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A COSMOPOLITAN INTERNATIONAL LAW: THE AUTHORITY OF REGIONAL INTER-GOVERNMENTAL ORGANISATIONS TO ESTABLISH INTERNATIONAL CRIMINAL ACCOUNTABILITY MECHANISMS

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I arrive on these shores exhausted, after many moons of being battered by harsh winds, waves and storms. I feel a strong sense of achievement and my heart is full of gratitude for those who have seen me through this journey.

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… and to myself ☺ …

ABSTRACT

The overall aim of this thesis is to investigate the potential role of regional inter-governmental organisations (RIGOs) in international criminal accountability, specifically through the establishment of criminal accountability mechanisms, and to make a case for RIGOs' active involvement. The thesis proceeds from the assumption that international criminal justice is a cosmopolitan project that demands that a tenable conception of state sovereignty guarantees humanity's fundamental values, specifically human dignity. Since cosmopolitanism emphasises the equality and unity of the human family, guaranteeing the dignity and humanity of the human family is therefore a common interest of humanity rather than a parochial endeavour. Accountability for international crimes is one way through which human dignity can be validated and reaffirmed where such dignity has been grossly and systematically assaulted. Therefore, while accountability for international crimes is primarily the obligation of individual sovereign states, this responsibility is ultimately residually one of humanity as a whole, exercisable through collective action. As such, the thesis advances the argument that states as collective representations of humanity have a responsibility to assist in ensuring accountability for international crimes where an individual state is either genuinely unable or unwilling by itself to do so. The thesis therefore addresses the question as to whether RIGOs, as collective representations of states and their peoples, can establish international criminal accountability mechanisms. Relying on cosmopolitanism as a theoretical underpinning, the thesis examines the exercise of what can be considered as elements of sovereign authority by RIGOs in pursuit of the cosmopolitan objective of accountability for international crimes. In so doing, the thesis interrogates whether there is a basis in international law for such engagement, and examines how such engagement can practically be undertaken, using two case studies of the European Union and the Kosovo Specialist Chambers and Specialist Prosecutor's Office, and the African Union and the (proposed) Hybrid Court for South Sudan. The thesis concludes that general international law does not preclude RIGOs from exercising elements of sovereign authority necessary for the establishment of international criminal accountability mechanisms, and that specific legal authority to engage in this regard can then be determined by reference to the doctrine of attributed/conferred powers and the doctrine of implied powers in interpreting the legal instruments of RIGOs. Based on this conclusion, the thesis makes a normative case for an active role for RIGOs in the establishment of international criminal accountability mechanisms, and provides a practical step-by-step guide on possible legal approaches for the establishment of such mechanisms by RIGOs, as well as guidance on possible design models for these mechanisms.

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHPR Study	Study on Transitional Justice and Human and Peoples' Rights in Africa
African Charter	African Charter on Human and Peoples' Rights
AL	Arab League
ASEAN	Association of Southeast Asian Nations
AU	African Union
AU Assembly	Assembly of Heads of State and Government of the African Union
AUCISS	African Union Commission of Inquiry on South Sudan
AU Commission	African Union Commission
AU-PSC	African Union Peace and Security Council
Basic Principles	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
CADSP	Common African Defence and Security Policy
CFSP	European Union Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CoE Assembly	Parliamentary Assembly of the Council of Europe
Council of the EU	Council of the European Union
CTRH	Commission for Truth, Reconciliation and Healing
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
EULEX Kosovo	European Union Rule of Law Mission in Kosovo
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGAD	Intergovernmental Authority on Development
IHL	International Humanitarian Law
ILC	International Law Commission
IMT Charter	Charter of the International Military Tribunal of 1945
IMTFE Charter	Charter of the International Military Tribunal for the Far East
IOs	International Organisations
IRMCT	International Residual Mechanism for Criminal Tribunals
KLA	Kosovo Liberation Army
KSC	Kosovo Specialist Chambers
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity
Orentlicher Principles	Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity
PAP	Pan-African Parliament

PSC Protocol	Protocol Relating to the Establishment of the Peace and Security Council of the African Union
R-Agreement	Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan
REC	Regional Economic Community
RIGOs	Regional Inter-Governmental Organisations
R-JMEC	Reconstituted Joint Monitoring and Evaluation Commission
R2P	Responsibility to Protect Doctrine
SCSL	Special Court for Sierra Leone
SITF	Special Investigative Task Force
SPO	Specialist Prosecutor's Office
STL	Special Tribunal for Lebanon
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Charter	Charter of the United Nations
UN Security Council	United Nations Security Council
UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
USA	United States of America
VCLT 1969	Vienna Convention on the Law of Treaties
VCLT 1986	Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations
WW I	First World War
WW II	Second World War
2014 PAP Protocol	Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament

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CHAPTER ONE

INTRODUCTION TO THE RESEARCH

1.1 Background

Despite lofty pronouncements by states and international organisations (IOs) during the last half of the 20th Century, international crimes continue to stain the 21st Century landscape. Accountability for these crimes has, so far, been administered either at the national level primarily by the concerned state(s), or at the global level by international judicial mechanisms in the form of courts or *ad hoc* tribunals. In both instances, the primary actors have been directly affected states in their individual capacity, third states exercising universal jurisdiction, the United Nations (UN) exercising powers under Chapter VII of the Charter of the United Nations (UN Charter),[1] or groups of states through a multi-lateral treaty such as the Rome Statute of the International Criminal Court (Rome Statute).[2] Apart from instances where individual states have undertaken accountability for international crimes either as directly affected states or in exercise of the principle of universal jurisdiction, most prominent international criminal accountability processes have been spearheaded by the UN and, most recently, by the International Criminal Court (ICC).

The role of regional inter-governmental organisations (RIGOs) in this quest for accountability for international crimes has been largely invisible. This can be attributed to several factors. First, RIGOs are often primarily established for economic and/or political integration purposes and do not have accountability for international crimes as their primary mandate, at least not as an explicit objective. Second, the fact that states have traditionally been considered as the primary subjects of international law has meant that international criminal justice discourse has often focused on states, with RIGOs not featuring as obvious subjects of this discussion. Third, states and RIGOs have traditionally deferred to the UN Security Council for action when the concerned state is either genuinely unable or unwilling to ensure accountability for international crimes. Consequently, international criminal accountability mechanisms have been concentrated at the global level, being UN tribunals and the ICC, thereby giving the misleading impression that international criminal justice is 'justice delivered by international courts'.[3] The engagement of RIGOs in regional-level accountability for international crimes has consequently been tepid at best, and the potential role of RIGOs in international criminal justice generally, and in individual criminal accountability specifically, has remained under-explored.

[1] Charter of the United Nations, 24 October 1945, 1 UNTS XVI.
[2] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.
[3] Florian Jessberger, 'International v. National Prosecution of International Crimes' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 208.

1.2 State of Global-Level Administration of International Criminal Accountability

Recent events on the international scene, however, point to waning appetite for global-level accountability for international crimes[4] and to a failure of imagination in conceiving and exploring alternative institutional paths to accountability, or as Vukusic aptly puts it, 'a certain malaise in the international community, a lack of vision and optimism, burdening the pursuit of justice'.[5] Mass atrocities of the 1990s and early 2000s resulted in relatively rapid coalescence of international efforts that resulted in international criminal accountability responses. This response was firstly undertaken through *ad hoc* mechanisms established by the Security Council for specific situations, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and hybrid mechanisms established through cooperation between the UN and states such as the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL). Secondly, and to avoid having to resort to *ad hoc* mechanisms, a global initiative of states led to the establishment of the ICC as a permanent judicial mechanism which can respond either directly in state parties to the Rome Statute through *proprio motu* powers of its Prosecutor or by invitation from states or indirectly if its jurisdiction is triggered by a referral from the Security Council. However, despite being a global mechanism, many states and situations remain legally and practically beyond the reach of the ICC because so far only 123 states are parties to the Rome Statute, and the Security Council has so far been unable to refer more situations to the ICC.[6] Consensus on global-level administration of criminal accountability has therefore proven difficult to achieve for more contemporary mass atrocities, particularly those beyond the ICC's ordinary jurisdictional purview.[7] For instance, despite well-documented cases of violations of international humanitarian law and human rights law possibly amounting to international crimes allegedly committed in Syria by state and non-state actors and foreign actors,[8] agreement on globally-

[4] *See for example* Maxwell O. Chibundu, 'The Parochial Foundations of Cosmopolitan Rights' in Mortimer Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press 2012) 194–208.

