes a threat to international peace and security’.\(^{138}\) In addition, resolution 1497 was formally adopted under Chapter VII UNC.\(^{139}\) Although there is no immediate relation between the threat to the peace and the non-prosecution of personnel of contributing non-party states before the ICC\(^{140}\), the Chapter VII determination in resolution 1497 is sufficiently specific within the terms of Article 39 UNC, as it is limited to operations on the territory of Liberia.\(^{141}\) On the basis of this understanding, it would be conceivable that Paragraph 7 of resolution 1497 is interpreted as a deferral request under Article 16 RS. However, although the exemption of personnel of contributing states is limited in geographical terms, operative Paragraph 7 does not contain a temporal limitation. This, according to Nigel White and Robert Cryer, could be interpreted as an (unlawful) attempt to permanently exclude the jurisdiction of the ICC.\(^{142}\) In this sense, according to William Schabas, it would also be possible to understand the immunity exemption in resolution 1497 as ‘a manifestation of the hierarchical superiority of the Security Council, to the extent that its actions concerning the Court are not necessarily governed by the provisions of the *Rome Statute*.\(^{143}\) However, this interpretation would imply that the SC could exercise virtually unlimited powers vis-à-vis the Court, which is clearly not the intention of the drafters of this provision.\(^{144}\) Rather, with a view to the competence of the Court to assess the conformity of SC deferrals in the terms of the RS, Neha Jain concludes that ‘Article 16 is meant to be exhaustive of the kind of limitations that Security Council actions may impose upon the ICC, an institution independent of the UN structure’.\(^{145}\) In view of the facts that resolution 1497 neither contains a reference to Article 16 RS nor limits the immunity exemption in temporal terms, Paragraph 7 should not be qualified as an exercise of deferral power under Article 16 RS.

Jain, in addition, has suggested that operative Paragraph 7 of resolution 1497 could also be interpreted ‘to represent an international agreement for the purposes of

\(^{138}\) S/RES/1497 (2003), at preambular para.8.  
\(^{139}\) Ibid., at preambular para.9.  
\(^{140}\) Zappalà, *supra* note 137, at 674f.  
\(^{141}\) See White and Cryer, *supra* note 103, at 471; and Abass, *supra* note 137, at 292.  
\(^{142}\) See White and Cryer, *supra* note 103, at 472.  
\(^{143}\) Schabas, *supra* note 18, at 330 (emphasis in the original).  
\(^{144}\) See Jain, *supra* note 129, at 246. On the negotiation history of the provision, see *supra* section 8.2.  
\(^{145}\) Jain, *supra* note 129, at 246.
Article 98 (2) RS between UN members, undertaken through instrumentality of the SC. However, as will become clear from the discussion contained in the following chapter on bilateral non-surrender agreements, Article 98 (2) RS requires that such agreements must ‘ensure effective prosecution’ of international core crimes at a national level, which is not the case in the context of resolution 1497. The underlying immunity exemption not only does not contain a request to investigate or prosecute but at the same time deprives third states from legitimately exercising criminal jurisdiction, universal or otherwise. In the absence of any safeguard that prosecution takes place at a national level, the above immunity exemption runs counter the very purpose of the RS and accordingly cannot be considered as a case of application of Article 98 (2) RS. This line of argument was similarly shared by Jain, who notes that ‘[a]n agreement that does not provide any effective guarantees of investigation and prosecution undermines the purpose of the Rome Statute and will therefore not be a valid agreement for the purposes of Article 98 (2) RS.’

It can be summarised with regard to the immunity clause in resolution 1497 that no matter how someone classifies the immunity exemption ‘[n]either theory is particularly satisfying for supporters of the Court’. Either way, resolution 1497 has no practical relevance, irrespective of how the provision is interpreted. This is because the ICC, in the absence of a SC referral under Article 13 (b) RS, may only exercise jurisdiction when the crime is committed on the territory of a state party or when the accused is a national thereof. As Liberia is not a state party to the ICC and the situation in Liberia was not referred to the Court under Article 13 (b) RS, crimes committed by personnel of non-party states to the RS fall outside of the jurisdictional competence of the ICC. In view of the fact that the immunity exemption underlying resolution 1497 had no practical impact on the jurisdiction of the ICC, it thus appears that the SC,

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146 Ibid., at 249.
148 On the scope of Article 98 (2) RS, see infra Chapter 9, section 9.3.
149 On this matter, see Zappalà, supra note 137, at 672f.
150 Jain, supra note 129, at 249.
151 Schabas, supra note 18, at 330.
152 Article 12 (2) RS.
with resolution 1497, in the first place aimed at limiting the jurisdiction of third states.\textsuperscript{153}

However, despite the lack of practical relevance of the exemption in the context of the ICC, resolution 1497 constitutes yet another example of the SC using its superior position under Chapter VII to water down generally established obligations in the context of international crimes prosecution. It moreover appears that the ICC is used as a pretext to avoid criminal responsibility by setting (illegitimate) precedents through the adoption of over-inclusive SC resolutions which also affect domestic prosecution mechanisms.

8.4.4. Security Council resolutions 1593 and 1970

The issue of immunity exemptions, as we saw in the previous analysis of Article 13 (b) RS, once again surfaced in the referrals of the situations in Darfur (2005)\textsuperscript{154} and Libya (2011)\textsuperscript{155} to the ICC by the SC. Both resolutions contain in Paragraph 6 an immunity exemption which bears strong resemblance, in style and wording, to the immunity clause in Paragraph 7 of resolution 1497. Similarly to resolution 1497, no reference to Article 16 RS is made and the exemptions are not limited in temporal terms.\textsuperscript{156} However, compared to resolution 1497, resolutions 1593 and 1970 were an exercise of Article 13 (b) RS, extending the jurisdiction of the ICC to the situations in the Sudan and Libya, both of which are non-party states to the RS.\textsuperscript{157} This distinction is important because the immunity exemptions in resolutions 1593 and 1970, we recall, are meant to define the scope of the referral and therefore should be interpreted in relation to Article 13 (b) RS. In consequence, it was concluded that the immunity exemptions in resolutions 1593 and 1970 are an unlawful attempt to define the personal scope of these referrals.\textsuperscript{158} Preambular references to Article 16 RS in resolutions 1593 and 1970 are therefore only declaratory and should not be linked to the immunity exemptions in the operative part of these resolutions.\textsuperscript{159} Rather, by merely ‘recalling’ Article 16 RS in the Preamble of these resolutions, the SC

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{153} See also, Zappalà, supra note 137, at 674 (arguing that Paragraph 7 ‘seeks to impose undue restriction on the criminal jurisdiction of states’).
  \item \textsuperscript{154} S/RES/1593 (2005).
  \item \textsuperscript{155} S/RES/1970 (2011).
  \item \textsuperscript{156} See supra Chapter 7, sections 7.4.3. and 7.5.2.
  \item \textsuperscript{157} See Ibid.
  \item \textsuperscript{158} Ibid.
  \item \textsuperscript{159} S/RES/1593 (2005), at preambular para.2; and S/RES/1970 (2011), at preambular para.12.
\end{itemize}
\end{footnotesize}
anticipates that it may revisit the deferral issue at a later stage of the peace processes in the Sudan and in Libya.\textsuperscript{160}

Although at first glance it seems contradictory that the SC leaves the door open for a deferral under Article 16 RS with respect to a situation which it has referred to the ICC under Article 13 (b) RS, the analysis and interpretation of both Article 13 (b)\textsuperscript{161} and 16 RS\textsuperscript{162} indicate that a deferral is not excluded in such circumstances. This is because under Article 13 (b) RS the SC may only refer situations to the Court. The term ‘situation’, as was outlined in previous Chapter 7, must be defined in geographical and temporal terms, excluding personal parameters.\textsuperscript{163} Article 16 RS, by contrast, not only covers entire situations but can similarly be exercised in relation to individual cases.\textsuperscript{164} This interpretation dissolves the apparent contradiction between the positive powers of the SC under Article 13 (b) RS and the negative powers of the Council under Article 16 RS with regard to one and the same situation. Therefore, it can be concluded that a deferral with respect to the situations in the Sudan and Libya is still possible and that preambular reference to Article 16 RS is merely a manifestation of the SC to revisit the deferral question at some other point.

8.5. AU’s requests to defer ICC proceedings under Article 16 RS

8.5.1. Introductory remarks

After having made controversial use of Article 16 RS with respect to UN peacekeepers in the early days of the ICC, the SC has not resorted to this instrument ever since, despite repeated requests on the part of the AU to defer proceedings concerning various African situations.\textsuperscript{165} In particular the (non-deferral of)


\textsuperscript{161} See supra Chapter 7, section 7.3.

\textsuperscript{162} See supra section 8.3.

\textsuperscript{163} See, in particular, supra Chapter 7, section 7.3.2.

\textsuperscript{164} See, in particular, supra section 8.3.2.

proceedings against the incumbent Sudanese President Al-Bashir and the President and Deputy President of Kenya, Uhuru Kenyatta166 and William Ruto, have provoked widespread reactions and promoted solidarity among the AU member states vis-à-vis the ICC. In May 2013, the former chairman of the AU, Hailemariam Desalegn, openly even accused the ICC of race-hunting, claiming that the Court is ‘chasing’ after the elected President and Deputy President of Kenya.167 In the author’s view, this statement is a consequence of the long-lasting refusal of the SC to give effect to AU deferral requests in the context of the situations in the Sudan and Kenya and, at the same time, is an expression of the frustration of the AU that its leverage in and on the SC and therewith on ongoing ICC proceedings is essentially limited.

In taking up the AU criticism, it will be assessed in the following whether the non-exercise of Article 16 RS may be labelled a case of legal neo-colonialism. Bearing in mind that AU efforts with respect to Article 16 RS were mainly focused on the situations in the Sudan and Kenya, the following section will place emphasis on the AU’s commitment in regard to those two cases.168

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166 On 13 March 2015, however, the charges against Kenyatta were withdrawn (see The Prosecutor v. Uhuru Muigai Kenyatta (ICC-01/09-02/11), Decision on the Withdrawal of Charges against Mr Kenyatta, 13 March 2015).


168 The AU has made deferral requests with respect to Kenya, the Sudan and Libya. However, with respect to Libya, such a request has only been made once (see Decision on the Implementation III, supra note 165, at para.6).
8.5.2. Request to defer proceedings against Omar Al-Bashir

The situation in Darfur, we recall, was referred to the ICC pursuant to SC resolution 1593 on 31 March 2005. As Sudan had not ratified the RS at that time, a referral by the SC was necessary in order to extend the jurisdiction of the ICC over the situation in Darfur. Following the referral in March 2005, the OTP decided that there is a reasonable basis to launch an investigation into the Darfur situation on 1 June 2005. On 14 July 2008, the prosecutor filed an application requesting the PTC to issue an arrest warrant against the Sudanese President Omar Al-Bashir. This request immediately prompted criticism from various circles including states and regional organisations and resulted in a call of the AU Peace and Security Council (PSC) to defer proceedings against Al-Bashir under Article 16 RS, only one week after the prosecutor’s application. The PSC claimed that an approval of the prosecutor’s request could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a result, may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region.

A meeting of the SC at the beginning of August unveiled that opinions on this issue diverged drastically among the members of the Council. While some states emphasised their unconditional support for the ICC without further substantiating their opposition to the application of Article 16 RS, others expressed backing for a deferral because they feared that proceedings against the sitting Head of State of the Sudan could seriously jeopardise efforts for a comprehensive peace in the Darfur region. It soon became clear that the SC would not be able to agree on this matter. The PSC reiterated its concerns on 22 September 2008 and again demanded that

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170 Situation in Darfur, Sudan (ICC-02/05-2), Decision by the Prosecutor to Initiate an Investigation, 01 June 2005.
171 The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 para.4.
172 See Ciampi, supra note 160, at 885f.
173 PSC. ‘Communiqué of the 142nd Meeting’ (21 July 2008) PSC/MIN/Comm(CXLII) at para.11(i).
174 Ibid., at para.9.
175 See SC Verbatim Record (31 July 2008) UN Doc S/PV/5947.
176 Ibid., at 4 (Costa Rica), at 5 (Croatia), at 9 (France), at 10 (Belgium), at 11 (Italy).
177 Ibid., at 3 (Russia), at 6 (China), at 7 (the Libyan Arab Jamahiriya), at 8 (Burkina Faso), at 11 (Viet Nam), at 12 (the Sudan).
the SC should make use of its deferral powers under Article 16 RS.\textsuperscript{178} In a SC meeting in December 2008, South Africa, otherwise an ardent supporter of the Court, also declared its endorsement for the PSC deferral request under Article 16 RS, noting that

\begin{quote}
Article 16 of the Rome Statute was contemplated for precisely the kind of situation we face with regard to the application by the Prosecutor for the indictment of President Al-Bashir. It is our contention that article 16 can best be applied prior to issuing a warrant of arrest, so as to avoid interference with the judicial process.\textsuperscript{179}
\end{quote}

The deferral request was formally endorsed by the AU in February 2009.\textsuperscript{180} However, AU efforts to postpone looming proceedings against the Sudanese President did not bear fruit and the PTC issued an arrest warrant against Al-Bashir in March 2009 for war crimes and crimes against humanity.\textsuperscript{181} A second warrant of arrest for the crime of genocide followed in July 2010.\textsuperscript{182} The AU continued to reiterate its request to the SC at a biannual basis at the Assembly of the AU.\textsuperscript{183} Despite the AU’s commitment to this particular issue, the SC has not given effect to these requests at the time of writing.

8.5.3. Request to defer proceedings against Uhuru Kenyatta and William Ruto

The second situation with respect to which a deferral of proceedings under Article 16 RS was demanded on the part of the AU concerned the ICC proceedings relating to the 2007 post-election violence in Kenya. Kenya, contrary to the Sudan, ratified the RS as of 1 June 2005 and is a state party to the ICC.\textsuperscript{184} The situation concerning Kenya thus differs from the situation in the Sudan insofar as the ICC may exercise jurisdiction in the absence of a SC referral under Article 13 (b) RS, either following a state-party referral or on the initiative of the prosecutor. With a request to the PTC to authorise a formal investigation into the 2007 post-election violence in Kenya on 26

\textsuperscript{178} PSC, ‘Communiqué of the 151st Meeting (Report of the Implementation of Communiqué of 142nd Meeting)’ (22 September 2008) PSC/MIN/3 (CLI) at para.3.
\textsuperscript{179} SC Verbatim Record (3 December 2008) UN Doc S/PV/6028 at 16.
\textsuperscript{180} See Decision on the Application, \textit{supra} note 165, at para.3.
\textsuperscript{181} \textit{The Prosecutor v. Omar Hassan Ahmad Al Bashir} (ICC-02/05-01/09), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 04 March 2009.
\textsuperscript{182} \textit{The Prosecutor v. Omar Hassan Ahmad Al Bashir} (ICC-02/05-01/09), Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010.
\textsuperscript{183} See \textit{supra} note 165, Decision on the Update, at para.2; Decision on the Progress III, at para 7; Decision on International Jurisdiction, at para.3; Decision on the Implementation IV, at para.4, Decision on the Progress II, at para.3; Decision on the Implementation III, at para.3; Decision on the Implementation II, at para.3; Decision on the Progress I, at para.4; Decision on the Report II, at para.10; Decision on the Meeting, at para.9.
November 2009, the prosecutor of the ICC exercised its *proprio motu* powers for the first time in the history of the Court. Of particular relevance to the PTC to grant the prosecutor’s request was the ‘lack of pending national proceedings against those bearing the greatest responsibility for crimes against humanity allegedly committed’. An admissibility challenge filed by Kenya was unanimously rejected by the PTC on 30 May 2011. In March 2013 the PTC confirmed charges against four individuals, among them Uhuru Kenyatta and William Ruto who were elected President and Deputy President of Kenya at that time.