[5] Iva Vukušić, 'Accountability in Syria: What Are the Options?' in Arnaud Kurze and Christopher Lamont (eds), *New Critical Spaces in Transitional Justice: Gender, Art, and Memory* (Indiana University Press 2019) 208.

[6] The UNSC has so far only managed to refer the situation in Darfur, Sudan and in Libya. *See* Security Council Resolution 1593 (2005) (31 March 2005); Security Council Resolution 1970 (2011) (26 February 2011). Deadlock at the Security Council, specifically among the permanent members, has frustrated the possible referral of other situations including Myanmar and Syria.

[7] For a discussion on the impasse at the UNSC that has contributed to the Council's inability to effectively respond to atrocity crimes in recent years, *see* Jennifer Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge University Press 2020); Charles Chernor Jalloh, 'UNSC Veto Power Symposium: Are There Jus Cogens Limits to UN Security Council Vetoes in Atrocity Crime Contexts?' (*Opinio Juris*, 30 November 2020) <http://opiniojuris.org/2020/11/30/unsc-veto-power-symposium-are-there-jus-cogens-limits-to-un-security-council-vetoes-in-atrocity-crime-contexts/> accessed 1 December 2020; Dire Tladi, 'UNSC Veto Power Symposium: Doing Away with the Veto for Atrocity Crimes? Trimming the Edges of an Illegitimate Institution in Order to Legitimise It' (*Opinio Juris*, 1 December 2020) <http://opiniojuris.org/2020/12/01/unsc-veto-power-symposium-doing-away-with-the-veto-for-atrocity-crimes-trimming-the-edges-of-an-illegitimate-institution-in-order-to-legitimise-it/> accessed 1 December 2020.

[8] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/46/55 (11 March 2021); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,

administered accountability, or indeed any accountability at all, has so far proven elusive to attain. Similar scenarios continue to play out in other situations around the world such as in Yemen,[9] South Sudan,[10] the Tigray Region of Ethiopia,[11] in Myanmar where the Rohingya ethnic group faces state-sponsored violence,[12] and in Ukraine where accountability for Russia's act of aggression is still proving elusive.[13]

The faltering state of global-level administration of international criminal accountability is, in large part a function of the paradoxes of globalisation. In order 'to exercise their functions and remain as independent as possible, states are forced to cooperate due to the unavoidable reality of interdependence and globalization'.[14] However, this phenomenon has itself given rise to what Slaughter calls the globalisation paradox whereby while states appreciate the need for globalised governance, some still conservatively hold on to state-centric interpretations of the principle of state sovereignty which are resistant to any mechanisms or processes perceived as eroding this principle.[15] The insistence on (or re-emergence of) such conservative conceptions of state sovereignty in relation to state responsibility and state obligations, at least by some

A/HRC/46/54 (21 January 2021); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/44/61 (03 September 2020); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/45/31 (14 August 2020); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/43/57 (28 January 2020); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/42/51 (15 August 2019); Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/40/70 (31 January 2019). *See also* Iva Vukušić (n 5).

[9] Report of the Group of Eminent International and Regional Experts on Yemen, A/HRC/48/20 (13 September 2021); Detailed Findings of the Group of Eminent International and Regional Experts on Yemen, A/HRC/45/CRP.7 (29 September 2020); Report of the Group of Eminent International and Regional Experts on Yemen, A/HRC/45/6 (28 September 2020); Report of the Group of Eminent International and Regional Experts on Yemen as Submitted to the United Nations High Commissioner for Human Rights, A/HRC/42/17 (9 August 2019); Report of the United Nations High Commissioner for Human Rights Containing the Findings of the Group of Eminent International and Regional Experts and a Summary of Technical Assistance provided by the Office of the High Commissioner to the National Commission of Inquiry, A/HRC/39/43* (17 August 2018).

[10] Final Report of the African Union Commission of Inquiry on South Sudan (15 October 2014) http://www.peaceau.org/en/article/final-report-of-the-african-union-commission-of-inquiry-on-south-sudan accessed 10 July 2019; African Committee of Experts on the Rights and Welfare of the Child, 'Report on the Advocacy Mission to Assess the Situation of Children in South Sudan' (August 2014) https://www.refworld.org/docid/545b4e384.html accessed 01 June 2021; Report of the Commission on Human Rights in South Sudan, A/HRC/34/63 (06 March 2017); Report of the Commission on Human Rights in South Sudan, A/HRC/37/71 (13 March 2018); Report of the Commission on Human Rights in South Sudan, A/HRC/40/69 (12 March 2019); Report of the Commission on Human Rights in South Sudan, A/HRC/43/56 (31 January 2020); Report of the Commission on Human Rights in South Sudan, A/HRC/46/53 (04 February 2021).

[11] Report of the Ethiopian Human Rights Commission (EHRC)/Office of the United Nations High Commissioner for Human Rights (OHCHR) Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia (2021) https://digitallibrary.un.org/record/3947207?ln=en accessed 10 April 2022.

[12] Report of the Independent Investigative Mechanism for Myanmar, A/HRC/42/66 (07 August 2019); Report of the Independent Investigative Mechanism for Myanmar, A/HRC/45/60 (07 July 2020); Report of the Independent Investigative Mechanism for Myanmar, A/HRC/48/18 (05 July 2021).

[13] Organisation for Security and Cooperation in Europe, Report on Violations of International Humanitarian and Human Rights Law, War Crimes and Crimes against Humanity Committed in Ukraine Since 24 February 2022, ODIHR.GAL/26/22/Rev.1 (13 April 2022).

[14] Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity* (4 Revised, Martinus Nijhoff Publishers 2003) 2.

[15] *See* Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005).

states, has had a dampening effect on (some) states' appetite for the administration of accountability for international crimes at the global level. The result has been, as described by de Sousa, the emergence of an era in which 'the most appalling social injustices and most unjust human suffering no longer seem to generate the moral indignation and the political will necessary … to combat them effectively'.[16] This is compounded by the reality that due to prevailing structural weaknesses in governance systems in most (post)conflict states, domestic processes are still genuinely unable to effectively pursue accountability for international crimes. The effect is an impunity gap.

1.3 Emergence of Regional Inter-Governmental Organisations as Assertive International Actors

Contemporaneous with the waning appetite for global-level administration of international criminal accountability is the rise of RIGOs. A prominent feature of the late 20th Century and the early 21st Century is globalisation which is increasingly challenging the classical conceptions of state sovereignty with their strong attachment to territoriality and states' monopoly over the exercise of political authority.[17] With the process of gobalisation comes interdependence and the need for some level of governance at the regional and global levels, leading to the emergence of economically and politically active inter-governmental organisations organised on a regional basis. These organisations exercise a reasonable degree of control over some common economic and political actions previously governed almost exclusively through domestic prerogatives. It is appropriate at this point to define what the thesis understands regional inter-governmental organisations to mean.