The Kenyan government called on the SC to defer the investigation into the 2007 post-election violence on the basis of Article 16 RS for the first time in late 2010. This deferral request was endorsed by the AU in January 2011. Following an official request on the part of the Kenyan government, an informal debate among the members of the SC on this issue took place in April 2011, but no action was taken. As was the case with regard to the deferral request concerning the proceedings against Al-Bashir, the AU has biannually reiterated its request for

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185 *Situation in the Republic of Kenya* (ICC-01/09), Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009.
187 Ibid., at para.183.
189 *The Prosecutor v. Francis Kirimi Muthaura et al* (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, 23 January 2012; *The Prosecutor v. William Samoei Ruto et al* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, 23 January 2012. In the context of these decisions, the PTC declined to confirm charges against Kosgey and Ali. In addition, on 11 March 2013, the Prosecutor decided to drop charges against Francis Muthaura due to lack of evidence (*The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (ICC-01/09-02/11), Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, 11 March 2013). On 13 March 2015, in addition, the charges against U. Kenyatta were withdrawn (*The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11), Decision on the Withdrawal of Charges against Mr Kenyatta, 13 March 2015).
194 See Moss, supra note 191, at 11.
deferral of Kenyan proceedings at the Assembly of the AU ever since.\textsuperscript{195} While the exercise of Article 16 RS had already been requested prior to the Kenyan presidential vote in March 2013, voices urging the immediate application of Article 16 RS have intensified after the promulgation of the electoral results. The terrorist attack of the Westgate Mall in Nairobi in September 2013 by the Somalia-based Islamist Al-Shabaab group has fuelled expectations that the proceedings against both Kenyatta and Ruto should be put on hold. In response to the attack, the SC confirmed

> that terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security, and that any acts of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed.\textsuperscript{196}

The members of the SC discussed the deferral possibility on various occasions since but no resolution was adopted.\textsuperscript{197} Following another official request on behalf of the Kenyan government\textsuperscript{198} a draft resolution on a deferral of the proceedings against Kenyatta and Ruto was put to the vote in the SC on 15 November 2013.\textsuperscript{199} The vote again unveiled a divided Council. The majority of states were of the opinion that the proceedings against the President and Deputy President of Kenya did not constitute a threat to international peace and security and thus did not qualify for the application of Article 16 RS.\textsuperscript{200} Seven countries, by contrast, voted in favour of the draft resolution, emphasising that proceedings against the President and Deputy President of Kenya should be deferred, in particular with a view to the centrality of Kenya as a front-line state in the fight against international terrorism.\textsuperscript{201} A statement by Frederick Ruhindi at the 12th Assembly of States Parties to the RS on behalf of the AU in November 2013 testifies to the significance of this matter to Kenya and the AU:

\textsuperscript{195} See, \textit{supra} note 165, Decision on the Update, at para.2; Decision on the Progress IV, at para.3; Decision on the Progress III, at para.8; Decision on Africa’s Relationship, at paras.10(ii),(x); Decision on International Jurisdiction, at para.3; Decision on the Implementation IV, at para.4, Decision on the Progress II, at para.3; Decision on the Implementation III, at para.4.


\textsuperscript{199} SC Verbatim Record (15 November 2013) UN Doc S/PV/7060.

\textsuperscript{200} Ibid., at 2f. (Guatemala), at 3 (Luxembourg), at 4 (Argentina), at 6 (United Kingdom), at 6f. (France), at 7f. (United States of America), at 9 (Australia), at 9f. (Republic of Korea).

\textsuperscript{201} Ibid., at 4 (Pakistan), at 5 (Russian Federation), at 7 (Morocco), at 8f. (Azerbaijan), at 10 (Togo), at 10ff. (Rwanda), at 12 (China).
The African Union believes that if Kenya does not qualify for use of Article 16 of the Rome Statute [...] then no other State Party will. [...] We therefore believe that the position of some Members of the UN Security Council that the Kenyan situation does not fall under Chapter VII of the UN Charter misses the point about the need to pursue justice in a manner that does not jeopardize efforts aimed at promoting lasting peace, national healing and reconciliation.[...] The decision of the people of Kenya to elect the President and Deputy President should be respected and the latter need to be able to discharge their constitutional responsibilities efficiently and effectively, in particular in light of the Westgate terrorist attack and the clear danger posed by Al shabab/al Qaeda in the region as recognized by UN Security Council in its statement after the Westgate tragedy wherein it reaffirmed that terrorism in all its form and manifestations was a threat to international peace and security.  

8.6. Article 16 RS and legal neo-colonialism

8.6.1. Introductory remarks

In the introductory part of this chapter, the possibility that Article 16 RS gives the SC the power to establish a two-class enforcement system which is to the benefit of Western states is discussed. Thus far, the present section provided a thorough examination of Article 16 RS, including analyses of the legislative history of the provision\(^\text{203}\), the previous deferral practice of the SC\(^\text{204}\) and the non-exercise of Article 16 RS in the context of the situations in the Sudan and Kenya\(^\text{205}\). Similarly to the analysis of Article 13 (b) RS, the following part will now integrate the preliminary findings on Article 16 RS with the understanding of neo-colonialism gained above. However, as opposed to the two-tiered final analysis in the previous chapter\(^\text{206}\), this part deals with all of Article 16 RS at once. This is particularly due to the fact that the deferral power of the SC does not contain a twofold structure which provides for the establishment of de facto and de jure immunities, as was the case in the context of Article 13 (b) RS. Rather, the SC, acting under Article 16 RS, merely has the possibility to establish (temporary) de jure immunities from ICC prosecution on the basis of collective decision-making power.


\(^{203}\) See supra section 8.2.

\(^{204}\) See supra section 8.4.

\(^{205}\) See supra section 8.5.

\(^{206}\) See supra Chapter 7, section 7.6.
The methodology adopted in the above section on Article 13 (b) RS will also be employed in the present section. On the one hand, it is analysed how far the structural power of the states involved relates to the (non-) exercise of Article 16 RS. On the other hand, it is tested whether the power exercised by these states indeed results in unjustified, neo-colonialist asymmetries in the enforcement of the law of the ICC.

8.6.2. The structure of Article 16 RS

From the negotiation history on Article 16 RS, we learned that the provision attracted an enormous diversity of opinions among the delegations present at the Rome Conference. The main reason why this issue attracted so much attention lies in the complex nature of the relationship between the SC, which is vested with primary responsibility in the field of international peace and security, and an independent court competent to deal with international core crimes. While the negotiating states in many other domains, such as the subject-matter jurisdiction of the Court, were able to find a common understanding quite smoothly, the Article 16 RS compromise, we saw, indeed lives up to its name. We recall a statement by Sivu Maqungo, who noted with regard to the position of the SADC on Article 16 RS:

SADC states wanted no role for the UN Security Council in the proceedings of the ICC. The only role that SADC saw for the Security Council was one of referring matters to the prosecutor’s office for investigation and prosecution. Article 16 of the ICC Statute reflects a compromise position that was reached, as states such as the United States preferred the proposal made by the ILC on the role of the Security Council, which was much more intrusive.

Article 16 RS envisages that the SC can actively request the Court to defer proceedings for a renewable period of twelve months when it is acting under Chapter VII UNC. In contrast to Article 13 (b) RS, which provides for the extension of the jurisdiction of the ICC, Article 16 RS is thus not an instrument which is designed to broaden the jurisdiction of the Court. Instead, the provision provides a measure to prevent the ICC from exercising jurisdiction over a given situation or case. However, it is important to understand that Article 16 RS is not invoked automatically when certain preconditions are fulfilled. Instead, by adopting the system of Article 16 RS, it

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207 See supra section 8.2.
208 Maqungo, supra note 53, at 47.
was deliberately accepted that the SC has the discretion to decide whether or not a
deferral should take place. More specifically, we learned that the SC is given wide
discretion to decide whether a Chapter VII situation is at hand and if so, what
measures are taken as a response under Article 41 UNC. In addition, it is
noteworthy that Article 16 RS, at least where the SC issues a deferral with regard to
a single person, stands in conflict, for a limited period, with the principle of equality
before the law because defendants with regard to whom a deferral is issued are
treated differently than others that are targeted by the Court. However, within the
terms of Article 16 RS, we saw that such a differentiation in treatment is justified in
case the deferral is issued in relation to a threat to international peace and security
under Article 39 UNC.

In order to mitigate the influence of the SC vis-à-vis the ICC, the negotiating
states have included a number of safeguards which limit the structural power the SC is able
to exercise under Article 16 RS. Firstly, the provision provides for a limitation of the
power exercised by the Council because it envisages a positive action on the part of
the SC to initiate a deferral request. Any attempt to receive protection under Article
16 RS therefore requires an affirmative vote by the Council in accordance with Article
27 (3) UNC. In other words, similarly to the establishment of de jure immunities under
Article 13 (b) RS, structural power by the members of the SC is exercised collectively
in the context of Article 16 RS. In this sense, the earlier discussed Singapore
proposal, which was introduced shortly before the conference, was an important step
towards limiting the power of the SC vis-à-vis the Court. This proposal, we recall,
reversed the hierarchical order inherent to the ILC draft text and imposed on the SC
the burden to justify why the ICC should abstain from investigating or prosecuting a
specific situation or case. A consequence of the so-called Singapore compromise,
thus, is that a deferral is only possible in case that none of the P-5 states exercises
its veto right and under the condition that a majority of nine members have
consented. In further consequence, the fact that the SC must issue a deferral
resolution collectively increases the importance of the non-permanent members of
the SC. In this connection, it is relevant that the seats of the non-permanent

209 See supra section 8.3.1.
210 Ibid.
211 See supra section 8.3.3.
212 See supra section 8.3.1.
213 See ‘Amendments to Article 23, Paragraph 3 Proposed by Singapore’ (8 August 1997)
Non_Paper/WG.3/No.16.
members of the Council are allocated according to the principle of ‘equitable geographical distribution’. The fact that the voting procedure limits the terms of the non-permanent members to a period of two years, in addition, ensures that the balance of power among the non-permanent members is subject to rotation. In combination with the temporal limitation of Article 16 RS, this signifies that a deferral request, which was previously rejected by the Council, possibly has a better chance of acceptance at a later stage. Secondly, in the context of already existing exemptions, we saw that the Council must renew its consensus each year. This provides a safeguard against the repeated misuse of power under Article 16 RS. An example that the renewal clause fulfils its purpose is the non-renewal of resolution 1487 in 2004.

A consequence of the peculiar structure of Article 16 RS is that the likelihood that Article 16 RS is exercised is rather low. This presumption is supported by the recent deferral practice of the SC. As we saw, with the exception of the (proactive) application of Article 16 RS in resolutions 1422 and 1487, the SC has not yet deferred any ICC investigations or prosecutions.

8.6.3. The scope of Security Council deferral power

Resolutions 1422 and 1487 sought to exempt UN servicemen from contributing non-party states from the jurisdiction of the ICC for a limited period of twelve months. This preventive, temporarily limited exclusion of UN peacekeeping personnel from ICC jurisdiction ended when resolution 1487 expired in July 2004. In assessing the immunity exemptions in resolutions 1422 and 1487, it is irrelevant that the likelihood ‘that peacekeepers mandated by the United Nations could ever be associated with the kinds of crimes that fall within the jurisdiction of the ICC’ was very low at the time of the adoption of these resolutions.

214 Article 23 (1) UNC and Article 143 Rules of Procedure of the General Assembly (2008, UN Doc A/520/Rev.17) [hereinafter Rules of Procedure]. In Paragraph 3 of GA Res 1991 (XVIII) (17 December 1963), the General Assembly decided that the non-permanent members are elected in line with the following pattern: five from African and Asian States; one from Eastern European States; two from Latin American States; two from Western European and other States.

215 Article 23 (2) UNC and Article 142 Rules of Procedure.

216 See supra section 8.4.2.

217 Ibid.

218 SC Verbatim Record (10 July 2002) UN Doc S/PV/4568 at 21 (Brazil). In a similar vein, at 5 (New Zealand), at 10 (U.S.), at 13 (India).
Both identical resolutions proved defective in at least two respects. On the one hand, resolutions 1422 and 1487 did not sufficiently refer to an existing threat to peace and security under Chapter VII. They therefore stood in conflict with the UNC. However, we saw that the competence of the ICC does not include the right to review Chapter VII determinations of the SC in substance. In further consequence of this lack of (review-) competence, the ICC would not have been in the position to decline the application of resolutions 1422 and 1487 on the basis of the fact that the Chapter VII determinations were flawed. In other words, as long as SC deferral resolutions are otherwise in conformity with the terms of Article 16 RS, the Court is bound by a deferral request issued by the SC. In this sense, resolutions 1422 and 1487 are illustrative of the fact that the members of the SC, merely on the basis of their privileged position within the system of the UN, can manipulate the jurisdiction of the ICC through the artificial invention of Chapter VII determinations. In the context of the adoption of resolution 1422, the Canadian delegate accordingly concluded that the SC, in view of the absence of a threat to international peace and security, was acting ultra vires and therewith ‘set a negative precedent under which the Security Council could change the negotiated terms of any treaty it wished [...]’. The proposed draft resolution would thereby undermine the treaty-making process. This statement emphasises a structural dimension of the problem as the Council, with adoption of such Chapter VII resolutions, unduly extends its competence to matters which it is not competent to deal with otherwise.

On the other hand, the immunity exemptions in resolutions 1422 and 1487 were couched in general terms and presumably applied to UN peacekeeping operations in general, irrespective of where these missions were carried out. Although we saw that the SC is allowed to define a deferral in personal terms under Article 16 RS, such blanket immunity does not conform with the requirement that the deferral must be limited geographically to a specific situation. However, as is the case with regard to over-inclusive SC referral resolutions, it remains within the competence of the ICC to refuse the application of immunity exemptions which stand in conflict with the

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219 See, in particular, supra section 8.4.2.1.
220 See supra section 8.3.4.
221 See Condorelli and Villalpando, supra note 62, at 647f.; and Deen-Racsmány, supra note 62, at 361.
222 SC Verbatim Record (10 July 2002) UN Doc S/PV/4568 at 3.
223 See supra sections 8.3.1. and 8.3.2.
224 See supra Chapter 7, sections 7.4.3. and 7.5.2.
Accordingly, the flawed application of Article 16 RS by the SC does not have any binding effect on the ICC and, as a consequence, any acceptance of such blanket immunities would be solely attributable to the ICC and is not related to the exercise of structural power.

8.6.4. The concept of patronage

The above described structure of Article 16 RS also has a bearing on the exercise of patronal power when it comes to the application of SC deferral power. More specifically, the fact that the SC must take positive action as a collective reduces the possibility that clients of single P-5 states may benefit from deferral power, due to the collective nature of the decision to be taken. This, in turn, increases the possibility that protection under Article 16 RS is extended to groups of client states, which, for whatever reason, receive protection from the SC collective. As was indicated above, this presumption is supported by the recent deferral practice of the SC which has exercised its powers under Article 16 RS only twice so far, in resolutions 1422 and 1487.

The de jure immunity exemptions in resolution 1422 and 1487 extended to ‘current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation’. Similarly to the de jure immunity included in referral resolution 1593, the immunity exemptions contained in resolutions 1422 and 1487 relate to interstate joint peacekeeping operations and are aimed at the protection of personnel of the participating non-party states from the jurisdiction of the ICC. Perpetrators of international crimes from non-contributing non-party states, by contrast, were excluded from this protection and continued to be subject to the jurisdiction of the Court under Article 12 (2)(a) RS. Accordingly, within the same conflict situation, potential defendants from non-contributing non-party states were treated differently than nationals of states that took part in such operations. In the context of resolutions 1422 and 1487, thus, the patrons – i.e. the members of the SC – and the clients alike receive protection from ICC jurisdiction in return for their participation in UN authorised missions. It follows that the concept of patronage, where the SC collectively decides in favour of granting it, is decisive to receiving immunity from ICC

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225 See supra section 8.3.4.
prosecution under Article 16 RS. The argument that the prosecution of peacekeeping personnel, as opposed to the prosecution of ‘ordinary’ perpetrators, constitutes a threat to peace and security does not withstand scrutiny in these cases because, as was outlined previously, both resolutions were issued in the absence of a threat to peace and security. This, after all, corroborates the presumption that the SC has (mis-) used its powers under Chapter VII UNC to illegitimately limit the jurisdiction of the ICC in personal terms.

As we saw previously in this chapter, the AU repeatedly urged that the SC should use its powers under Article 16 RS in the context of the situations in the Sudan and Kenya. These requests were based on the argument that a deferral of these proceedings would prevent negative repercussions for the peace processes in these countries. In regard to both situations, it was maintained that these are classical examples in which Article 16 RS should be applied.

In the case of the deferral of proceedings against Al-Bashir, the Council, while agreeing unanimously that a threat to peace existed, was divided on whether an activation of its deferral powers under Article 16 RS would essentially contribute to achieving peace in the situation in Darfur. As the British delegate noted:

[T]he Council will need to continue considering the important issues of justice and impunity in Darfur. Article 16 of the ICC Statute will be part of that discussion, but it will not be only the part. Sudan’s lack of cooperation with the ICC will also be directly relevant, as will other factors.

Due to the fact that the P-5 of the Council remained divided on this issue, no collective decision to defer proceedings was taken. In this context, it is not decisive that several other important international stakeholders, such as the Non-Aligned Movement, the Organization of the Islamic Conference and the League of Arab States, which represent the view of a majority of states within the international community, supported the application of Article 16 RS.

In the case of Kenya, the situation was different because some members of the Council even denied the existence of a threat to the peace in the context of ICC

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227 See supra sections 8.5.2. and 8.5.3.
228 Ibid.
229 Ibid.
231 See, in particular, supra section 8.5.2.
232 See SC Verbatim Record (31 July 2008) UN Doc S/PV/5947 at 3(Russia).
proceedings against the Kenyan President and Deputy President. Thus, the British
delegate opined:

Nobody, least of all the United Kingdom, underestimates the gravity of the security
challenges in the Horn of Africa, but the question before the Council today was
whether or not continuing with the ICC proceedings constituted in itself a threat to
international peace and security. In our view, it does not.233

However, as was indicated in the above analysis of the provision, the invocation of
Article 16 RS does not necessarily require that ICC investigations or prosecutions, in
and of themselves, constitute a threat to the peace and security, but that ‘the SC
could refer to a larger factual or political background, related to the proceedings
before the Court and placed in one of the categories described in Article 39’.234 This
larger factual and political background could include, for example, that parallel ICC
prosecutions against the President and Deputy President of a front-line state against
terrorism could prevent their ability to fulfil their constitutional responsibilities
accurately. Accordingly, the perspective adopted by the British delegate is slightly
one-dimensional with a view to the centrality of Kenya as a leading power in the fight
against terrorism in the Horn of Africa region. The Rwandan representative, amongst
others, therefore took a different view on the matter:

If a terrorist attack by members of Al-Shabaab — an Al-Qaida-linked movement […]
does not meet the threshold line that other situations have crossed, then which one
would? If a clear and present threat of terrorism against the Kenyan people,
resulting from their determination and courageous intervention in Somalia, does not
meet the threshold, what other threat can be alleged to do so?235

In a press release shortly after the attacks in Nairobi in September 2011, in addition,
we recall that the SC has labelled ‘terrorism in all its forms and manifestations’ a
threat to international peace and security.236 The Kenyan example thus perfectly
illustrates that there are different perceptions, firstly, whether there exists a threat to
the peace at all and secondly, how the SC is going to respond to such a situation.

233 SC Verbatim Record (15 November 2013) UN Doc S/PV/7060 at 6. In a similar vein, the
representative of Luxembourg commented: ‘pursuing the suit in the ICC against the President and
Deputy President of Kenya does not of itself create a threat to regional or indeed international peace
and security’ (ibid., at 4). See also the statement of Australia at 9.
234 Condorelli and Villalpando, supra note 62, at 647.
235 SC Verbatim Record (15 November 2013) UN Doc S/PV/7060 at 11.
236 ‘Security Council Press Statement on Attack in Nairobi’ (Press Release, 21 September 2013) UN
Doc SC/11129-AFR/2695.
Due to these different assessments of what essentially constitutes a threat to international peace and security, the SC was not able to find an agreement with regard to the exercise of Article 16 RS in the case of Kenya.

The decision of the SC to reject AU deferral requests with regard to the situations in Kenya and Sudan supports the previously raised hypothesis that the concept of patronage plays a subordinate role in the context of Article 16 RS where a deferral concerns single client states. This is because the threshold to receive temporary protection from ICC prosecution by the SC collective is much higher than in case of the non-extension of the RS under Article 13 (b) RS, where one single patron is sufficient to block the referral of a situation to the ICC. In so far, the requirement of collective action on the part of the SC not only diminishes the structural power of the SC but at the same time also narrows the scope of applicability of patron-client relationships. In the context of Article 16 RS, thus, the concept of patronage will typically only result in a (temporal) protection from ICC prosecution when the SC is collectively interested in granting such protection. This will likely include situations in which the collective of the SC itself is interested in such a protection, as was the case with resolutions 1422 and 1487. In those instances, the political commitment of states to participate or not to participate in UN authorised missions determined the patron-client network and the reception of a temporary immunity from ICC prosecution. As a consequence, we saw that these exemptions resulted in an asymmetric protection from ICC jurisdiction only for nationals of non-party states that formed part of such an alliance.

8.6.5. Article 16 RS and legal neo-colonialism

We learned that the structure of Article 16 RS provides a different approach than Article 13 (b) RS in two respects. On the one hand, Article 16 RS is designed to prevent or suspend ICC investigations or prosecutions and therewith allows the SC to interfere in the jurisdiction of the ICC in that it (temporarily) limits the Court’s jurisdiction ratione personae. In other words, an Article 16 deferral defeats the competence of the ICC to (legitimately) exercise jurisdiction over a situation or case in conformity with the provisions of the RS. Within the terms of Article 16 RS, we saw, such a temporary differentiation between perpetrators of international crimes is

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237 See supra Chapter 7, section 7.6.2.2.
justified when the ICC is acting under Chapter VII UNC. On the other hand, we saw that the SC, to prevent the exercise of ICC jurisdiction, must act as a collective.

There are two particular scenarios that have been addressed during the previous analyses, one dealing with the situation where the SC (proactively) invoked Article 16 RS to prevent the ICC from commencing investigations or prosecutions, the other concerned with the non-application of Article 16 RS in the situations in Kenya and Sudan. Both case studies, again, illustrate that Chapter VII UNC leaves (virtually unlimited) discretion to the SC in deciding whether or not it should become active under Article 16 RS.

Turning to the first scenario, the question arises whether the exercise of Article 16 RS can be subsumed under the previously elaborated understanding of legal neo-colonialism. In the above section on the structure of the RS, we saw that Article 16 RS principally allows the SC to exercise structural power and determine in which situations the ICC is temporarily prohibited from exercising jurisdiction. More specifically, the structural power element consists of the fact that the ICC, lacking the power to review Chapter VII determinations in substance, is bound to deferral resolutions as long as they are in conformity with the RS. This holds true even where the SC exercises its deferral powers on the basis of ill-defined or hypothetical Chapter VII determinations only. This obviously adds a structural dimension to the exercise of Article 16 RS, because the SC can manipulate the exercise of ICC jurisdiction in the absence of a threat to the peace and security. An example where the SC only relied on a hypothetical threat to the peace were the SC resolutions 1422 and 1487, which provided that peacekeepers of non-party states, over acts or omissions related to UN operations, were exempted from ICC jurisdiction. The concern that SC involvement under Article 16 RS could indeed generate inequalities on the basis of (politicised) SC decision-making, we recall, was already emphasised by the negotiating states during the drafting of the Statute.238 Referring to the adoption of resolutions 1422 and 1487, William Schabas observed in a similar vein:

Probably, the permanent members of the Security Council saw article 16 as a very important limitation upon the powers of the Court, to be used at its discretion and for

238 See supra section 8.2.
whatever political purposes it saw fit, including the protection of themselves and their close allies.\textsuperscript{239}

However, with a view to the drafting history of the provision, it is also important to reiterate that the strong mistrust of the SC by many states has resulted in a number of safeguards which limit the structural power the SC is able to exercise in the context of Article 16 RS.\textsuperscript{240} An important limitation in this regard, as we learned, is that the SC must take positive action as a collective under Article 16 RS. In the context of resolution 1422, this requirement has brought to light another dimension of structural power, namely, structural power exercised within the Council itself. It was indicated previously that resolution 1422 was only adopted after the U.S. had threatened to oppose the extension of the UNMIBH and to boycott future peacekeeping missions in general.\textsuperscript{241} More specifically, prior to the adoption of resolution 1422, the U.S. warned that it would stop contributing to UN peacekeeping operations in case U.S. personnel did not formally receive protection from ICC prosecution.\textsuperscript{242} This proclamation was followed by a veto of the U.S. in the Council’s vote on the extension of the UN peacekeeping mission in Bosnia and Herzegovina on 30 June 2002.\textsuperscript{243} In light of this development and the U.S.’s threat to veto further votes on this matter, the members of the Council, despite the fact that many of them had doubts about the legality of the immunity-provision in terms of the RS, accepted to adopt resolution 1422, in order to receive the support of the U.S. in extending the UNMIBH mandate. The adoption of resolution 1422 was therefore a direct consequence of the structural power exercised by the U.S. vis-à-vis other members of the Council. As far as resolution 1422 is concerned, one could therefore also argue that the unjustified asymmetry inherent in this instrument is a result of the exercise of structural power of one single P-5 state, notably the U.S.

It can be deduced from the above analysis that the exercise of Article 16 RS in the context of resolutions 1422 and 1487 constitutes a case of legal neo-colonialism. This is because in these resolutions the SC, on the basis of a hypothetical threat to the peace only, has immunised nationals of contributing non-party states from the

\textsuperscript{239} Schabas, supra note 18, at 332.
\textsuperscript{240} See supra section 8.6.2.
\textsuperscript{241} See Murphy, supra note 99, at 725ff.
\textsuperscript{243} See SC Verbatim Record (30 June 2002) UN Doc S/PV/4563 at 3.
jurisdiction of the ICC on the basis of the exercise of (collective) structural power. Nationals of non-contributing states that were involved in the very same conflict-situations at that time, by contrast, were not covered by this immunity-exemption. Accordingly, perpetrators of international crimes from different states were treated differently as a consequence of structural power exercised by the SC. As was indicated previously, the concept of patronage is involved in the sense that all states contributing to peacekeeping missions received immunity from ICC prosecution. However, in any case, one should bear in mind that resolutions 1422 and 1487, and therewith the exercise of collective structural power, was limited in temporal terms to a (renewable) period of twelve months.

The second scenario that was assessed relates to the rejected application to defer ICC proceedings against the Sudanese President Al-Bashir and the President and Deputy President of Kenya, Kenyatta and Ruto. In this context, the question arises whether the non-deferral of ICC proceedings in these situations also constitutes a case of legal neo-colonialism. Although many states have contended that Article 16 RS was contemplated precisely for situations such as those in the Sudan and Kenya, we learned that the SC repeatedly rejected AU demands to make use of Article 16 RS because the SC member states were not able to find a consensus. In this regard, it is also irrelevant that a majority of states, represented by the NAM, the Islamic Conference and the League of Arab States, would have favoured a deferral, as was emphasised by the Russian delegate with respect to the Al-Bashir indictment. With regard to both situations, thus, the SC has exercised structural power firstly, in that it (actively) refused to make use of Article 16 RS and secondly, in that the minority opinion of a few members of the SC has defeated the opinion of a majority of (non-member) states.

However, as we learned from previous Chapters 5 to 7, the mere fact that structural power is exercised does not automatically imply that the exercise of structural power reflects a case of legal neo-colonialism. Rather, the previously elaborated understanding of neo-colonialism requires that the exercise of structural power results in an asymmetry in the enforcement of the RS. In the cases of Al-Bashir, Kenyatta and Ruto, however, the exercise of structural power did not trigger an asymmetry vis-à-vis nationals of other states which are subject to the jurisdiction

244 See supra sections 8.5.2. and 8.5.3.
245 See SC Verbatim Record (31 July 2008) UN Doc S/PV/5947 at 3.
of the ICC. In other words, the non-application of Article 16 RS does not serve the production of traditional inequalities in the enforcement of the RS between states possessing 'inherited' structural power and states that do not. Rather, as we saw in the context of resolutions 1422 and 1487, it is exactly the (ill-founded) application of Article 16 RS which allows the SC to establish unjustified immunity exemptions from ICC prosecution for states possessing 'inherited' power.

In comparative perspective, juxtaposing resolutions 1422 and 1487, where a specific threat to the peace was not even looming on the horizon, on the one hand and the non-application of Article 16 RS in the context of the Sudan and Kenya on the other, well-illustrates the paradoxes inherent to Article 16 RS. Although the non-application of Article 16 RS in these cases does not itself lead to an unjustified asymmetry in the sense of the present study, it aggravates the decision to accept ill-founded immunity exemptions in the context of resolutions 1422 and 1487. In this sense, the deferral practice of the SC, to put it in the vocabulary of the Rwandan representative to the SC, corroborates the suspicion that Article 16 RS serves ‘as an additional tool for the big Powers to protect themselves and protect their own’.246

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246 SC Verbatim Record (15 November 2013) UN Doc S/PV/7060 at 11.
Chapter 9

U.S. Bilateral Non-Surrender Agreements and Article 98 (2) Rome Statute

9.1. Introductory remarks

As we saw in Chapter 5’s discussion of the application of universal values in the field of ICL, one of the major objections of the U.S. to the RS concerns its extension to nationals of non-party states in cases where the state of territoriality transfers its inherent right to exercise criminal jurisdiction over these persons to the ICC. From the perspective of the U.S., we saw that one of the ways to avoid the initiation of ICC investigations and prosecutions against its own nationals is the deferral power of the SC under Article 16 RS. This provision was twice misused to establish unlawful immunity from ICC prosecution in the context of UN authorised operations. More specifically, the U.S. used their leverage within the SC in July 2002 to push through resolution 1422, therewith (proactively) preventing the ICC from exercising jurisdiction over ‘current or former officials or personnel from a contributing State not Party to the RS over acts or omissions relating to a United Nations established or authorized operation’, before the Court had even heard a single case. However, we know from the previous chapter that the deferral power under Article 16 RS is not unlimited. Rather, the SC must act in accordance with a number of requirements which are designed to prevent it from deferring proceedings in a haphazard fashion. In this sense, Article 16 RS at the same time provides for a limitation of the structural power single P-5 states are able to exercise in the context of this provision. In 2003, in addition, the SC, in resolution 1497, sought to establish exclusive jurisdiction of contributing non-party states for the commission of crimes ‘arising out of or related to the Multinational Force or United Nations stabilization force in Liberia’, a strategy that resembles the instrument of SOFAs.