1.3.1 What is a Regional Inter-Governmental Organisation?

The understanding of an inter-governmental organisation as used in this thesis is both 'normative' and 'descriptive' in nature. While the former refers to the 'legal' criteria that an organisation must meet in order to be regarded as inter-governmental, the latter is the practice of relevant organisations, which practice inevitably also has legal implications. Normative and descriptive understandings of 'inter-governmental organisation' are inextricably interconnected. Considering that the thesis seeks to explore both the legal nature of RIGOs and the legal implications of RIGOs' practice, such, a 'thick' understanding that fuses 'normative' and 'descriptive' definitions is necessary.

Article 2(1)(i) of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT 1986) defines an international organisation as an intergovernmental organization, a provision identical to the earlier 1982 International Law Commission (ILC) draft articles on the matter as well as Article 2(1)(i) of the 1969 Vienna Convention on the Law of Treaties (VCLT 1969). The ILC

[16] Boaventura de Sousa Santos, *If God Were a Human Rights Activist* (Stanford University Press 2015) xiv.
[17] *See for example* Richard Falk, 'Sovereignty' in Joel Krieger and others (eds), *The Oxford Companion to Politics of the World* (Oxford University Press 1993); Richard Falk, *Human Rights and State Sovereignty* (Holmes & Meier 1981).

commentary to this provision clarifies this definition to mean 'organization composed mainly of States and, in exceptional cases, one or two international organizations and having in some cases associate members which are not yet States or which may be other international organizations'.[18] Article 2(a) of the 2011 ILC Draft Articles on the Responsibility of International Organisations defines international organisation thus, '[A]n organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.' Significantly, the ILC in its commentary on this provision casts significant doubt as to the appropriateness of assuming that 'international organisation' equates to 'intergovernmental organisation', seeing as some international organisations include non-state actors in their membership.[19] Of course, these definitions are not general in nature, but are rather specific to the issues regulated by these treaties or canvassed by the draft articles.

Evidently, there is either confusion over what exactly an inter-governmental organisation is, or at the very least, it is assumed to be synonymous with international organisation. An earlier definition proffered by Virally came usefully close to succinctness. He defined international organisation as 'an association of States, established by agreement among its members and possessing a permanent system or set of organs, whose task it is to pursue objectives of common interest, by means of cooperation among its members'.[20] While this definition is indeed influential and is considered by many commentators as authoritative,[21] it however, seems to assume, like the treaties and ILC draft articles above, that 'international organisation' and 'inter-governmental organisation' are synonymous, an assumption that this thesis disputes.

The African Court on Human and Peoples' Rights (African Court) has itself attempted to clarify what an inter-governmental organisation means. In its Advisory Opinion in *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child on the Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights,*[22] the Court defined inter-governmental organisation as 'association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfil particular functions within the organization', and which is composed of government representatives directing its

[18] Report of the International Law Commission, 34th Session, 3 May-23 July 1982, Document A/37/10*, (1982) II(2) Yearbook of the International Law Commission 20, para 19.
[19] Report of the International Law Commission, 63rd Session, 26 April–3 June and 4 July–12 August 2011, U.N. GAOR Supp. No. 10 (A/66/10), (2011) II(2) Yearbook of the International Law Commission 49, paras. 1-15.
[20] Michel Virally, 'Definition and Classification of International Organizations: A Legal Approach' in Georges Abi-Saab (ed), *The Concept of International Organization* (UNESCO 1981) 51. *See also* Finn Seyersted, *Common Law of International Organizations* (Martinus Nijhoff Publishers 2008) 39–43.
[21] See for example Catherine Brölmann, *The Institutional Veil in Public International Law: International Organisations and the Law of Treaties* (Hart Publishing 2007) 16–19.
[22] Request No. 002/2013 (Advisory Opinion of 5 December 2014).

affairs.[23] The African Court's definition comes close to the thesis' understanding of inter-governmental organisation, but is nonetheless incomplete.

For purposes of this thesis, a working (constitutive) definition is derived by adopting and modifying the definitions proffered in the treaties, commentaries, jurisprudence and literature above, and formulating a normative, descriptive and functional definition. The thesis understands an inter-governmental organisation to be an organisation: established by states through an instrument governed by international law; which has an international legal personality; with its membership restricted to states;[24] organised in the form of permanent organs; and (mostly) pursuing its members' common or agreed-upon objectives, albeit with a latitude of functional independence or autonomy. It follows, therefore, that a regional intergovernmental organisation is one organised on a regional basis, whose membership is open to states from the region in question and closed off to outsider states, and whose competence is (mainly) limited to said region.[25] 'Region' here is understood either geographically or politically.

Of course, it is worth emphasising that the thesis does not attempt or concern itself with a classification of organisations, neither does the research depend on a universally accepted definition of intergovernmental organisation or international organisation. While such classification may be useful for organisational purposes, any attempt at classifying organisations only serves to 'show that organizations are not monolithic, built according to one and the same eternally valid blueprint, but are wide-ranging in variety'.[26] The thesis therefore distinguishes intergovernmental organisations from international organisations purely to clarify the variations among organisations. While an inter-governmental organisation is indeed a type of international organisation whose membership is nonetheless restricted to states,[27] 'international organisation' is a generic term which refers to organisations with an international legal character including those whose membership could be open to entities and actors other than states. In other words, 'international organisation' can be considered as a general term for organisations meeting the above common characteristic, but it is a collective term that encompasses internal variants such as inter-governmental organisations.

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[23] Request No. 002/2013 (Advisory Opinion of 5 December 2014) paras 71–74, referencing the Encyclopaedia of Public International Law.

[24] Possibly, and as a rare exception, a member whose statehood is contested may be admitted to membership, but even then, this member is admitted based on its recognition as a state by the intergovernmental organisation. For example, while the status of Western Sahara is contested, the Organisation of African Unity (now the African Union) recognised it as a state in February 1982 and admitted it as a member state. *See* African Union, 'Member State Profiles' <https://au.int/memberstates> accessed 18 February 2019. Notably, however, in this case the OAU formally recognised Western Sahara as a state as a precondition for its admission to the organisation.

[25] For a conceptualisation of 'region' and 'regionalism', *see* Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Hart Publishing 2004) 1–26.

[26] Jan Klabbers, *An Introduction to International Organizations Law* (3rd edn, Cambridge University Press 2015) 23.

[27] *See for example* Chris Nwachukwu Okeke, *Controversial Subjects of Contemporary International Law: An Examination of the New Entities of International Law and Their Treaty-Making Capacity* (Rotterdam University Press 1974) 181.