1 See supra Chapter 5, section 5.2.3.1.  
2 See supra Chapter 8, section 8.4.2.  
4 On the limitations of Article 16 RS, supra Chapter 8, section 8.3.  
5 See, in particular, supra Chapter 8, section 8.6.2.  
6 S/RES/1497 (2003), at para.7. For an in depth-analysis, see supra Chapter 8, section 8.4.3. On SOFAs, see Fleck, infra note 17.
Another way to avoid ICC prosecution, obviously, is for states to pre-emptively exercise jurisdiction against their own nationals. This possibility is open to states, parties and non-parties to the RS alike, and derives from the subsidiary character of the ICC, which is guided by the principle of complementarity.\(^7\) As opposed to the exercise of territorial jurisdiction by a state against a national of a third state, we saw that the principle of complementarity thus provides an additional safeguard in that it explicitly gives priority to the jurisdiction of the state of the defendant’s nationality.\(^8\)

The power given to the SC under Article 16 RS and the safeguards afforded by the principle of complementarity obviously did not suffice to assuage U.S. concerns regarding the possible exercise of ICC jurisdiction over U.S. nationals.\(^9\) The clearest evidence for this is the fact that as early as 2002, the U.S. launched a campaign to conclude bilateral agreements with signatories and non-signatories to the RS to prevent the surrender of U.S. nationals from these states to the ICC.\(^10\) The standard justification of the U.S. for concluding such bilateral agreements, which are considered by the U.S. to fall within Article 98 (2) RS\(^11\), emphasises the fear of politically motivated prosecutions by the ICC:

> These agreements are necessary to protect American citizens from politically motivated prosecutions by a court of which we are not a member. We believe in justice and the rule of law and accountability for war crimes, crimes against humanity and genocide. As a sovereign nation the United States accepts the responsibility to investigate and prosecute its own citizens for such offenses should they occur.\(^12\)

While an assessment of the weakness of the ‘politiciised justice’ can be found elsewhere\(^13\), the following analysis will focus on the legality of these agreements

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\(^7\) See *supra* Chapter 5, section 5.2.1.
\(^9\) On the U.S.’s apprehensions against the principle of complementarity, see *supra* Chapter 5, section 5.2.3.1.
\(^10\) See *infra* section 9.4.
under Article 98 (2) RS\textsuperscript{14} and assess whether the (hypothetical) exclusion of U.S. nationals from ICC prosecution on the basis of these agreements can be labelled a case of legal neo-colonialism.

Article 98 (2) RS was included to prevent that states parties are confronted with competing international obligations arising between ICC requests for surrender and other bilateral or multilateral international obligations.\textsuperscript{15} As will be demonstrated further below, the motivation for Article 98 (2) RS was to solve legal disputes emanating from SOFAs, which typically provide the legal framework for temporary military operations of foreign forces in host countries.\textsuperscript{16} These bi- or multilateral agreements, among other things, ‘lay down the conditions under which the sending and the receiving state respectively may exercise their jurisdiction over offences allegedly perpetrated by members of the armed forces of the sending state’.\textsuperscript{17} SOFAs are based on the assumption of primary jurisdiction by the sending state. Accordingly, rather than prosecute a national of the sending state, the host state is typically under an obligation to extradite to the sending state the person accused of crimes defined in the agreement.

In contrast to SOFAs, which delineate jurisdictional competences between the states involved in a general way, bilateral agreements between the U.S. and third states are not based on the principle of primacy of jurisdiction. Rather, the agreements explicitly aim at preventing the surrender of perpetrators of international crimes to the ICC.\textsuperscript{18} Bilateral non-surrender agreements are mostly based on reciprocal rights and obligations determining that both states to the agreement shall not surrender ‘current or former Government officials, employees (including contractors), or military personnel or nationals of one party’ to the Court.\textsuperscript{19} In order to ‘persuade’ as many states as possible to enter such agreements, the U.S. exercised

\textsuperscript{14} Article 98 (2) RS reads as follows: ‘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 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’.
\textsuperscript{15} See \textit{infra} section 9.2.
\textsuperscript{16} See, in particular, \textit{infra} section 9.2.2.
\textsuperscript{18} See \textit{infra} section 9.4.
\textsuperscript{19} See Standard Agreement, \textit{infra} note 69, para.E.1.
enormous diplomatic, financial and economic pressure.\textsuperscript{20} The American Service-
Members’ Protection Act, which is generally concerned with the protection of
American military personnel, elected or appointed officials from ICC prosecutions,
even prescribes that states parties to the RS, which show unwillingness to sign these
agreements, have to bear consequences in form of withdrawal of military assistance.\textsuperscript{21} However, this threat to withdraw military assistance does not extend to
NATO states and a number of other allied nations which are strategic partners of the
U.S.\textsuperscript{22} Accordingly, the denial of military assistance specifically targets smaller
countries and is not extended to client states.

The main question that arises in relation to bilateral non-surrender agreements is
whether they are covered by Article 98 (2) RS. It should be noted from the outset that
any such or similar agreements are only problematic in terms of the RS when one of
the contracting states has accepted the jurisdiction of the ICC on either a permanent
or an ad hoc basis. The conclusion of an agreement between two non-parties, by
contrast, in no case stands in conflict with the terms of the Statute as these states
have ‘no obligation to refrain from acts which would defeat the object and purpose of
the Statute’.\textsuperscript{23}

The present section will be structured like the chapters on Articles 13 (b) and 16
RS. Thus, it will first focus on the drafting history of Article 98 (2) RS and then
proceed with the analysis and interpretation of the provision, before discussing the
findings in the context of legal (neo-) colonialism. In contrast to previous sections on
Articles 13 (b) and 16 RS, which analysed the provisions in a more general way,
however, the present section specifically focusses on U.S. bilateral non-surrender
agreements and assesses their conformity with Article 98 (2) RS.

\textsuperscript{20} See D. McGoldrick, ‘Political and Legal Responses to the ICC’ in D. McGoldrick, P. Rowe and E.
Donnelly (eds), \textit{The Permanent International Criminal Court: Legal and Policy Issues} (Hart Publishing,
2004) at 424.
\textsuperscript{21} American Service-Members’ Protection Act, \textit{supra} note 11, section 2007.
\textsuperscript{22} Ibid., section 2007(d).
\textsuperscript{23} J. Crawford, P. Sands and R. Wilde, ‘Joint Opinion in the Matter of the Statute of the International
Criminal Court and in the Matter of Bilateral Agreements Sought by the United States under Article
98(2) of the Statute’ (5 June 2003) at para.5 <http://www.iccnow.org/?mod=bia> accessed 11 June
2015. See also, 1969 Vienna Convention, Articles 18 and 26.
9.2. Drafting process of Article 98 (2) RS

9.2.1. ILC Draft Statute

The drafting history of Article 98 (2) RS reveals that the negotiating states did not anticipate the highly controversial character of the provision during the preparatory stage of the ICC.\(^\text{24}\) In the ILC, it was only briefly mentioned that the relationship between requests for surrender and ‘existing extradition or status of forces agreements’ needed further consideration.\(^\text{25}\) The question of competing treaty obligations was also addressed by the Ad Hoc Committee, which noted in the commentary to Article 21 (2) of the ILC Draft Statute\(^\text{26}\) that ‘the view was expressed that a requesting state or a sending state entitled to assert jurisdiction under an extradition treaty or a status-of-forces agreement, respectively, should be able to prevent the court from exercising jurisdiction’.\(^\text{27}\) At the same time, it was emphasised that the principle of complementarity should be reflected more clearly in the form of a precondition to ensure that the court would not interfere with the legitimate investigative activities of national authorities or exercise jurisdiction \textit{when a State was willing and able to do so, including under bilateral extradition treaties or status-of-forces agreements.}\(^\text{28}\)

What is striking in this statement is that the Ad Hoc Committee, already at that stage of the negotiations, linked the exercise of jurisdiction of the future court to the negative condition that a state is \textit{unwilling or unable} to exercise jurisdiction on its own, a point which we will return to later in this chapter.\(^\text{29}\)

9.2.2. The Preparatory Committee on the Establishment of an International Criminal Court

Already in the first session of the PrepCom, the U.S. issued a document which emphasised the relevance of SOFAs in the context of cooperation between a permanent international criminal court and national authorities. Therein, it advocated


\(^{26}\) Article 21 ILC Draft Statute deals with the ‘Preconditions to the exercise of jurisdiction’ (ibid. at 41).


\(^{28}\) Ibid., at para.109 (emphasis added).

\(^{29}\) See \textit{infra} section 9.4.
that the system of SOFAs, which provides for the administration of justice between a
sending and a receiving state,

[continues] to function and prevail notwithstanding the existence of an International
Criminal Court. […] SOFAs ensure that the state having the exclusive or primary
right to exercise criminal jurisdiction does so, and that the interest of justice are
served for all concerned. The ICC should remain, therefore, a court of second resort
in such instances, becoming involved only where the sending and receiving states
are unable or unwilling to comply with their agreements regarding the exercise of
criminal jurisdiction, for those crimes defined by the statute of the ICC, under
applicable SOFAs.30

This statement illustrates that the U.S. clearly considered the future court as an
instrument which should step in in case ‘the sending and the receiving state are
unable or unwilling to comply with their agreements regarding the exercise of criminal
jurisdiction’. The ‘unwilling or unable’ formulation, as we already know, was later used
to describe instances in which the ICC is allowed to initiate investigations and
prosecutions under the principle of complementarity, stipulated in Article 17 RS.31 In
this sense, the position of the U.S. during the PrepCom sessions is congruent with
the aforementioned position taken by the Ad Hoc Committee. However, it will be
demonstrated further below that the U.S. deviated from this formulation in
subsequent bilateral non-surrender agreements which require the contracting states
to prosecute criminal conduct only ‘where appropriate’.32

During the further course of the negotiations the states focused on technicalities
relating to cooperation and judicial assistance in general, as well as on the
hierarchical relationship between cooperation requests by the future court and
extradition requests between states.33 The PrepCom Draft eventually dealt with
possible grounds for refusing a request for surrender to the Court in two distinct
provisions. Article 87 (3) proposed in Option 2 (e) that a state party can deny a
request for surrender if ‘[compliance with the request would put it in breach of an

30 ‘Cooperation between the States and the ICC: Remarks of the U.S. Delegation’ (8 April 1996) at 13
31 Article 17 (1)(a) RS determines that a case is inadmissible when ‘The case is being investigated or
prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely
to carry out the investigation or prosecution’ (emphasis added). On the principle of complementarity,
see supra Chapter 5, section 5.2.1.
32 See Standard Agreement, infra note 69, para. C.
33 See ‘International Court Should Have Extradition Priority for ‘Core Crimes’, Preparatory Committee
for the Establishment of Court Told’ (8 April 1996) L/2779.
existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State]. ³⁴ Along similar lines, Article 90 (2) Option 2 (f) envisaged that a request for assistance can be rejected by a state if ‘[compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party]]’. ³⁵ The square brackets in these provisions indicate that no agreement was reached at that time whether the provisions should be included at all. In any case, the proposals show ‘that the issue of possible conflicting international obligations was now seen as going beyond the competition of surrender and extradition requests’. ³⁶

9.2.3. The Rome Conference

During the Rome Conference, the foundation of Part 9 of the RS (International Cooperation and Judicial Assistance) was laid by the Working Group on International Cooperation and Judicial Assistance, which conducted its work through informal consultations. ³⁷ However, no specific legislative development of what later became Article 98 (2) RS can be reconstructed, because the issue of competing international obligations in the context of requests for surrender received little attention, both in the plenary meetings and in the meetings on the Committee of the Whole. ³⁸

One of the main issues that preoccupied the Working Group on International Cooperation and Judicial Assistance was ‘whether there should be an unequivocal legal obligation on the part of the States Parties to comply with requests from the International Criminal Court, or whether the State concerned would decide on how it wished to respond to the Court’s request’. ³⁹ The focus of attention, according to Phakiso Mochochoko who chaired the working group, was on the debate on possible

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³⁴ A footnote to the text was added which said that ‘[i]t was suggested that the following ground for refusal should be included: when the imposition or the execution of punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of the requested State if the requested State were to have jurisdiction over the offence’ (‘Report of the Preparatory Committee on the Establishment of an International Criminal Court [hereinafter PrepComDraft Statute]’ (14 April 1998) UN Doc A/Conf.183/2/Add.1 at 134.
³⁵ Ibid. at 144.
³⁶ Kress and Prost, supra note 24, at 1602.
³⁹ Mochochoko, supra note 37, at 306.
grounds to refuse the cooperation with the future court. A final compromise was transmitted by the working group to the Committee of the Whole on 13 July 1998. However, the informality of the process precludes an exact reconstruction of how that compromise was reached. The draft consolidated text in Article 90quater (2) was subsequently integrated verbatim into Article 98 (2) RS.

9.3. Article 98 (2) RS analysis and interpretation

9.3.1. Introductory remarks

According to Article 98 (2) RS,

"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 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."

Article 98 (2) RS, as we learned from the previous section, emerged in the context of the debate about situations in which states are able to refuse a request for surrender by the Court. In other words, the idea behind the provision was to avoid that states parties are 'confronted with an embarrassing situation in which they face conflicting obligations'. In structural terms, Article 98 RS forms part of the regime on international cooperation and judicial assistance which is located in Part 9 of the Statute. The cooperation of states is an essential requirement for the proper functioning of the ICC, as the Court has no enforcement agencies of its own. Article 86 RS thus places a general duty on states parties to 'cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. In contrast to a cooperation request issued by the SC under Article 13 (b) RS, which may similarly comprise an obligation to cooperate for states not party to the RS, the

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40 Ibid., at 310ff.
42 Emphasis added.
43 Van der Wilt, supra note 13, at 100.
45 On the obligation of non-party states to cooperate with requests of the SC, see supra Chapter 5, section 5.2.3.2. In addition, an 'obligation to cooperate with the Court could also be imposed by the
obligations described in Part 9 RS are solely based on treaty law and therefore only create binding obligations for states which have accepted the RS on either a permanent or an ad hoc basis.\textsuperscript{46} States not party to the RS are thus not faced with conflicting obligations on the basis of Part 9 RS, as they are not obliged to comply with cooperation requests issued by the Court.\textsuperscript{47}

Framed in general terms, Article 98 (2) RS is an exemption from the general duty of states parties to fully cooperate with requests of the Court. However, the wording of Article 98 RS is different from other provisions in Part 9 RS because it imposes an obligation on the Court, and not the states parties,\textit{not} to proceed with an Article 89 (1) RS request in case a state party is confronted with conflicting obligations under international law.\textsuperscript{48} This also implies that a state party is\textit{not} precluded under Article 98 (2) RS from concluding agreements which would require the Court not to proceed with an Article 89 (1) request.\textsuperscript{49} Rather, the provision merely delineates the conditions under which the Court may not proceed with a request. According to Claus Kress and Kimberly Prost the Court, ‘to the extent necessary to avoid the creation of conflicting international obligations […] is obliged to seek cooperation from the third or sending State, before pursuing the request’.\textsuperscript{50} Article 195 (1) RPE further specifies the procedure applicable in such cases:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.