Additionally, it necessary to clarify whether there exist differences with any significant implications for the thesis between references to 'international/intergovernmental' and 'supranational'. The term 'supranational' is increasingly being used specifically in reference to the European Union (EU) and so-called EU law. The term serves the very useful purpose of explaining the unique applicability of EU law, particularly EU Regulations, in EU member states. EU Regulations can be taken by majority vote hence will bind even members who registered opposing votes; these Regulations become EU law which is then superior to domestic law; and then have direct effect or enforceability in member states' domestic legal systems. The first two features are not entirely unique to the EU. Binding decisions of the African Union (AU) can also be taken by majority vote and, depending on the nature of the decision, may be superior to conflicting domestic law. However, the third feature is, so far, still a uniquely EU phenomenon. The fact of direct effect of EU Regulations in member states has prompted reference to the EU as a supranational organisation to which member states have transferred some of their sovereignty.[28] The concept is also being advanced with respect to the AU, though not as strongly as with the EU. Amao, for instance, points to the integrationist ambitions of the AU, its role in the development of a unique emerging continental legal order, and continental institutions under its auspices including judicial institutions, as evidence that the AU is more than just an intergovernmental organisation, but is rather a supranational organisation.[29] However, beyond explaining the relationship and interaction between the decisions, laws and actions of the organisation and the domestic legal systems of member states including hierarchy of laws, this 'categorisation' neither alters nor adds to the legal definition of an international organisation or RIGO. As such, it does not reveal any legal definitional distinction between the EU/AU and other international organisations or RIGOs. It appears, therefore, that the preference of the term 'supranational' in reference to the EU and the reluctance to refer to it as an international organisation or a RIGO is informed primarily by the difficulty in reconciling its assertive authority vis-à-vis member states, and in some cases to the exclusion of the member states, with traditional functionalist understandings of IOs.[30]

The thesis argues that the nature and practice of an IO's authority vis-à-vis member states does not negate the fact of that the organisation is an IO and a RIGO, however assertive or passive its authority. This increasing assertiveness of RIGOs is actually one of the justifications for this research. The EU is indeed a regional intergovernmental organisation whose laws arguably have 'supranational' effect, hence transcending domestic legal boundaries. While this feature may be useful when comparing aspects of the institutional functional competence of RIGOs, it has no effect on the normative/legal character of the RIGO as far as international law is concerned, and therefore has no utility when the organisation is examined from an international law perspective.

[28] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 27–28; William Wallace, 'The Sharing of Sovereignty: The European Paradox' (1999) XLVII Political Studies 503, 511.
[29] Olufemi Amao, *African Union Law: The Emergence of a Sui Generis Legal Order* (Routledge 2018).
[30] Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 8.

1.3.2 The Evolving Role of Regional Inter-Governmental Organisations

Even though most RIGOs are more prominent as economic and integration blocs rather than as political blocs, some are gradually emerging as equally assertive organisations for states' collective political bargaining. Of course, this is not to say that state sovereignty is retreating to the background in international affairs; states remain the principal players here. However, as asserted by the former Secretary-General of the UN, Kofi Annan, states are no longer the only players in international relations[31] and as such, sovereignty must 'be understood as contingent and conditional on states' taking responsibility for the security of their own people's human rights'[32] and not as 'a shield behind which gross violations of human rights can be committed'.[33] While state sovereignty remains the pillar of international law and international politics, states are inevitably entrusting some hitherto domestically controlled functions to RIGOs.[34] Inevitably, and perhaps inadvertently, any belief of states' exclusive authority is challenged by the decision of states themselves to establish and empower RIGOs. More optimistically, this commitment to limitations on sovereignty inherent in being members of RIGOs may itself be considered as an expression of, and not necessarily as a claw-back on, sovereignty.[35]

RIGOs are increasingly metamorphosing from their 'traditional' roles of economic integration entities into active and influential political players deployed by states in negotiating international affairs and influence and as avenues for states' collective access to and participation in global decision-making fora. The EU and the AU are prominent in this regard. The EU, for instance, is empowered by its constituent instruments to bargain and conclude treaties with third states or international organisations on behalf of its members as a collective in order to further common objectives, particularly foreign and security policy and international relations.[36] It has since adopted a common policy on foreign relations and security to guide its response to violations of international law, human rights, the Rule of Law and principles of democracy. The objectives of the AU also include promoting and defending 'African common positions on issues of interest to the continent and its peoples'.[37] With this increasingly assertive role for RIGOs, the traditional concentration of international criminal justice at the global level no longer appears tenable. With political influence comes (political) responsibility, hence a potential role for RIGOs in international criminal accountability. As states increasingly legally empower RIGOs as functional vehicles for collective bargaining, they should anticipate and appreciate the inevitable political, and perhaps even legal, responsibilities that result from such empowerment. Further to this functional conception of RIGOs as vehicles for states' collective action, the argument for identifying and harnessing the potential of RIGOs to play a proactive role in international criminal accountability can be better understood and appreciated

[31] United Nations, 'Report of the Secretary-General on the Work of the Organization' (2006) A/61/1, para 6.
[32] Kofi Annan, *Interventions: A Life in War and Peace* (Nader Mousavizadeh ed, Penguin 2012) 84.
[33] Kofi Annan (n 32) 133.
[34] This theme is explored in detail in Chapter Three.
[35] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* International Court of Justice, Merits, Judgment, 27 June 1986, I.C.J. Reports 1986, p. 14 [259].
[36] Treaty on European Union, arts 8 & 37; Treaty on the Functioning of the European Union, arts 216-218.
[37] Constitutive Act of the African Union, art 3(d).

through an institutional and constitutional analysis whereby RIGOs are understood as more than just vehicles for states' collective action, but also as bodies with a rule-based degree of latitude or autonomy and a value system.[38]

Evidence already suggests changing attitudes among RIGOs. Both the UN and some RIGOs are increasingly viewing international justice 'as an indispensable component of [their] efforts … to bring an end to conflict and to promote lasting peace'.[39] Perhaps in an effort to assert authority over the validity of continental or regional responses to international crimes and to contribute to the definition of 'what is law' and what constitutes international legal standards, the AU, for example, is signalling a shift, albeit slowly, towards direct and active involvement in international criminal accountability at the regional level.[40] Notable recent examples of the AU's shifting attitude include: its role in the *Chambres Africaines Extraordinaires au Sénégal* (Hissèin Habré Trial); proposals for a Hybrid Court for Darfur;[41] proposals for a Hybrid Court for South Sudan;[42] cautious engagement with the *Cour Pénal Spéciale de la République Centrafrique*; the proposed international criminal chamber within the proposed African Court of Justice and Human and Peoples' Rights; and the AU's Transitional Justice Policy 2019. The EU has itself reasonably engaged with international criminal accountability following the violent breakup of the former Yugoslavia, most recently its role in the establishment of the Kosovo Specialist Chambers.[43] The EU has also become the collective voice of the reaction of member states to international crimes occurring elsewhere. The Organisation of American States (OAS), the Association of Southeast Asian Nations (ASEAN) and the Arab League (AL), while not exhibiting a shift towards active engagement as such, are themselves adopting policy positions on international crimes in their respective regions, albeit cautiously.[44] Of course, this global shift in attitude and the increasing appetite by RIGOs to play a part in international criminal accountability at the regional level are attributable to a multi-faceted array of often-contentious factors, aptly summarised by Musila as the 'perceived weaknesses within the global arrangements that have produced weak or inadequate responses to various situations'.[45] While these factors are not, *per se*, the subject of

[38] These themes are explored in detail in Chapter Three.
[39] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (1st edn, Oxford University Press 2012) 2.
[40] See Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 International Criminal Law Review 445; Godfrey M. Musila, 'Th e Role of the African Union in International Criminal Justice: Force for Good or Bad?' in Evelyn A. Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Intersentia 2016); Lydian Apori Nkansah, 'International Criminal Justice in Africa: Some Emerging Dynamics' (2011) 4 Journal of Politics and Law 74; Henry Richardson, 'African Grievances and the International Criminal Court' in Vincent Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012).
[41] Report of the African Union High-Level Panel on Darfur, PSC/AHG/2(CCVII) (29 October 2009) paras 25, 246–255, 318 & 322–333.
[42] *See* Chapter Six.
[43] *See* Chapter Five.
[44] Specifically, the OAS Mission to Support the Peace Process in Colombia; 2019 ASEAN Summit Statement addressing ongoing humanitarian crisis in Rakhine State, Myanmar; the Arab League Decree Regarding the Arab Model Law Project on Crimes within the Jurisdiction of the International Criminal Court.
[45] Godfrey M. Musila (n 40) 301.

this research, some of them are highlighted throughout the research in order to provide useful context to the research's objectives.

1.4 Contextual and Normative Basis of International Criminal Accountability

This section clarifies what the research understands by accountability for international crimes. In so doing, the section provides working definitions of international crimes and international criminal accountability for the purpose of the research and identifies the basis of international criminal accountability in international law. While accountability in international law may have subject-specific meaning(s) depending on the subject matter, accountability for purposes of this research is understood more by what it is not, rather than by what it is. This derives from the meaning of 'impunity' as defined by the 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher Principles),[46] the 2019 Study on Transitional Justice and Human and Peoples' Rights in Africa (ACHPR Study)[47] conducted by the African Commission on Human and Peoples' Rights (ACHPR) and the 2015 EU Policy Framework on Support to Transitional Justice (EU Transitional Justice Policy)[48]. The Orentlicher Principles define impunity as-

> [T]he impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.[49]

The ACHPR Study defines 'accountability and non-impunity' as-

> The (formal and local/indigenous) legal measures that should be adopted for investigating and establishing accountability and giving judicial remedy for and acknowledgement of the suffering of victims. Alongside its focus on holding perpetrators accountable (retribution), in the African transitional setting the accountability and non-impunity element should involve conciliation and restitution, with procedures that involve granting of compensation for victims and facilitate full participation of victims and community members in proceedings and reconciliation and healing.[50]

The EU Transitional Justice Policy understands impunity as the existence of a situation where perpetrators are shielded from prosecution either due to an inadequate legal framework or the existence of challenging political, institutional and other situations especially in post-conflict societies, and argues that ending impunity entails the perpetrators of international crimes being 'brought to justice and held accountable by fair and effective judicial bodies, at the national or international level'.[51] Accountability, for purposes of this research, is therefore the absence of impunity, whereby individual perpetrators of international crimes are brought to justice through

[46] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity 2005 (E/CN4/2005/102/Add1).
[47] 'Study on Transitional Justice and Human and Peoples' Rights in Africa' (African Commission on Human and Peoples' Rights 2019).
[48] EU's Policy Framework on Support to Transitional Justice 2015 (13576/15).
[49] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity 6.
[50] 'Study on Transitional Justice and Human and Peoples' Rights in Africa' (n 47) para 205.
[51] EU's Policy Framework on Support to Transitional Justice 8, 16.

criminal prosecutions. As Chengeta posits, 'accountability is the crux of International Law … Not only does accountability counter impunity, it is the basis on which victims of international crime … realize their right to a remedy'.[52]

However, many including the UN appear to take for granted that 'States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for [crimes under international law] and, if found guilty, the duty to punish her or him'.[53] This is the position that the UN General Assembly (UNGA) took in Resolution 60/147 of 16 December 2005 when it adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles). The idea of accountability for international crimes and the individual criminal responsibility attendant thereto are, nevertheless, not uncontroversial. The precise understanding of accountability for international crimes as well as the obligations arising therefrom are unsettled.[54] The section seeks to clarify the contextual and normative basis of the working definition of international criminal accountability applicable to the research by highlighting the historical evolution of international criminal accountability and analysing the relevant positions of various authoritative bodies in order to better appreciate the 'controversies' around international criminal accountability.

1.4.1 Historical Evolution of International Criminal Accountability

The idea 'that international responsibility is imposed upon states to ensure that perpetrators of international crimes are brought to justice' may have been suggested during the Nuremberg trials at the end of the Second World War (WW II),[55] but it was not entirely a novel idea.[56] Of course, the phrase 'brought to justice' does not necessarily mean criminal accountability or prosecution, but it indeed suggests criminal accountability or prosecution as one way of 'bringing to justice'.

[52] Thompson Chengeta, 'Accountability Gap: Autonomous Weapon Systems and Modes of Responsibility in International Law' (2016) 45 Denver Journal of International Law and Policy 1, 49.
[53] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005 (A/RES/60/147), para 5.
[54] *See for example* the famous debate between Prof. Diane Orentlicher and Prof. Carlos Nino. Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of Prior Regime' (1991) 100 Yale Law Journal 2537; Carlos S. Nino, 'The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina' (1991) 100 Yale Law Journal 2619; Diane F. Orentlicher, 'A Reply to Professor Nino' (1991) 100 Yale Law Journal 2641; Diane F. Orentlicher, '"Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (2007) 1 International Journal of Transitional Justice 10.
[55] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (n 39) 1; See also Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 British Yearbook of International Law 58.
[56] For a brief history of international criminalisation, see Robert Cryer, 'The Doctrinal Foundations of International Criminalization' in M. Cherif Bassiouni (ed), *International Criminal Law* (3rd edn, Martinus Nijhoff Publishers 2008).

1.4.1.1 Events Following the First World War

Attempts at internationally prosecuting crimes committed during war, some of which are today considered part of the corpus of international crimes, are prominently evident from events following the First World War (WW I). The 1919 Treaty of Peace with Germany (Treaty of Versailles) concluded between the Allied and Associated Powers and the defeated German state envisioned a tribunal composed of judges from the Allied and Associated Powers to prosecute the ex-Kaiser of Germany, Wilhelm II for the ill-defined 'supreme offence against international morality and the sanctity of treaties'.[57] The treaty also envisioned the prosecution by the Allied and Associated Powers of other Germans suspected of committing 'acts in violation of the laws and customs of war',[58] though Germany's insistence on prosecuting these persons before its domestic courts eventually prevailed. The 1920 Treaty of Peace Between the Allied & Associated Powers and Turkey (Treaty of Sèvres) similarly provided for the prosecution of those deemed 'responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914'[59] by the Allied Powers before a tribunal of their choosing, including any such tribunal that may be established by the League of Nations.[60]

An examination of the negotiation process leading up to the Treaty of Versailles reveals significant uncertainty and disagreement among the Allied and Associated Powers as to the nature, scope and international character of the crimes that the ex-Kaiser was to be held responsible for, hence the vague formulation above.[61] In fact, it was partly as a result of these uncertainties and disagreements that the United States of America (USA) never ratified the Treaty of Versailles. Suffice to say, the trial of the ex-Kaiser never materialised due in part to waning appetite for it among the Allied and Associated Powers and the refusal of The Netherlands, where the ex-Kaiser had been granted asylum, to extradite the ex-Kaiser.[62] Further, the domestic trials in Germany held at Leipzig only netted a handful of low-level

[57] Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, 225 CTS 188, art 227. *See also* William A. Schabas, *The Trial of the Kaiser* (Oxford University Press 2018).
[58] Treaty of Peace with Germany (Treaty of Versailles), 28 June 1919, 225 CTS 188, art 228.
[59] Treaty of Peace Between the Allied & Associated Powers and Turkey (Treaty of Sèvres) (10 August 1920), art 230.
[60] Treaty of Peace Between the Allied & Associated Powers and Turkey 1920, art 230. *See also* Sévane Garibian, 'From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress' (2010) 52 Armenian Review 86; Lina Laurinaviciute, Regina M. Paulose and Ronald G. Rogo, 'The Forgotten: The Armenian Genocide 100 Years Later' in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, vol 1 (Torkel Opsahl Academic EPublisher 2014).
[61] For a detailed examination of the intrigues surrounding the unsuccessful attempt to prosecute ex-Kaiser Wilhelm II, *see* William A. Schabas, *The Trial of the Kaiser* (n 57).
[62] Jackson Nyamuya Maogoto, 'The 1919 Paris Peace Conference and the Allied Commission: Challenging Sovereignty Through Supranational Criminal Jurisdiction' in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, vol 1 (Torkel Opsahl Academic EPublisher 2014) 185–190.

military captains and commanders who nevertheless served pitifully short sentences.[63] For its part, the Treaty of Sèvres did not amount to anything as Turkey refused to ratify it.