The competence to decide whether a state party legitimately relies on a conflicting international obligation under Article 98 (2) RS, which would bar the Court from

\textsuperscript{46} See also, 1969 Vienna Convention, Articles 34/35.
\textsuperscript{47} See also, Benzing,\textit{supra} note 44, at 199.
\textsuperscript{48} See Crawford and others,\textit{supra} note 23, at para.21.
\textsuperscript{49} Ibid., at para.21.
\textsuperscript{50} Kress and Prost,\textit{supra} note 24, at 1603.
proceeding with a request under Article 89 (1) RS, rests within the Court itself.\textsuperscript{51} This competence to authoritatively rule on the interpretation of conflicting obligations is not only rooted in the wording of Article 98 (2) RS but similarly derives from Article 119 (1) RS, which determines that '[a]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court'.

9.3.2. Types of agreements covered by Article 98 (2) RS

Article 98 (2) RS refers to bilateral and multilateral agreements between states rather than between states and inter-governmental or non-governmental organisations. This understanding of the term 'agreement' follows from the use of the terms 'requested State' and 'sending State' in Article 98 (2) RS.\textsuperscript{52} As became clear in the above section on the negotiation history of Article 98 (2) RS, one of the core issues that recurred during the negotiations on international cooperation and judicial assistance concerned the relationship between the jurisdiction of the ICC and SOFAs.\textsuperscript{53} The question therefore arises whether Article 98 (2) RS was intended to be limited specifically to this category of international agreements.\textsuperscript{54} In general terms, Article 98 (2) RS refers to international agreements 'pursuant to which the consent of a sending State is required to surrender a person of that State to the Court'.\textsuperscript{55} Again, the literal reading does not appear to make a case that only SOFAs are encompassed by this provision. Rather, the wording indicates that other international agreements that were concluded between a 'sending State' and a 'requested State' are also included under Article 98 (2) RS, provided that 'the consent of a sending State is required' before a national of such a state can be surrendered to the Court.\textsuperscript{56}


\textsuperscript{52} See also, Schabas, supra note 38, at 1042; and Kress and Prost, supra note 24, at 1615.

\textsuperscript{53} See, in particular, supra section 9.2.2.

\textsuperscript{54} There are a number of authors who limit Article 98 (2) RS to SOFAs (see, e.g., Amnesty International. 'International Criminal Court: US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes' (August 2002) at 2.5ff.; and H-P Kaul and C. Kress. 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises' (1999) Vol. 2 Yearbook of International Humanitarian Law at 165). However, some authors have raised doubts that SOFAs effectively fall within the scope of Article 98 (2) RS (Fleck, supra note 17, at 651; J. J. Paust. 'The Reach of ICC Jurisdiction over Non-Signatory Nationals' (2000) 33(1) Vanderbilt Journal of Transnational Law at 10ff.; and D. Akande. 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) 1(3) Journal of International Criminal Justice at 644).

\textsuperscript{55} Emphasis added.

\textsuperscript{56} See Akande, supra note 54, at 645.
The notion ‘sending State’, which does not appear elsewhere in the Statute, is traditionally used in the domain of diplomatic relations between states. Reference to the term ‘sending state’ suggests, in the first place, that particular situations in which a person has been sent to another state as part of an official mission are covered by Article 98 (2) RS. James Crawford, Philippe Sands and Ralph Wilde describe the linkage between a person of a sending and a requested state in the context of Article 98 (2) RS in the following terms:

[T]he key factor requiring a nexus to the third State is not the status of the person or the activity he or she is performing, but rather the circumstances leading to his or her presence on the territory of the requested State Party. Such nexus would be assumed for persons who enjoy a certain status and are performing a particular activity, such as officials of the third State, e.g. a government minister or an ambassador or a soldier, who is in the territory of the requested State with the consent of that State to engage in official business of the sending State.

The drafting history of the provision does not provide any indication that the term ‘sending State’ should be interpreted differently in the context of Article 98 (2) RS. It therefore follows that the mere presence of a national of a non-party state on the territory of a requested state party, so long as the presence is not linked to any positive act of the sending state, does not suffice to invoke Article 98 (2) RS and prevent the ICC from exercising jurisdiction with regard to this person. Accordingly, it can be summarised that Article 98 (2) RS is applicable to international agreements of any kind ‘provided that they make use of the technical concept of a "sending" and a "receiving" state’.

9.3.3. The temporal scope of Article 98 (2) RS

While the term international agreements does not give rise to controversy in the context of Article 98 (2) RS, it is contested whether the provision only refers to agreements which existed at the time of ratification of the Statute; or, if the provision also covers agreements concluded by states which already accepted the jurisdiction

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57 On the use of the term in this domain, Scheffer, supra note 51, at 347.
59 Crawford and others, supra note 23, at para.43.
60 Ibid. at para.45.
61 Kress and Prost, supra note 24, at 1615.
of the Court (these agreements will be named 'new agreements' in the following). Some authors emphasise that only existing obligations were meant to be covered by Article 98 (2) RS.\textsuperscript{62} Others are of the opinion that the formulation of Article 98 (2) RS, lacking in contrast to Articles 90 (6) and (7)(b), 93 (3) and 97 (c) the qualifying adjective 'existing', similarly extends to agreements which were concluded by states subsequent to the signing\textsuperscript{63} or ratification of the RS.\textsuperscript{64} The U.S., unsurprisingly, support the latter interpretation. As David Scheffer has noted:

\begin{quote}
[P]articlar international agreements - \textit{either already in force or that would be negotiated and ratified in the future} and which establish jurisdictional responsibilities for investigating and prosecuting criminal charges against certain individuals before national courts - could be used to avoid surrender of particular types of suspects to the ICC.\textsuperscript{65}
\end{quote}

There are a number of observations to make in this regard. Above all, the literal reading of the provision, which gives no indication that only existing obligations should be covered, suggests that the scope of the provision is not limited to existing obligations but similarly extends to new agreements. However, the textual interpretation of the provision does not necessarily prevail when the historical or contextual interpretation are proof that the literal meaning of a provision is too narrow.

In a first step, emphasis is placed on the contextual relationship between Article 98 (2) RS and other provisions concerning international cooperation and judicial assistance in Part 9 RS. It is particularly worthwhile to cast a glance at Article 90 RS, which deals with the hierarchy of competing requests. According to Article 90 (4) RS, when a request is made by a state not party to the RS, the requested state may refuse the surrender of a person to the ICC only in case it is ‘under an international obligation to extradite the person to the requesting State’. In contrast to Paragraph 4, Paragraphs 6 and 7 (b) of Article 90 RS explicitly note that a state may only prioritise the request of a non-party state over the request by the ICC in case of ‘existing

\begin{flushright}
\textsuperscript{63} According to Article 18 (a) 1969 Vienna Convention, a state is also obliged to refrain from acts which defeat the object and purpose of the treaty when it has only signed the treaty. As a consequence, a state which has signed (but not ratified) the RS has the same obligation to act in conformity with object and purpose of the Statute.
\textsuperscript{64} See van der Wilt, \textit{supra} note 13, at 101; and Crawford and others, \textit{supra} note 23, at para.38.
\textsuperscript{65} Scheffer, \textit{supra} note 51, at 336 (emphasis added).
\end{flushright}
international obligations to extradite'.\textsuperscript{66} Although Article 90 (4) does not make use of the qualifying adjective 'existing', the contextual relationship between those paragraphs suggests that this provision also only covers existing agreements. Both Article 98 (2) and 90 RS define grounds based on which the jurisdiction of the ICC can be circumvented by states in the event of competing international obligations. This raises the question of whether it can be deduced from the solution adopted in Article 90 RS that Article 98 (2) RS was similarly designed to cover only international agreements concluded prior to the ratification of the RS by one of the contracting states.

The negotiation history does not provide a clear picture in this regard. On the one hand, the fact that the legislative history dealt with the ‘competing obligation issue’ as a package tends to bolster the contextual understanding that only existing obligations were considered to fall under Article 98 (2) RS. This understanding is corroborated by the fact that from the outset of this debate, existing SOFAs were used to illustrate the problem of competing obligations. Thus, Hans-Peter Kaul and Claus Kress have argued: ‘The idea behind the provision [Article 98 (2)] was to solve legal conflicts which might arise because of Status of Forces Agreements which are already in place’.\textsuperscript{67} However, it should be noted that Articles 90 (6) and (7) (b) explicitly refer to extradition treaties and not, as is the case with respect to Article 98 (2) RS, to international agreements in general. Another argument that the qualifying adjective 'existing' was omitted intentionally is the precise language otherwise used in Article 98 (2) RS, specifying that only international agreements involving a ‘requested state’ and a ‘sending state’ are covered by this provision.

In view of the fact that neither the negotiation history nor the contextual interpretation provide clear guidance as to whether only existing agreements were meant to be covered by Article 98 (2) RS, the present author refrains from interpreting Article 98 (2) RS too narrowly. It follows that Article 98 (2) RS is not limited in temporal terms to agreements which were concluded prior to the ratification of the RS and thus also extends to new agreements.

\textsuperscript{66} Emphasis added.
\textsuperscript{67} Kaul and Kress, supra note 54, at 165 (emphasis added).
9.4. U.S. bilateral non-surrender agreements and Article 98 (2) RS

As was already indicated in the introductory part to this chapter, the U.S. actively sought to conclude bilateral non-surrender agreements, with both states parties and non-states parties to the RS, shortly after the RS entered into force on 1 July 2002.\(^{68}\) Compared to traditional SOFAs or traditional extradition obligations, the U.S. bilateral non-surrender agreements are atypical in that they neither allocate jurisdictional competences between states nor contain an obligation of the third state to extradite suspects to the U.S. Rather, these agreements are merely designed to prevent surrender to the ICC. As we saw above, the applicability of Article 98 (2) RS is not excluded in cases where the U.S. concluded such an agreement with a state after that state acceded to the ICC.

Despite the fact that the provision is not limited to existing agreements, there are two aspects, in particular, which raise doubts about the compatibility of these agreements with Article 98 (2) RS. The first aspect concerns the personal scope of these bilateral non-surrender agreements. The standard agreement used by the U.S.\(^{69}\) extends to ‘current or former Government officials, employees (including.

\(^{68}\) A list with the agreements can be found at http://www.law.georgetown.edu/library/research/guides/article_98.cfm (last accessed on 25 June 2015).

\(^{69}\) A standard example of these bilateral non-surrender agreements contains the following clauses (the agreements are available at: http://guides.ll.georgetown.edu/c.php?g=363527&p=2456099) (emphasis added).

The Government of X and the Government of the United States of America, hereinafter “the Parties”

A. Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

B. Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

C. Considering that the Parties have each expressed their intention to investigate and to prosecute where appropriate acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals,

D. Bearing in mind Article 98 of the Rome Statute,

E. Hereby agree as follows:

1. For purposes of this agreement, "persons" are current or former Government officials, employees (including contractors), or military personnel or nationals of one Party.

2. Persons of one Party present in the territory of the other shall not, absent the expressed consent of the first Party, (a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or (b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the United States extradites, surrenders, or otherwise transfers a person of the other Party to a third country, the United States will not agree to the surrender or transfer of that person to the International Criminal Court by the third country, absent the expressed consent of the Government of X. [This paragraph is included only in reciprocal agreements]
contractors), or military personnel or nationals of one Party.\textsuperscript{70} This enumeration covers a broad range of persons and it is difficult to see how these categories correspond with the personal limitation of Article 98 (2) RS which links the status of a person covered by this provision to the technical concept of a ‘sending State’. Rather, the personal scope of these agreements, owing to the blanket term ‘nationals’, presumably extends to any person of the contracting states, irrespective of why the person concerned is present on the territory of the receiving state.\textsuperscript{71} The interpretation that persons in a private capacity are also covered by Article 98 (2) RS, as we saw, is over-inclusive and conflicts with both the textual and historical understanding of the provision. In addition, even the U.S., as the statement issued at the beginning of the PrepCom shows, appears to have understood the matter of conflicting obligations in relation to the technical concepts of ‘sending and receiving states’.\textsuperscript{72} The far-reaching personal scope of U.S. bilateral non-surrender agreements appears to be incompatible with the RS for yet another reason. As we saw in the preceding discussion of the temporal scope of Article 98 agreements, Article 90 (6) RS deals with the situation where a state party is confronted with competing requests by the ICC and a state not party to the RS. In this case, the requested state has to make a choice whether it should prioritise the existing obligation with the non-party state and extradite the person to this state or surrender the person to the Court. As opposed to Article 98 (2) RS, which explicitly refers to the concept of ‘sending State’, Article 90 (6) does not contain a personal limitation and therefore appears to cover all nationals of a state, irrespective of any personal

\textsuperscript{70} Ibid., at para. E.1.

\textsuperscript{71} See, among others, van der Wilt, supra note 13, at 104; Crawford and others, supra note 23, at para.44; and Benzing, supra note 44, at 211. This interpretation is confirmed by Scheffer, supra note 51, at 344ff.

\textsuperscript{72} See ‘Cooperation between the States and the ICC: Remarks of the U.S. Delegation’ (8 April 1996) at 13 <http://www.iccnow.org/?mod=prepcommittee1> accessed 10 June 2015. This view is supported by Scheffer, who notes that with the Bush administration the previously adopted position was revised (see Scheffer, supra note 51).
status.\textsuperscript{73} Accepting the legality of U.S. bilateral non-surrender agreements covering all nationals of the U.S. would thus render Article 90 (6) RS meaningless, which ‘would undercut both the limitation to existing extradition treaties and the principle of concurrence, as embodied in Article 90(6)’.\textsuperscript{74}

The second aspect which raises doubts about the compatibility of these agreements with Article 98 (2) RS relates to the fact that the agreements merely contain binding obligations for the contracting states with regard to the non-transfer of nationals to the ICC. They do not contain any obligation on the part of the contracting states to investigate or prosecute international crimes committed by nationals of these states. In the standard example cited above, there are two paragraphs that are worth mentioning. First, in Paragraph A, the states ‘[reaffirm] the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes’.\textsuperscript{75} Second, in Paragraph C, the contracting states ‘[express] their intention to investigate and to prosecute \textit{where appropriate} acts within the jurisdiction of the International Criminal Court alleged to have been committed’.\textsuperscript{76} While the former paragraph is merely declaratory, Paragraph C needs further consideration, as it leaves a wide margin of discretion to the contracting states to decide whether or not, and based on what considerations, investigations and prosecutions are to be initiated by the contracting states.