Besides being the first serious attempts at establishing an international criminal mechanism, these episodes in history neither meant that there existed at the time an obligation under international law for states to ensure criminal accountability for international crimes nor that there existed at the time crimes that could be properly defined as international crimes if committed during war-time. The trials conducted by Germany at Leipzig were international only as far as they were based on the Treaty of Versailles and applied the extranational category of crimes known as 'laws and customs of war'. The few trials in Istanbul[64] were not based on treaty since Turkey never ratified the Treaty of Sèvres, but the crimes charged could be considered international in as far as they related to crimes committed during a conflict of an international character. This is as far as the 'international' nature of the post-WW I efforts go.

These were indeed watershed moments, at least for the idea of international criminal accountability. However, they cannot be said to have reflected an international obligation on states to prosecute international crimes. As Schabas asserts rather derisively, '[T]he fact that five victorious powers and Germany might agree to something is not enough to create international law applicable to other states.'[65] Further, implementation of the two treaties, particularly their provisions on international criminal accountability, were predicated on the express consent of the two affected states. As mentioned above, Turkey never fulfilled this condition because it never ratified the treaty, opting instead to try a few suspects domestically. While Germany ratified the treaty, not much else followed from it.

1.4.1.2 Events Following the Second World War

The efforts made after WW I gained some traction over two decades later following the devastation caused by WW II. Through the Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Soviet Socialist Republic for the Prosecution and Punishment of the Major War Criminals of the European Axis of 1945 (London Agreement) to which was attached the Charter of the International Military Tribunal of 1945 (IMT Charter), the Allied Powers resurrected the idea of individual criminal responsibility first mooted in the Treaty of Versailles. The London Agreement and IMT Charter established the International Military Tribunal (Nuremberg Tribunal), composed of judges from the Allied Powers and their Allies, for the 'just and prompt trial and punishment of the major war criminals of the European Axis'[66] individually

[63] For a discussion of the Leipzig Trials*, see* Joseph Rikhof, 'The Istanbul and Leipzig Trials: Myth or Reality?' in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, vol 1 (Torkel Opsahl Academic EPublisher 2014) 263–274.
[64] For a discussion of the Istanbul Trials*, see* Joseph Rikhof (n 63) 274–282.
[65] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (n 39) 8.
[66] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 280, art 1 of the Charter.

responsible for crimes against peace, war crimes and crimes against humanity.[67] To bolster its claim to international status, or at least to multilateralism, the London Agreement and IMT Charter were supported by eighteen other non-participating signatories.[68] The Nuremberg Tribunal eventually prosecuted twenty-two former leading figures of Nazi Germany for crimes against peace, war crimes and crimes against humanity.[69]

The Nuremberg Tribunal made sweeping claims that while the trial was a manifestation of the occupying powers' collective action, this was action that they were *entitled* to take individually. Nevertheless, this claim to *entitlement* is not an assertion that there was indeed an obligation on any of these states individually to prosecute the crimes that they deemed to be international crimes. More importantly, the Nuremberg Tribunal's practice firmly established the principle of individual criminal responsibility for what could be considered as international crimes, something that had been the aim of the Treaty of Versailles but whose implementation had aborted. In its much-celebrated words, the Nuremberg Tribunal asserted in *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Herman Wilhelm Goering & others* that, 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[70] After the conclusion of the Nuremberg Tribunal, the occupying powers, specifically the USA and the Soviet Union, conducted military trials of other suspected Nazi war criminals in their various zones of occupation. These suspects were tried for much the same corpus of crimes as were prosecuted at the Nuremberg Tribunal which 'while not genuinely international … marked the start of … the implementation of international criminal law by domestic courts'.[71]

A similar contemporaneous tribunal known as the International Military Tribunal for the Far East (Tokyo Tribunal) modelled along the lines of the Nuremberg Tribunal was established

[67] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945 (82 UNTS 280), arts 1 of the Agreement and 1 & 6 of the Charter. The Charter defined crimes against peace as 'planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing', war crimes as 'violations of the laws or customs of war … include[ing], but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or 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' and crimes against humanity as 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.

[68] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, The Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay and Yugoslavia.

[69] *See generally* Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press 2011); Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II* (Oxford University Press 2020).

[70] Trial of the Major War Criminals before the International Military Tribunal, vol 1, 14 November 1945 – 1 October 1946, vol 1, 223.

[71] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (n 39) 12.

by the 1946 Special Proclamation by the Supreme Commander for the Allied Powers and to which was attached the Charter of the International Military Tribunal for the Far East (IMTFE Charter). It was composed of judges from the Allied Powers and a judge from newly-independent India and was tasked with 'the trial of those persons charged individually, or as members of organizations, or in both capacities'[72] for crimes against peace, conventional war crimes and crimes against humanity.[73]

It is noteworthy that these prosecutions were the first occasion when third states involved in, affected by or with an interest in a conflict successfully banded together to prosecute crimes committed outside of their territories and by persons who were not their nationals, hence the emergence of a concept of international response to atrocities through justice actions.[74] This assertion is strengthened by the fact of the 'adherence' to the London Agreement and the IMT Charter by the other states that were not directly involved in the conflict, which itself signified multinational condemnation of these acts and an endorsement of 'international' action to prosecute. Perhaps the inclusion of a judge from newly-independent India, Justice Radha Binod Pal,[75] in the Tokyo Tribunal can also be cited as an indication of a desire by the Allied Powers to portray the trials as the action of a 'global community' notwithstanding their restrictive and exclusionary understanding of 'global community' at the time.

However, as important and foundational to international criminal accountability as understood today, these prosecutions were more an expression of war victors' intent on meting punishment for what they considered to be international crimes, than an expression of any belief of an obligation under international law on states to prosecute international crimes. They were conducted more as an expression of a 'right' of victorious parties to prosecute atrocities committed during the war, and less as an expression of an obligation (much less binding) to do so.

1.4.1.3 Events After Nuremberg and Tokyo

The period after the Nuremberg and Tokyo tribunals was characterised by stuttering attempts at codification rather than prosecution. Three relevant processes were undertaken contemporaneously during this period. Firstly, on 11 December 1946, the UNGA 'affirm[ed] the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal'[76] and soon thereafter on 21 November 1947 directed the newly-established International Law Commission (ILC) to 'formulate the principles of international

[72] Special Proclamation by the Supreme Commander for the Allied Powers, and Charter of the International Military Tribunal for the Far East, arts 1 of the Special Proclamation.
[73] Special Proclamation by the Supreme Commander for the Allied Powers, and Charter of the International Military Tribunal for the Far East, arts 1 of the Special Proclamation and 5 of the Charter.
[74] *See generally* Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 Journal of International Criminal Justice 830.
[75] See Rohini Sen and Rashmi Raman, 'Retelling Radha Binod Pal: The Outsider and The Native' in Frédéric Mégret and Immi Tallgren (eds), *The Dawn of a Discipline: International Criminal Justice and Its Early Exponents* (Cambridge University Press 2020); Sujith Xavier, 'Locating and Situating Justice Pal: TWAIL, International Criminal Tribunals, and Judicial Powers' [2022] Asian Journal of International Law 1.
[76] UN General Assembly Resolution 95 (I) (11 December 1946).

law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal'.[77] The ILC completed this task by 1950 and adopted the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, commonly known as the Nuremberg Principles.[78] The seven principles relate to: individual criminal responsibility for international crimes; irrelevance of the non-criminalisation under domestic law; irrelevance of official position or capacity; irrelevance of claim to superior orders; right to a fair trial; list of international crimes, being crimes against peace, war crimes, crimes against humanity; and complicity as a crime. Even though the UNGA did not formally adopt the principles formulated by the ILC, the UNGA's previous 'affirmation' of the yet-to-be formulated principles in 1946 has been interpreted by some as a clear intention of the international community (even though very narrowly and exclusively conceived at the time) to 'robustly set in motion the process for turning the principles at issue into general principles of customary law binding on member States of the whole international community'.[79] Of course, the principles as formulated by the ILC are not binding. Nonetheless, they formed a firm foundation for the subsequent development of international criminal law.

Secondly, in the same Resolution 177 (II) of 21 November 1947, the UNGA entrusted the ILC with codifying 'offences against the peace and security of mankind'.[80] Despite early drafts of this code by the ILC in 1954 and 1957,[81] progress more or less stalled throughout the Cold War period. The ILC picked up pace at the end of the Cold War, producing an ambitious first draft Code of Crimes against the Peace and Security of Mankind in 1991 (under the stewardship of Special Rapporteur Doudou Thiam) with a long list of crimes.[82] Following criticism by states, the ILC later reduced this list to five (genocide, crimes against humanity, war crimes, aggression and crimes against United Nations and associated personnel) in its 1996 second draft of the Draft Code of Crimes against the Peace and Security of Mankind.[83]

Thirdly, the ILC embarked on drafting principles on state responsibility for internationally wrongful acts. What is significant about this process is that a very early draft of these principles contained a provision on international crimes. Article 19 of the 1979 version of the ILC Draft Articles on State Responsibility (for Internationally Wrongful Acts) sought to

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[77] UN General Assembly Resolution 177 (II) (21November 1947) para a.
[78] Report of the International Law Commission, 2nd Session, 5 June –29 July 1950, U.N. GAOR Supp. No. 12, U.N. Doc. A/1316),(1950) II Yearbook of the International Law Commission 96.
[79] Antonio Cassese, 'Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal' 1 https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf accessed 20 August 2019.
[80] UN General Assembly Resolution 177 (11) (21 November 1947) para b. For the drafting history of this Code, *see* M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011).
[81] UN General Assembly Resolution 897 (IX) (04 December 1954); UN General Assembly Resolution 1186 (XII) (11 December 1957).
[82] Report of the International Law Commission, 43rd Session, 29 April –19 July 1991, U.N. GAOR Supp. No. 10, U.N. Doc. A/46/10 (1991), (1991) II(2) Yearbook of the International Law Commission 79. The identified offences were: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; exceptionally serious war crimes; recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; willful and severe damage to the environment;
[83] Report of the International Law Commission, 48th Session, 6 May – 26 July 1996, GAOR Supp. No. 10, U.N. Doc. A/15/10 (1996), (1996) II(2) Yearbook of the International Law Commission 15.

engage the responsibility of a state for an international crime which it defined as 'an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole'.[84] However, subsequent versions of these principles, including the final Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the ILC in 2001 and submitted to the UNGA did not include this provision or make any other reference to international crimes. Nonetheless, this drafting history is significant for the very fact that it signified tacit recognition by the ILC of some connection between states and international crimes which potentially engages state responsibility and hence a potential role for states in ensuring accountability for international crimes.

1.4.2 Normative Basis of International Criminal Accountability

1.4.2.1 Obligation of States to Respect and Ensure rights

International instruments entrench broad and general rights and corresponding state obligations, but without providing any specific guidance on the precise content of the obligations, much less on their measures of implementation. Admittedly, however, the 'problem' of the precise content of obligations is not unique to instruments relevant to international crimes but is rather emblematic of international law generally. Accountability can be said to hinge upon article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) which codifies the undertaking of state parties to 'respect and to ensure' all the rights and freedoms guaranteed by the instrument. This obligation is of a dual character, that is, it is both a negative and a positive obligation.

As a negative obligation, it requires the state to refrain from interfering with the enjoyment of the rights guaranteed by the ICCPR through direct or indirect acts of commission and/or omission attributable to the state. The positive obligations envisioned have been defined by the Human Rights Committee (HRC) in its General Comment 31[80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant as requiring state parties to take active steps by putting in place due diligence measures aimed at preventing, investigating, punishing and redressing offending acts and omissions. This interpretation aligns with the various perceived aims of accountability, being preventive, retributive and restorative.[85] First, the state is obligated to take positive preventive measures to ensure that persons within its jurisdiction do not suffer from violations of guaranteed rights from any foreseeable source. These measures include legislative measures that protect people from such violations, including those violations that could amount to international crimes. This obligation is open-ended and envisions any other relevant measures that a state deems appropriate to achieve this purpose. The second limb requires that the state takes positive measures to ensure

[84] Report of the International Law Commission, 31st Session, 14 May – 3 August 1979, U.N. Doc. A/34/10/ (1979), (1979) II(2) Yearbook of the International Law Commission 87.
[85] *See* Anthony Duff, 'Process, Not Punishment: The Importance of Criminal Trials for Transitional and Transnational Justice' (2013) 14 Minnesota Legal Studies Research Paper.

that appropriate corrective measures are undertaken if a violation of the guaranteed rights has occurred.

The ICCPR further provides at article 2(3) that a violation of a right or fundamental freedom guaranteed by the instrument engages the state party's obligation to ensure that an effective remedy is available to the aggrieved party through 'competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State', and to ensure the enforcement of such remedies. This obligation draws directly from article 8 of the Universal Declaration of Human Rights (UDHR) which, while not binding, set the foundation for the codification of binding human rights standards in subsequent instruments such as the ICCPR. Interpreting article 2(3) on effective remedies, the HRC elaborated on the nature of an effective remedy in its General Comment 31[80], laying particular emphasis on accessible and effective remedies such as: administrative mechanisms for ensuring thorough, independent and impartial investigations; judicial justiciability of rights including bringing perpetrators to justice; and availability of reparation for affected individuals. Particularly important in this interpretation is the HRC's assertion that this obligation entails an obligation to investigate and prosecute. Regional systems also express an appreciation for the importance of a remedy for violation of rights. The African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights, for example, are respectively empowered to 'make appropriate orders to remedy the violation'[86] and order that 'the breach of such right or freedom be remedied',[87] while the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantees a right to 'an effective remedy' for the violation of rights and fundamental freedoms.[88]

Important to the discussion of accountability measures generally, and international criminal accountability specifically, is the question of to whom the obligation to respect and ensure rights is owed. Foremost, the above obligations are owed to the relevant individual rights bearers,[89] and to the general public. Further, according to the HRC in paragraph 4 of its General Comment 31[80], this obligation is to be interpreted as also being owed by a state party to other state parties, that is, it is an *erga omnes partes* obligation. The relevance of this interpretation in the context of international crimes is that any state party to the ICCPR has the legitimate interest and right to call upon another state party in which international crimes occur to ensure an effective remedy for those violations. It is also reasonable to argue that by virtue of the obligations under articles 1(3) and 55 of the UN Charter which call upon member states and the UN to achieve international cooperation in ensuring respect for human rights and fundamental freedoms, all UN member states have a responsibility to assist and cooperate with affected states in ensuring effective remedy for international crimes.

[86] Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/ PROT (III), art 27(1).
[87] American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, art 63(1).
[88] European Convention for the Protection of Human Rights and Fundamental Freedoms, 04 November 1950, 213 UNTS 221, art 13.
[89] Human Rights Committee General Comment 31[80].