The principal problem with this conception is that nationals of the contracting states, which have perpetrated crimes subject to the RS, appear to remain beyond the reach of the ICC \textit{even when these states are unwilling or unable} to bring these persons to justice. In other words, it is assessed in the following whether Article 98 (2) RS only covers agreements that contain an obligation on the part of the contracting states to investigate and prosecute cases.\textsuperscript{77} In a first step, this question is analysed with respect to existing agreements concluded between a non-party state and a state that has accepted the jurisdiction of the ICC subsequently. As was shown in the part on the negotiation history, the drafters initially had this situation of existing conflicting obligations in mind. As a matter of treaty law, a non-party state, unless it has already signed, or otherwise expressed its consent to be bound by the RS, is

\textsuperscript{73} See van der Wilt, \textit{supra} note 13, at 104f.
\textsuperscript{74} Ibid., at 105.
\textsuperscript{75} See Standard Agreement, \textit{supra} note 69.
\textsuperscript{76} Ibid. (emphasis added).
\textsuperscript{77} See Zappalà, \textit{supra} note 58, at 131.
under no obligation to observe the object and purpose of the Statute at the time of conclusion of the contract.\textsuperscript{78} In this case, ‘there is nothing in Article 98(2) that expressly requires parties to the Statute to decline to give effect to them [existing agreements] if they do not include a requirement to investigate or prosecute’.\textsuperscript{79} This interpretation corresponds with Article 30 (4) of the 1969 Vienna Convention which provides that

[w]hen the parties to the later treaty [in the present case, the Rome Statute] do not include all the parties to the earlier one…(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

However, it is noteworthy that at least one statement by the U.S., which was already referred to in the section on the drafting process of the provision, indicates that also existing agreements which prevent the ICC from exercising jurisdiction should not result in a vacuum in the prosecution of international crimes either. In this statement, the U.S. noted:

SOFAs ensure that the state having the exclusive or primary right to exercise criminal jurisdiction does so, and that the interest of justice are served for all concerned. The ICC should remain, therefore, a court of second resort in such instances, becoming involved only where the sending and receiving states are unable or unwilling to comply with their agreements regarding the exercise of criminal jurisdiction, for those crimes defined by the statute of the ICC, under applicable SOFAs.\textsuperscript{80}

In other words, the U.S. has suggested that the concurrence between conflicting agreements should not lead to impunity gaps when the contracting states are either unwilling or unable to prosecute international crimes subject to the RS. This statement is a clear indication that an obligation to investigate and prosecute was originally also envisaged in the context of existing agreements. This position is confirmed by Scheffer, who notes that ‘protection [from ICC prosecution] was never

\textsuperscript{78} 1969 Vienna Convention, Article 18.
\textsuperscript{79} Crawford and others, supra note 23, at para.47. However, the fact that the non-party state was not bound by the RS does not mean that these agreements cannot conflict with other obligations the state has under customary or conventional international law.
intended to shield most suspects from investigation and, if merited, prosecution before a competent court of law’.  

One possible reason for why the U.S. has deviated from this initial position in the context of bilateral non-surrender agreements relates to the fact that the American legal system operates under the so-called political question doctrine. This approach, we recall from the assessment of the U.S.’s objections against the principle of complementarity, allows political branches to decide over a number of ‘matters peculiarly reserved to them, including certain foreign relations, military, and security issues’. Accordingly, the formulation ‘where appropriate’ seems to be a reaction to concerns that even an obligation to investigate or prosecute would not comprehensively deprive the ICC from the right to exercise jurisdiction. Be that as it may, the above statement of the U.S. during the preparatory stage, although showing the volatility of the U.S. posture towards this issue over time, does not suffice to overturn the otherwise clear interpretation of Article 98 (2) RS with regard to existing agreements. In this sense, Harmen van der Wilt notes that Article 98 RS epitomises the ‘balance between the lofty ideal of ending impunity and political realities’. 

The situation is different with regard to new agreements which are concluded by states parties after having accepted the jurisdiction of the ICC. This is because a state party to a treaty ‘is required to take all steps necessary to give effect to its obligations under the Statute, including the obligation not to deprive the Statute of its object and purpose’. The overriding object and purpose of the RS, is ‘to put an end to impunity for the perpetrators of [the most serious] crimes [of concern to the international community] and thus to contribute to the prevention of such crimes’. The principle of complementarity expressed in the preamble and Articles 1 and 17 RS, in addition, corroborates that it is in line with the object and purpose of the Statute that national authorities may exercise international criminal jurisdiction in

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81 Scheffer, supra note 51, at 336.
82 See supra Chapter 5, section 5.2.3.1.
84 Van der Wilt, supra note 13, at 100.
85 Crawford and others, supra note 23, at para.48. This obligation can be found in Article 18 of the 1969 Vienna Convention.
86 Preamble of the RS, para.5.
place of the ICC. \(^{87}\) This, under the condition, that they ensure effective investigation, prosecution and punishment for perpetrators of core crimes. \(^{88}\) Accordingly, a state party may enter into new agreements which deprive the ICC from exercising jurisdiction so long as these agreements ensure that perpetrators of international crimes are held accountable for their deeds and do not escape scot-free. \(^{89}\) Any other interpretation of Article 98 (2) RS, by contrast, would create an incentive for states parties to conclude agreements amounting to an obstacle to executing cooperation requests and exercising ICC jurisdiction. The formulation that investigations or prosecutions are only initiated ‘where appropriate’, however, is not tantamount to an obligation to investigate and prosecute and accordingly does not satisfy the requirements of Article 98 (2) RS. Rather, this formulation leaves room for discretion to the contracting states. Thus, it allows for a national of a non-party state, who commits crimes subject to the RS on the territory of a contracting state party, escaping justice where the non-party state is unwilling to prosecute, because an investigation or prosecution is deemed ‘inappropriate’. This, in turn, undermines the legitimate exercise of the Court’s jurisdiction under Article 12 (2)(a) RS.

It is important to note that even when a new agreement between a non-party state and a state party to the RS is not covered by Article 98 (2) RS for the aforementioned reason, it is nevertheless a valid international agreement which is binding on the contracting parties. \(^{90}\) It follows that the state party to the RS must breach either the bilateral obligation or the RS and therewith bears responsibility under international law for these breaches towards the contracting state or the other states parties to the RS respectively. \(^{91}\) However, we learned that the U.S. is prepared to sanction contracting states should they be willing to give precedence to the RS. \(^{92}\)

9.5. U.S. bilateral non-surrender agreements and legal neo-colonialism

9.5.1. U.S. bilateral agreements and the issue of asymmetry

So far, we have analysed the legality of U.S. bilateral non-surrender agreements under Article 98 (2) RS. The question remains whether the immunities from ICC prosecution established in the context of bilateral non-surrender agreements are an

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\(^{87}\) See also, Crawford and others, supra note 23, at para.26; and Scheffer, supra note 51, at 335f.
\(^{88}\) See Crawford and others, supra note 23, at paras.26/48.
\(^{89}\) Ibid., at paras.48-51; and van der Wilt, supra note 13, at 103.
\(^{90}\) Akande, supra note 54, at 646.
\(^{91}\) See van der Wilt, supra note 13, at 103; and Crawford and others, supra note 23, at para.51.
\(^{92}\) See American Service-Members’ Protection Act, supra note 11.
example of legal neo-colonialism. In dealing with this issue, emphasis is first placed on the question of whether such agreements trigger an asymmetry in the enforcement of the RS at all. In a second step, it will be assessed in what way these asymmetries relate to the exercise of structural power. Assessing the asymmetry issue, again, it appears reasonable to distinguish between existing and new agreements which have been in the focus of the above analysis of Article 98 (2) RS. With respect to both types of agreements, there is a dual asymmetry which has to be assessed. On the one hand, it is necessary to analyse the position of states parties which have ratified a bilateral agreement vis-à-vis other states parties which have not entered such bilateral treaties. On the other hand, the position of the U.S. vis-à-vis other non-state parties will be scrutinised.

Starting with existing agreements between a state party to the RS and a state not party thereof, we saw that states which have signed such agreements before acceding to the ICC may legitimately have recourse to Article 98 (2) RS. This is because the RS, at the time of the conclusion of the bilateral agreement, does not impose any obligations on states not party to the Statute and these states have no obligation to act in compliance with the object and purpose of the Statute. However, after having accepted the jurisdiction of the ICC, these states, unlike states parties which have not ratified bilateral non-surrender agreements, are treated differently than other states parties as the Court will usually give precedence to the bilateral agreement under Article 98 (2) RS and not proceed with a request for surrender in these situations. Nationals of states parties to the RS which have signed a bilateral non-surrender agreement, accordingly, are exempted from the jurisdiction of the ICC in these cases. With respect to nationals of states parties which have not concluded such agreements, on the contrary, the ICC does not have an obligation to discontinue a request for surrender under Article 98 (2) RS. As was outlined above, this differentiation in treatment is based on traditional principles of treaty law enshrined in the 1969 Vienna Convention on the Law of Treaties.

In case of new agreements, at least when the agreements do not contain an obligation to investigate or prosecute, the ICC is not prevented from proceeding a request under Article 89 (1) RS on the basis of Article 98 (2) RS because the states

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93 1969 Vienna Convention, Articles 18 and 34.
94 1969 Vienna Convention, Article 30 (4)(b).
95 See supra section 9.4.
parties, with the conclusion of such bilateral non-surrender agreements, have acted in a manner which runs counter to the object and purpose of the Statute.\textsuperscript{96} Accordingly, the states parties remain under an obligation to fully comply with requests of the Court.\textsuperscript{97} As concerns the relationship between states parties that have concluded a bilateral non-surrender agreement and those that have not, there is accordingly no differentiation in treatment on the part of the ICC, because no conflicting obligations exist that justify a discontinuation of a request for surrender.

However, we saw that even though the above discussed bilateral non-surrender agreements are not covered by Article 98 (2) RS because the personal scope of these agreements is too broad and they do not contain an obligation to prosecute, it is probable that the contracting states parties will give precedence to the bilateral agreement over the ICC request. This is because the U.S., with the American Service-Members’ Protection Act, has enacted a law which envisages that non-compliant states are being sanctioned accordingly.\textsuperscript{98} In this case, U.S. nationals, who have committed crimes on the territory of a state party to the RS, retain immunity from ICC prosecution because a request for surrender by the ICC is (unjustifiably) not complied with by the state party, despite the fact that the underlying bilateral agreement does not warrant the application of Article 98 (2) RS. As compared to nationals of other non-party states, this effectuates an asymmetry because these nationals, on the basis of the (delegated) territorial jurisdiction of states parties, remain potential targets of ICC prosecution on the basis of Article 12 (2)(a) RS.

9.5.2. U.S. bilateral agreements and legal neo-colonialism

Do the asymmetries identified in turn imply that immunities received on the basis of new bilateral non-surrender agreements are an example of legal neo-colonialism? The answer to this question is no. The reason for this conclusion is based on the distinction between relational power and power emanating from the structural conditions in the field of ICL and the ICC in particular, a distinction that was elaborated in Chapter 2.\textsuperscript{99}

At this point, it is worthwhile to briefly come back to the incentives of states parties for entering into such new agreements. We know that the U.S. has threatened to cut

\textsuperscript{96} 1969 Vienna Convention, Articles 18, 26.
\textsuperscript{97} Article 86 RS.
\textsuperscript{98} American Service-Members’ Protection Act, supra note 11, section 2007.
\textsuperscript{99} See supra Chapter 2, section 2.4.
military assistance of states parties which have not shown willingness to enter new bilateral non-surrender agreements. However, states parties must have anticipated that they are acting inconsistently with the object and purpose of the Statute by concluding new agreements. It is quite obvious that some (smaller) states have entered such agreements on the basis of the pressure exercised by the U.S. In other words, the agreements are a result of the relational power exercised by the U.S. against states dependent from the U.S. for military or other reasons. By contrast, states parties which have resisted the relational power exercised by the U.S. and which are not exempted from the sanction regime adopted by the U.S., had to bear the consequences in form of withdrawal of military assistance.\textsuperscript{100}

As we saw in Chapters 2 and 7, patron-client dyads are dependent on a variety of internal and external parameters and are instable, non-permanent relationships. In the context of bilateral non-surrender agreements, this non-permanent character is exemplified by the fact that some states have signed the agreements, but subsequently refused to ratify them.\textsuperscript{101} This is significant because the asymmetries produced vary depending on the relational power the U.S. is able to exercise vis-à-vis single states parties. In addition, not only the U.S. but similarly other non-party states, irrespective of any structural preconditions, can exercise relational power to ‘persuade’ states parties to enter such or similar agreements. In this sense, the asymmetries and immunities produced are not necessarily permanent and can be subject to change, a feature which is not observable with regard to systemic inequalities based on structural conditions. Within the scope of the present study, accordingly, the conclusion of bilateral non-surrender agreements and resulting asymmetries in the enforcement of the law of the RS may not be labelled a case of legal neo-colonialism, because the power exercised is not related to structural conditions which promote a typical neo-colonial outcome.

\textsuperscript{100} The American Service-Members’ Protection Act exempts the following countries from the ‘Prohibition of Military Assistance’: All NATO members; major non-NATO allies including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand; and Taiwan (see supra note 11, section 2007(c)).

\textsuperscript{101} After signing the agreement, Romania has stopped the ratification process because it doubted that the agreements are in conformity with the EU ‘guiding principles’ on these bilateral non-surrender agreements (see Human Rights Watch. ‘Bilateral Immunity Agreements’ (20 June 2003) at 2ff.).
Chapter 10

Concluding Remarks

Chapter 1 started with the question: The International Criminal Court – Old Wine in a New Bottle? This saying connotes that an existing concept manifests itself in a new guise. In other words, the question that this study has been concerned with is how the concepts of colonialism and neo-colonialism reappear in the field of ICL in general and in the context of the ICC in particular. After the first two parts have elaborated a contemporary concept of legal neo-colonialism in the field of ICL, the third part, in line with the colonial dichotomy between powerful (Western) and weak (non-Western) states, specifically focussed on the mechanisms inherent to the Rome Statute which are potentially vulnerable to the influence of powerful states, to wit, Articles 13 (b), 16 and 98 (2) RS.

The present study, thus, is an attempt to conceptualise an emotionally laden discussion on the question whether the ICC is an instrument of Western states that internalises the preferences of a few powerful nations. Allegations of that kind became particularly widespread after the ICC had issued an arrest warrant against the Sudanese President Al-Bashir for war crimes and crimes against humanity in Darfur in March 2009. The fact that many state and non-state actors have a negative perception of the ICC these days contrasts sharply with the international community’s initial enthusiasm that surrounded the adoption of the Rome Statute in 1998 and the subsequent establishment of the ICC in 2002. In this spirit of optimism, Cherif Bassiouni, we recall, solemnly proclaimed after the adoption of the RS that ‘realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted’. Instead, the ICC would remind governments that ‘impunity for the perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated’ and that the Court, ‘is a triumph for all peoples of the world’. In the author’s view, the growing discontent with the ICC has much to do with the exaggerated expectations that accompanied the creation of this Court and which distorted the

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2 Ibid., at xxi.
reality that the ICC, at least to some extent, is an instrument that is at the mercy of powerful states.

The conflict situation in Syria, where currently a highly complex civil war is raging and in respect to which the SC was not able to agree on an Article 13 (b) RS referral, is a good example for this gap between expectation and reality. Although from a legal perspective it is crystal clear that the ICC does not have a mandate to exercise jurisdiction over the situation in Syria unless the SC gives effect in this direction, it nonetheless seems that public opinion largely attributes the non-involvement of the ICC in Syria to the Court itself. As such, the Court found itself in a position where it had to justify and explain that it only follows the rules in the context of Syria. However, the (intentional or unintentional) failure to acknowledge the crucial role of the SC in the context of the ICC and the thereto related inability of the Court to exercise jurisdiction over some of the most horrific conflicts in recent years is, so to say, a bit odd. This is because the establishment of the ICC by the constituent assembly of states in 1998 was only made possible by granting influence to the SC, a matter which proved to be a hard nut to crack during the negotiations. Particularly the cumbersome negotiations on the possibility that the SC can block ICC proceedings, an option which later found entry into Article 16 RS, well illustrate the interdependence between the rule of law and power politics within the system of the ICC.

In selecting the issue of neo-colonialism in the context of the ICC, two particular statements have inspired the author’s approach to this matter, both of which are presented at the very beginning of this study. The first statement was made by Patrice Lumumba, the first Prime Minister of Congo Léopoldville (which later became the DRC), who noted on the day of that country’s independence: ‘We have not forgotten that the law was never the same for the white and the black, that it was lenient to the ones, and cruel and inhuman to the others’. This statement reminds us that law is vulnerable to misuse, because it can be applied in a selective manner and, broadly speaking, is instrumental in establishing and maintaining systems of

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4 See supra Chapter 8, section 8.2.

suppression and subordination. Recourse to the law and order administration of European colonial possessions in Chapter 3 corroborates this presumption and confirms the importance of law in the expansion of colonial rule and the preservation of inequalities. The second statement stems from Victor Peskin and is extracted from a contribution that assesses the claim of victor's justice in the context of the ICTY and ICTR. Peskin, in this paper, concludes with the suggestion that '[a] comprehensive understanding of the politics of the tribunals involves not only an analysis of the role of the winners and losers but also of the powerful and weak'. The statement provides a different perspective to the selectivity claim in that it focuses on the capabilities of the actors involved in these adjudication processes. The underlying dichotomy between powerful and weak states has also been central to the analysis of the historical concepts of colonialism and neo-colonialism in Chapter 2, both of which are concepts involving actors with unequal power and capabilities. The statements of Patrice Lumumba and Victor Peskin thus combine to yield the understanding of neo-colonialism that was adopted in the context of the present study and which links the existence and exercise of structural power to the production and reproduction of structural inequalities. In this sense, the historical approach of this study also serves as a reminder that long-standing structures and the reproduction of traditional inequalities, based on the colonial dichotomy between powerful and weak states, remain of importance today.

However, significant conceptual differences between classical colonial and neo-colonial relationships on the one hand and ICL on the other, required a re-conceptualisation of the concept of legal neo-colonialism in the context of ICL. A major difference between European colonial rule and the field of ICL consists of the fact that the law applied by the colonial powers, as opposed to the law of the core crimes, was selective in that it was 'divided by race or "nationality"'. International core crimes, by definition, do not rely on qualifying personal elements and are designed to apply against perpetrators of international crimes worldwide. In other words, whereas the imposition of law and values during European colonialism was guided by a sense of cultural dissimilarity (superior European legal culture vs. inferior

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7 K. Mann and R. Roberts, 'Law in Colonial Africa' in K. Mann and R. Roberts (eds), Law in Colonial Africa (Heinemann, 1991) at 35.
native law), ICL is essentially based on values, although Western in origin, that have been accepted by the states on a worldwide basis and that are now considered to be ‘universal’. Does this in turn imply that allegations of neo-colonialism are out of place in the context of ICL? The present author argues against this (purely) cultural understanding of neo-colonialism. This is because we saw that the generality of norms in the field of ICL does not prevent that the law is applied unevenly against its subjects. In this case, the result is the same as is in the case of selective norms, namely that the subjects are treated differently on the basis of legal processes. A consequence of the ‘same effects’-approach is that the technical categorisation of norms as general or universal does not preclude that the elaborated understanding of neo-colonialism can be applied to the field of ICL and the ICC in particular.

The characterisation of certain norms as universal also has a bearing on the enforcement of these norms in that the underlying values require the even application of these values to all subjects alike. However, as we came to know, this aspiration cannot realistically be expected to be translated into reality. Nevertheless, we saw that there are reasonable grounds based on which perpetrators of international crimes are selected and based on which it is decided that some perpetrators escape punishment. As such, the ICC has the policy to select situations and cases according to the gravity of crimes and to focus on ‘those who bear the greatest responsibility’. While the prosecutor has to justify the selection of situations and defendants in legal terms, we learned that the SC is under no such obligation. This is where powerful states are able to exercise their influence. As was outlined in detail in Chapter 6, the claim of the SC to occupy a pre-eminent position within a permanent criminal tribunal relates to the monopoly position of the Council in matters concerning international peace and security under Chapter VII UNC. A crucial feature of the Chapter VII powers of the SC, we saw, is that it transcends specific historical contexts and stretches into various domains, both of which are characteristic features of structural power. In the field of ICL, this became first apparent in the course of the establishment of the ICTY and ICTR in the nineteen-nineties, an undertaking that also set the stage for the later involvement of the SC in the system of the ICC.

With relying on the SC, thus, the RS has integrated a structural element into the Statute which serves the production of decision patterns that are often based on the national interests of single SC member states. As such, the behaviour of the Council becomes predictable where those states vested with power as well as their client states are negatively affected by the decision to be taken. An example for this presumption is the above mentioned situation in Syria, which has repeatedly received protection in the Council from Russia and China over the past years. In further consequence, the SC produces and reproduces inequalities merely due to the fact that a number of states are vested with the power to decide that only resolutions that do not affect the national interests of these states are adopted. In comparative perspective, such a structural dimension of asymmetries, as we saw in Chapters 2 and 3, is also a characteristic feature of colonial and neo-colonial relationships. In the context of universal core crimes, thus, the present author understands unjustified neo-colonial asymmetry in relation to the exercise of power by states on the basis of their privileged position within the system of the UNC and the RS respectively. The power granted to the SC implies that the permanent members of the SC, in isolation of gravity considerations, can prevent that they themselves or their allies will be exposed to ICC prosecution.

On the basis of this understanding of neo-colonialism, it was concluded that the members of the SC collectively, or single P-5 states individually, in particular in the context of Articles 13 (b) and 16 RS, can establish neo-colonial asymmetries as the structural power these states are able to exercise defeats the principle of accountability and the claim of even-handed prosecution of international core crimes. However, we saw that in particular Article 16 RS contains a number of safeguards against the (repeated) abuse of SC deferral power. This is noteworthy in that the negotiating states have anticipated that the influence of the SC bears the risk of politicisation of the judicial process of the ICC. In this sense, the requirement of collective action and the limitation of the deferral power in temporal terms are counter-forces that dilute, to a certain extent, the claim of legal neo-colonialism in the context of Article 16 RS.

This is also where legal neo-colonialism in the context of the ICC differs from classical colonialism and neo-colonialism. Whereas old-style colonial and neo-colonial powers, wielding quasi-monopolist powers over other states and societies,
enjoyed wide discretion how to exercise domination in their spheres of influence, the international community showed during the negotiations at Rome that it is dedicated to narrow the scope of influence of powerful states in the field of ICL. In this sense, the international community, including international and non-governmental organisations, acts as a counterforce to monopolist (hegemonic) aspirations of a few powerful states. As was indicated previously, the limited scope of state power in the field of ICL also relates to the fact that the values underlying the system do not internalise a cultural dimension in that the law itself provides for selectivity *ratione personae*. Rather, we saw that in the realm of ICL international core crimes are designed to apply to all perpetrators of international crimes alike, regardless of their respective nationality. As a consequence, states wielding power in the field of ICL do not impose their systems on weaker states as is the case with classical colonial and neo-colonial relationships; rather, in the first place, powerful states seek to prevent that this (universal) system effectuates negative consequences to themselves.

At this point, it is worth briefly returning to the issue of how far the (re-) production of these traditional inequalities by the Security Council is attributable to the ICC. This question, obviously, also touches upon the previously discussed gap between expectation and reality and the therewith associated perception of the Court. What has to be considered when dealing with the issue of imputability of SC decisions to the ICC is that the negotiation history on the role of the SC has clearly shown that the international community had to make some concessions to the SC, in order not to jeopardise the establishment of the ICC. In this sense, the role of the SC is deeply rooted in the history of the Court and should therefore, as a rule, not be artificially separated from the ICC itself. However, it appears to the author that the role of the SC in the reproduction of traditional inequalities in the context of the ICC was underestimated at the time of the Court’s establishment. As a consequence, although a holistic consideration of the ICC is certainly desirable in many respects, the harsh criticism with which the ICC is confronted due to SC inactivity suggests that the influence of the Council on the Court, at least from a ‘cause-and-effects’ perspective, should be considered in isolation from the jurisdiction of the ICC. As we saw, it is the SC’s *sole responsibility*, in particular, in the context of *de facto* immunities under Article 13 (b) RS and *de jure* immunities under Article 16 RS, where the ICC is not furnished with substantive review power in the context of Chapter VII determinations. At the same time, we saw that the Court is left with supervisory power when it comes
to the question of whether referral and deferral requests by the SC are in conformity with the terms of the RS. This power to legal review, though limited, offers an opportunity for the Court to clarify the scope of these provisions and distance itself from attempts by the SC to manipulate the Court’s jurisdiction. In other words, despite the fact that the ICC is not able to prevent the production of structural inequalities, the Court may nevertheless rebut the production of inequalities in case the SC attempts to customise the provisions of the RS by way of over-inclusive interpretation. In this sense, it is the Court’s responsibility to distance itself from decisions of the Council and to make clear when it oversteps its competences under the Rome Statute. This requires, first and foremost, that the ICC authorities take a clear position when the SC unjustifiably attempts to enlarge its (limited) competences vis-à-vis the Court.
Summary

Introduction

After the International Criminal Court opened its doors on 1 July 2002, it soon faced criticism from various directions. From the African corner, allegations of neo-colonialism became widespread, in particular, after the ICC had issued an arrest warrant for war crimes and crimes against humanity against the Sudanese President Omar Al-Bashir, in March 2009.

How does the Rome Statute (RS) promote legal neo-colonialism? This research question, broadly speaking, combines two different themes which are at the core of this study, one located in the historical, the other in the legal realm. With the selection of this topic, the present author, having a background in law, aims at contributing a different perspective on the International Criminal Court; a perspective that is mindful that long-standing historical structures continue to remain of importance in legal systems today, in the sense that they can still foster the production of traditional inequalities. The term traditional, in this context, denotes that inequalities are produced alongside the dichotomy between powerful and weak states, a division which is also characteristic for colonial and neo-colonial relationships. While the term neo-colonialism, in present-day political discourse, is often used as a rhetorical tool to blame political enemies, the present study intends to deconstruct the notion of neo-colonialism, which also implies reference to the notion of colonialism, to isolate the constituting elements of this concept. The historical understanding gained then serves as a basis for assessing how neo-colonialism reappears in the field of ICL in general and the ICC in particular. Throughout the study, focus is placed on the African cause. This emphasis is particularly owed to the facts that the proceedings hitherto initiated by the ICC exclusively target African individuals and that allegations of neo-colonialism in relation to the ICC are particularly widespread in an African context.

Part I

Part I, comprising two chapters, is concerned with the historical analyses of the concepts of colonialism and neo-colonialism, including an assessment of the role of law during European colonialism on the African continent.
The analyses of the historical notions of colonialism and neo-colonialism in Chapter 2 dismantle these concepts as abstract, but transformative concepts which describe relationships between actors with unequal capabilities. Both of these forms of domination are not limited to a specific historical or temporal context and appear in different forms and manifestations. Within these relationships, the powerful actor aims to extend its control to the subordinate country, thus providing the foundation to exercise influence on the political and economic policies of the subordinate state, amongst others. Both colonial and neo-colonial relationships are characterised by the pervasive fact of asymmetry. As opposed to colonialism, however, neo-colonial relationships are not based on the formal physical appropriation of territory by the dominant state. Instead, on the basis of existing structures, influence is exercised in an informal fashion in the neo-colonial case. The exercise of influence within both forms of domination is based on the existence of structures which favour the dominant actor in these relationships. In the case of neo-colonialism, this argument is further advanced by reference to the Latin American Dependency Theory, which links the underdevelopment of states to an inherent asymmetry in the world economic market.

On the basis of these considerations, Chapter 3 focuses on the legal structures introduced by the colonial powers during colonial rule, in order to understand how law related and contributed to these systems of domination. Emphasis, in this chapter, is placed on the administration of French and British colonial Africa. Both France and Great Britain were the leading colonial powers in Africa in the nineteenth and twentieth centuries and at the same time were the architects of the main colonial policies on the African continent: the French policy of assimilation and the British indirect rule. In the context of both colonial strategies, law served as a means to impose, without the prior approval of the societies concerned, a Western legal system and enforce Western moral values in the colonial territories. Assessing these colonial policies, it is argued that these legal systems promoted a selectivity *ratione personae* and *ratione materiae*, both of which helped to consolidate the system of European colonialism on the African continent. The understanding of how law assisted in the consolidation of colonial rule in Africa provides the basis for the later assessment of legal neo-colonialism in the field of ICL.
Part II

In the second Part of the study, focus shifts towards the field of ICL. In particular, this part sets out an understanding of how the field of ICL is conceptually different from colonial and neo-colonial forms of domination.

Chapter 4 starts with assessing whether an imposition of Western laws and values can also be claimed in the field of ICL. With this task in mind, the chapter specifically centres on the system of international core crimes, which is the linchpin of international criminal law enforcement. With the International Military Tribunals at Nuremberg and Tokyo taken as a point of departure, it is examined whether the core crimes have acquired a universal status over the course of time. This is necessary since the crimes defined in the context of these Military Tribunals, which were later re-casted by the International Law Commission within the Nuremberg Principles, were enacted by the Allied Powers on a multilateral, rather than a universal basis. It goes without saying that international criminal law making at that time did not involve the colonised societies. In terms of methodology, the question concerning the universal character of the core crimes will be answered by assessing the African states’ commitments in this respect. Thus, a number of developments are listed to demonstrate that these core values, by and large consisting of the crime of genocide, war crimes, crimes against humanity and aggression, are indeed accepted as universal values by African states today. Among other things, the chapter includes assessments of the principle of universal jurisdiction and the core crimes regime within the system of the ICC.

Chapter 5 continues with an examination of the relationship between the core crimes and the sovereignty of states, which is an important concept in the context of neo-colonial dependencies, as well as in the field of general international law. In other words, does the universal character of core crimes imply that these values defeat sovereign decisions of states to deal with perpetrators of international crimes differently than on the basis of the principle of individual accountability, by granting amnesty for example? In a first step, thus, the principle of universal jurisdiction and the concept of amnesty are juxtaposed in order to evaluate which conception trumps the other. Secondly, the legitimacy of ICC jurisdiction is assessed with a focus on the Court’s jurisdiction over nationals of non-party states to the RS under Articles 12
(2)(a) and 13 (b) RS, of which the former, in particular, is subject to strong criticism on the part of the U.S.

**Part III**

Having argued that the imposition of law and values in the field of ICL is conceptually different from the imposition of law at the time of colonial rule, Part III sets out how the notion of neo-colonialism reappears in the field of ICL and the ICC in particular.

Chapter 6 first approaches the issue of how neo-colonial asymmetry materialises in the field of ICL. The concept of neo-colonialism, put in another way, is customised to the peculiarities of the field of ICL and the pervasive fact of asymmetry is analysed in the context of international crimes prosecution. While there are all kinds of asymmetries in the application of law, it is argued that neo-colonial asymmetry is linked to the power a number of states exercise on the basis of their privileged position within the structure of the international order; i.e. power which is based on a historical privilege and which exists independently from any historical, temporal or geographical context. The chapter is complemented through reference to the concept of patronage, which serves as an auxiliary tool to explain the full extent of the phenomenon of structural power in the field of ICL.

Chapters 7 to 9 subsequently deal with provisions of the RS which are particularly apt to provide protection from ICC prosecution for powerful states and their allies. Chapter 7 first applies the understanding of legal neo-colonialism gained previously to the Security Council (SC) referral power under Article 13 (b) RS. This examination deals with the structure of the provision and assesses on what basis the SC decides to extend, or prevent the extension of the jurisdiction of the ICC to nationals of non-party states. A similar approach is subsequently adopted in Chapter 8, which is concerned with the SC power to defer ICC proceedings for a renewable period of twelve months under Article 16 RS. With this provision the SC, in contrast to Article 13 (b) RS, is allowed to limit, rather than extend, the jurisdiction of the ICC. Again, we assess the considerations based on which the SC decides to make use of its deferral powers and whether this use constitutes a case of legal neo-colonialism. Chapter 9, finally, deals with U.S. bilateral non-surrender agreements, which are aimed at preventing that U.S. nationals are surrendered to the ICC. More specifically, this chapter analyses these agreements in light of Article 98 (2) RS, which is concerned with the issue of competing international obligations. Particular focus is placed on the
question of whether bilateral non-surrender agreements conform to this provision and if the conclusion of such agreements constitutes a case of legal neo-colonialism in the context of the ICC.

Chapter 10, lastly, contains some final reflections on the matter of legal neo-colonialism in the context of the ICC. On the one hand, the author reflects in what way legal neo-colonialism in the field of ICL differs from classical (neo-) colonialism. On the other hand, it is examined in how far the negative perception of the ICC is attributable to the Court itself in situations where the SC fails to act.
Samenvatting (Summary in Dutch)

Inleiding

Na de opening van het Internationaal Strafhof op 1 juli 2002 kreeg de instelling al spoedig van diverse kanten kritiek. Uit Afrikaanse hoek kwamen er regelmatig beschuldigingen van neokolonialisme, vooral nadat het Internationaal Strafhof in maart 2009 een arrestatiebevel wegens oorlogsmisdaden en misdaden tegen de menselijkheid had uitgevaardigd tegen de Soedanese president Omar Al-Bashir.

Hoe bevordert het Statuut van Rome juridisch neokolonialisme? In zijn algemeenheid combineert deze onderzoeksvraag twee thema’s die het hart van dit onderzoek vormen: een in het historische en een in het juridische domein. Met de keuze van dit onderwerp probeert de auteur, die een juridische achtergrond heeft, een bijdrage te leveren aan een ander perspectief op het Internationaal Strafhof: een perspectief dat rekening houdt met historische structuren die al lang bestaan en die ook in de rechtssystemen van vandaag nog belangrijk zijn, in die zin dat ze nog steeds bevorderlijk kunnen zijn voor traditionele ongelijkheden. De term ‘traditioneel’ verwijst in deze context naar ongelijkheden die ontstaan naast de dichotomie tussen sterke en zwakke staten, een verdeling die ook kenmerkend is voor koloniale en neokoloniale relaties. Daar waar de term ‘neokolonialisme’ in het politieke discours van vandaag vaak wordt gebruikt als retorisch middel om politieke vijanden te beschuldigen, is het de bedoeling van dit onderzoek om het begrip ‘neokolonialisme’ te deconstrueren, zodat de elementen van dit concept kunnen worden geïsoleerd. Hierbij zal ook verwezen moeten worden naar het begrip ‘kolonialisme’. De aldus verkregen historische inzichten kunnen vervolgens dienen als basis om te beoordelen hoe neokolonialisme zich opnieuw voordoet op het gebied van internationaal strafrecht in het algemeen, en bij het Internationaal Strafhof in het bijzonder. In het hele onderzoek ligt de focus op Afrikaanse kwesties. De reden voor deze nadruk ligt in het feit dat het Internationaal Strafhof zich tot nu toe uitsluitend op Afrikaanse personen heeft gericht en dat beschuldigingen van neokolonialisme aan het adres van het Internationaal Strafhof met name wijdverbreid zijn in een Afrikaanse context.

Deel I
Deel I bestaat uit twee hoofdstukken met historische analyses van de begrippen ‘kolonialisme’ en ‘neokolonialisme’. Ook wordt hierin een beoordeling gegeven van de rol van het recht tijdens Europees koloniaal bewind op het Afrikaanse continent.

Bij de analyse van de historische begrippen ‘kolonialisme’ en ‘neokolonialisme’ in hoofdstuk 2 worden deze begrippen gedeconstrueerd als abstracte maar transformatieve begrippen waarmee relaties tussen actoren met ongelijke mogelijkheden worden beschreven. Deze beide vormen van overheersing zijn niet beperkt tot een specifieke historische of temporele context en komen in verschillende vormen en manifestaties voor. Binnen deze relaties streeft de machtige actor ernaar om zijn controle uit te breiden tot het ondergeschikte land, waarmee de grondslag wordt gelegd voor het uitoefenen van invloed op onder meer het politieke en economische beleid van de ondergeschikte staat. Zowel koloniale als neokoloniale relaties worden gekenmerkt door een alomtegenwoordige asymmetrie. In tegenstelling tot koloniale relaties zijn neokoloniale relaties echter niet gebaseerd op een formele fysieke toe-eigening van grondgebied door de overheersende staat. In het geval van de neokoloniale relatie wordt in plaats daarvan op een informele manier invloed uitgeoefend. Het uitoefenen van invloed binnen beide vormen van overheersing is gebaseerd op het bestaan van structuren die in het voordeel zijn van de overheersende actor in deze relaties. In het geval van het neokolonialisme wordt dit argument verder uitgewerkt met verwijzing naar de in Latijns-Amerikaanse context gebruikte ‘dependencia-theorie’ (afhankelijkheidstheorie), waarin de achtergebleven ontwikkeling van staten wordt gekoppeld aan de asymmetrie die inherent is aan de wereldwijde economische markt.

Op basis van deze overwegingen richt hoofdstuk 3 zich op de juridische structuren die tijdens het koloniale bewind door de koloniale machthebbers zijn geïntroduceerd, om te begrijpen hoe het recht was gerelateerd aan deze systemen van overheersing en hoe het eraan heeft bijgedragen. De nadruk in dit hoofdstuk ligt op het bestuur van Franse en Britse Afrikaanse kolonies. Frankrijk en Groot-Brittannië waren in de negentiende en de twintigste eeuw de toonaangevende koloniale machten in Afrika en waren tegelijkertijd de architecten van een groot deel van het koloniale beleid op het Afrikaanse continent: het Franse beleid van assimilatie en het Britse indirecte bestuur. In de context van beide koloniale strategieën diende het recht als middel om in de koloniale gebieden zonder voorafgaande toestemming van de betrokken
samenlevingen een westers rechtssysteem op te leggen en westere morele waarden af te dwingen. Bij de beoordeling van dit koloniale beleid wordt gesteld dat deze rechtssystemen bijdroegen aan twee soorten selectiviteit: *ratione personae* en *ratione materiae*. Beide soorten hebben het systeem van het Europese kolonialisme op het Afrikaanse continent helpen consolideren. Het inzicht in de manier waarop het recht heeft bijgedragen aan de consolidering van het koloniale bewind in Afrika biedt later de basis voor de beoordeling van juridisch neokolonialisme op het gebied van internationaal strafrecht.

**Deel II**

In het tweede deel van het onderzoek verschuift de focus naar het terrein van het internationaal strafrecht. In het bijzonder wordt in dit deel uitgewerkt hoe het internationaal strafrecht in conceptuele zin afwijkt van koloniale en neokoloniale vormen van overheersing.

Hoofdstuk 4 begint met de beoordeling van de vraag of westerse wetten en waarden ook worden opgelegd op het gebied van internationaal strafrecht. Met deze taak in gedachten concentreert het hoofdstuk zich specifiek op het systeem van de ‘meest ernstige internationale misdrijven’, het systeem dat de hoeksteen van de internationale strafrechtshandhaving vormt. Met de Internationale Militaire Tribunalen van Neurenberg en Tokio als uitgangspunt wordt onderzocht of de meest ernstige misdaden in de loop der tijd een universele status hebben gekregen. Dit is noodzakelijk omdat de misdaden zoals gedefinieerd in de context van deze Militaire Tribunalen, en zoals later door de Commissie voor Internationaal Recht opnieuw vormgegeven binnen de Neurenbergse principes, door de Geallieerden zijn opgesteld op een multilaterale, en niet op een universele basis. Het spreekt vanzelf dat indertijd de geïkoloniseerde samenlevingen niet werden betrokken bij de ontwikkeling van het internationaal strafrecht. In methodologische termen kan de vraag naar het universele karakter van de meest ernstige misdaden worden beantwoord door de betrokkenheid van Afrikaanse staten in dit opzicht te beoordelen. Een aantal ontwikkelingen wordt opgesomd om aan te tonen dat deze meest ernstige misdaden, met name genocide, oorlogsmisdaden, misdaden tegen de menselijkheid en agressie, tegenwoordig door Afrikaanse staten inderdaad als universeel worden geaccepteerd. Het hoofdstuk bevat onder andere beoordelingen
van het principe van universele jurisdictie en de behandeling van de meest ernstige misdaden binnen het systeem van het Internationaal Strafhof.

Hoofdstuk 5 vervolgt met een onderzoek naar de relatie tussen de meest ernstige misdaden en de soevereiniteit van staten: een belangrijk concept in de context van neokoloniale afhankelijkheid en op het gebied van algemeen internationaal recht. Met andere woorden: impliceert het universele karakter van de meest ernstige misdaden dat deze waarden zwaarder wegen dan soevereine beslissingen van staten om plegers van internationale misdaden anders te behandelen dan op basis van het principe van individuele verantwoordelijkheid, bijvoorbeeld door amnestie te verlenen? Als eerste stap worden daarom het principe van universele jurisdictie en het begrip ‘amnestie’ tegenover elkaar geplaatst om te evalueren welk concept voorrang heeft. Ten tweede wordt de legitimiteit van de jurisdictie van het Internationaal Strafhof beoordeeld, met speciale aandacht voor de jurisdictie over inwoners van staten die niet deelnemen aan het Statuut van Rome, onder artikelen 12 (2)(a) en 13 (b) van het Statuut van Rome; met name het eerstgenoemde artikel wordt door de VS hevig bekritiseerd.

Deel III

Nadat is gesteld dat het opleggen van wetten en waarden op het gebied van internationaal strafrecht conceptueel anders is dan het opleggen van wetten tijdens een koloniaal bewind, wordt in deel III behandeld hoe neokolonialisme zich opnieuw voordoet op het gebied van internationaal strafrecht en in het bijzonder van het Internationaal Strafhof.

In hoofdstuk 6 wordt eerst bekeken hoe neokoloniale asymmetrie vorm krijgt in het internationaal strafrecht. Anders gezegd, het begrip ‘neokolonialisme’ wordt aangepast aan de bijzonderheden van het internationaal strafrecht en de alomtegenwoordige asymmetrie wordt geanalyseerd in de context van de vervolging van internationale misdaden. In de toepassing van het recht bestaan allerlei soorten asymmetriëén. Hier wordt gesteld dat neokoloniale asymmetrie verbonden is met de macht die door een aantal staten wordt uitgeoefend op basis van hun bevoorrechte positie binnen de structuur van de internationale orde; dat wil zeggen, macht die gebaseerd is op historische voorrechten en die onafhankelijk van enige historische, temporele of geografische context bestaat. Het hoofdstuk wordt aangevuld met een verwijzing naar het concept ‘patronage’, dat dient als hulpmiddel om het verschijnsel
van structurele macht op het gebied van internationaal strafrecht ten volle te verklaren.

In hoofdstuk 7 tot en met 9 gaat het over bepalingen van het Statuut van Rome die in het bijzonder geschikt zijn om machtige staten en hun bondgenoten te beschermen tegen vervolging door het Internationaal Strafhof. Hoofdstuk 7 past om te beginnen het eerder verworven inzicht in juridisch neokolonialisme toe op de bevoegdheid van de Veiligheidsraad onder artikel 13 (b) van het Statuut van Rome om situaties naar de aanklager te verwijzen. Hier wordt gekeken naar de structuur van de bepaling en beoordeeld op welke basis de Veiligheidsraad besluit om de jurisdictie van het Internationaal Strafhof uit te breiden tot inwoners van staten die niet deelnemen aan het Statuut van Rome, of deze uitbreiding te verhinderen. Een soortgelijke benadering wordt vervolgens toegepast in hoofdstuk 8, dat gaat over de bevoegdheid van de Veiligheidsraad om een onderzoek van het Internationaal Strafhof een jaar lang op te schorten, welke termijn telkens met een jaar kan worden verlengd, volgens artikel 16 van het Statuut van Rome. Volgens deze bepaling kan de Veiligheidsraad de jurisdictie van het Internationaal Strafhof juist beperken in plaats van uitbreiden, zoals bij artikel 13 (b). Ook hier beoordelen we de overwegingen op basis waarvan de Veiligheidsraad besluit om gebruik te maken van zijn bevoegdheid tot opschorting, en we stellen vast of dit gebruik een geval van juridisch neokolonialisme betreft. Hoofdstuk 9 behandelt de bilaterale niet-overleveringsovereenkomsten van de VS, die moeten voorkomen dat burgers van de VS worden overgeleverd aan het Internationaal Strafhof. Meer specifiek worden deze overeenkomsten in dit hoofdstuk geanalyseerd in het licht van Artikel 98 (2) van het Statuut van Rome, dat handelt over de kwestie van strijdige internationale verplichtingen. In het bijzonder wordt de nadruk gelegd op de vraag of bilaterale niet-overleveringsovereenkomsten in overeenstemming zijn met deze bepaling en of het sluiten van dergelijke overeenkomsten een geval van juridisch neokolonialisme in de context van het Internationaal Strafhof vormt.

Ten slotte bevat hoofdstuk 10 enige afsluitende overwegingen over de kwestie van juridisch neokolonialisme in de context van het Internationaal Strafhof. Enerzijds overweegt de auteur in welke zin juridisch neokolonialisme op het gebied van het internationaal strafrecht afwijkt van klassiek (neo)kolonialisme. Anderzijds wordt onderzocht in hoeverre de negatieve perceptie van het Internationaal Strafhof toe te schrijven is aan het Hof zelf in situaties waar de Veiligheidsraad niet in actie komt.
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SC Res 955 (8 November 1994) UN Doc S/RES/955


SC Res 2118 (27 September 2013) UN Doc S/RES/2118.

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1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984, 1465 UNTS 85, Entry into Force 26 June 1987) [Torture Convention].


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Situation in the Republic of Kenya (ICC-01/09), Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009.

The Prosecutor v. Bahar Idriss Abu Garda (ICC-02/05-02/09), Decision on the Confirmation of Charges, 8 February 2010.


The Prosecutor v. Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09), Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010.


The Prosecutor v. Callixte Mbarushimana (ICC-01/04-01/10), Decision on the "Defence Challenge to the Jurisdiction of the Court", 26 October 2011.

The Prosecutor v. Francis Kirimi Muthaura et al (ICC-01/09-02/11), Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, 23 January 2012.

The Prosecutor v. William Samoei Ruto et al (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61 (7)(a) and (b) of the Rome Statute, 23 January 2012.


The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (ICC-02/05-03/09), Public Redacted Decision Terminating the Proceedings against Mr Jerbo, 4 October 2013.


The Prosecutor v. Laurent Gbagbo (ICC-02/11-01/11), Decision on the Confirmation of Charges, 12 June 2014.


The Prosecutor v. Uhuru Muigai Kenyatta (ICC-01/09-02/11), Decision on the Withdrawal of Charges against Mr Kenyatta, 13 March 2015.

**International Criminal Tribunal for Rwanda**


**International Criminal Tribunal for the Former Yugoslavia**

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The Case of the S.S. "Lotus" (France v. Turkey), PCIJ Rep. Series A. No. 10, Judgment, 7 September 1927.
Special Court for Sierra Leone