1.4.2.2 Obligations Under Other International Law Instruments

Beyond the general obligations under the ICCPR, a few international instruments are more elaborate on the nature of relevant obligations, at least for some acts that amount to international crimes. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), for example, affirms genocide as an international crime which state parties undertake to prevent and punish.[90] The nature of this obligation to punish the crime of genocide provides the clearest expression of an obligation to punish an international crime. Beyond the treaty prohibition, the prohibition against genocide has been recognised by the International Court of Justice (ICJ) in *Case Concerning Armed Activities on the Territory of the Congo (New Application:2002) (Democratic Republic of the Congo v. Rwanda)* as a *jus cogens* norm which therefore binds all states.[91] According to the ICJ in *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* the undertaking under the Genocide Convention by state parties to punish the crime of genocide 'is not merely hortatory or purposive',[92] but is rather a formal acceptance of a binding obligation.[93] Further, the ICJ has opined in its Advisory Opinion *Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion* that the principles of the Genocide Convention are 'binding on States, even without any conventional obligation',[94] that is, they are of a customary international law nature. Since the declared aim of the Genocide Convention evident from its preamble includes universal condemnation of the international crime of genocide, the ICJ's opinion above can logically be interpreted to mean that the obligation to punish as reflected in Article 1 of the Genocide Convention reflects a customary international law obligation and is therefore binding on all states.

While the obligation to punish the crime of genocide is couched in absolute terms in the Genocide Convention, article VI of the Genocide Convention notably creates room for the possibility of various mechanisms for discharging the obligation to punish genocide, conspiracy or incitement to commit genocide, attempt to commit genocide and complicity in genocide, by providing that such acts can 'be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. This provision is considered to have been the first express anticipation of an international criminal court. It provides the possibility for two or more states acting in concert or a group of states acting through an inter-governmental organisation to establish an *ad hoc* or permanent

[90] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277, art I.
[91] *Case Concerning Armed Activities on the Territory of the Congo (New Application:2002) (Democratic Republic of the Congo v Rwanda,* International Court of Justice, Jurisdiction and Admissibility, Judgment, 3 February 2006, I.C.J. Reports 2006, p. 6 [64].
[92] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* International Court of Justice, Judgment, 26 February 2007, I.C.J. Reports 2007, p. 43 [162].
[93] ibid.
[94] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 15, 23.

criminal tribunal to punish the crime of genocide. This implication is apparent from the definition by the ICJ of the 'international penal tribunal' envisioned in article VI as 'cover[ing] all international criminal courts created after the adoption of the Convention … of potentially universal scope, and competent to try the perpetrators or any of the other acts enumerated in Article III',[95] notwithstanding the manner of its creation.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) imposes an obligation on state parties to not only criminalise all acts of torture, but to also prosecute and punish torture domestically or to extradite suspected torturers to other national jurisdictions that are willing and able to prosecute.[96] A similar express obligation to punish perpetrators of torture is found in some regional instruments such as the Inter-American Convention to Prevent and Punish Torture.[97] In its Judgment in *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the ICJ observed that the relevant provisions of the Convention against Torture, specifically the obligations to investigate and to prosecute, were 'similar' to those in the Genocide Convention and that '[t]hese obligation may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case'.[98]

The Four Geneva Conventions of 1949 expressly create an obligation on states to punish so-called grave breaches, which include some serious violations of the laws of war.[99] These examples of serious violations of the law of war are commonly known as war crimes and are part of the corpus of international crimes, alongside crimes against humanity and genocide. The above Geneva Conventions impose a specific obligation to prosecute and punish perpetrators of grave breaches or hand these persons over for prosecution and punishment by another state party.

The Rome Statute is so far not only the most comprehensive and unequivocal codification of international crimes, but also the closest that states have come to expressing a desire to actualise collective ambition of prosecuting international crimes, that is, crimes against humanity, genocide, war crimes and aggression. Notably, the Rome Statute does not

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[95] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro),* International Court of Justice, Judgment, 26 February 2007, I.C.J. Reports 2007, p. 43 [445].

[96] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85, arts 5, 7& 8.

[97] Inter-American Convention to Prevent and Punish Torture, 9 December 1985, OAS Treaty Series 67, arts 6 & 12.

[98] *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, International Court of Justice, Judgment, 20 July 2012, I.C.J. Reports 2012, p. 422 [68].

[99] For specific detailed definitions of what constitute 'grave breaches', *see* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), 12 August 1949, 75 UNTS 31, art 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), 12 August 1949, 75 UNTS 85, art 51; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III), 12 August 1949, 75 UNTS 135, art 130; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), 12 August 1949, 75 UNTS 287, art 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3, arts 11 & 85.

expressly speak to state obligation to prosecute these international crimes. However, a reading of Article 17(1)(a) of the Rome Statute implies such an obligation on state parties. The provision enables the ICC to exercise jurisdiction over these international crimes only in the event that the relevant state 'is unwilling or unable genuinely to carry out the investigation or prosecution'. This is commonly termed as the principle of complementarity, and when understood in light of the statute's preambular exhortation that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes', it leads to the logical implication that the Rome Statute recognises a primary duty of state parties to investigate and punish international crimes. Some have argued that the fact of the Rome Statute's ratification by over 100 states 'constitutes significant evidence of an acknowledgment of the duty to prosecute and punish these [international] crimes'.[100] While this argument is appealing, especially for those keen on asserting a binding international law obligation, its weakness lies in the fact that an almost equally sizeable number of states, including some of the world's most politically and economically powerful states, have firmly refused to become parties to the statute. Further, this argument is weakened by the recent withdrawal of Burundi and The Philippines from the statute.[101] Nonetheless, it is, at the very least, an indication by many states of their desire to see individual criminal accountability for international crimes.

1.4.2.3 The Position of 'Soft Law' Instruments

While some express obligations arise from certain binding instruments relating to specific categories of international crimes as highlighted above, these do not cover the entire corpus of what are considered to be international crimes. As such, it is prudent to seek further guidance on accountability from so-called 'soft law'. Notable in this regard is the UNGA's Basic Principles which emphasise access to justice for victims of gross violation of international human rights law or serious violation of international humanitarian law including through 'equal access to an effective judicial remedy as provided for under international law',[102] and further insist that–

> In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.[103]

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[100] Ken Obura, 'Duty to Prosecute International Crimes under International Law' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press 2011) 20.
[101] International Criminal Court, 'Statement of the President of the Assembly of States Parties on the Process of Withdrawal from the Rome Statute by Burundi' 18 October 2016 https://www.icc-cpi.int/news/statement-president-assembly-states-parties-process-withdrawal-rome-statute-burundi accessed 20 August 2019; International Criminal Court, 'ICC Statement on The Philippines' Notice of Withdrawal: State Participation in Rome Statute System Essential to International Rule of Law' 20 March 2018 https://www.icc-cpi.int/news/icc-statement-philippines-notice-withdrawal-state-participation-rome-statute-system-essential accessed 20 August 2019.
[102] Basic Principles, principle 12
[103] Basic Principles, principle 4.

While not binding, the Basic Principles signal a gradual coalescence of international consensus regarding certain international standards.[104]

Another notable document is the Orentlicher Principles which insists that 'victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings' and that states have 'primary responsibility to exercise jurisdiction over serious crimes under international law' particularly through 'prompt, thorough, independent and impartial investigations … [and] appropriate measures in respect of the perpetrators … by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished'.[105] While the Orentlicher Principles have not been formally adopted by the UN Human Rights Council or the UNGA, they continue to provide assertive guidance to stakeholders working on accountability.[106]

The 2019 ILC Draft Articles on Prevention and Punishment of Crimes against Humanity seek to impose an obligation on States to prevent, criminalise and punish crimes against humanity including through imposing individual criminal responsibility and penalties and an obligation to investigate.[107] Similar to the Convention against Torture, the Draft Articles also seek to impose an obligation on States to either prosecute and punish crimes against humanity domestically or to extradite suspected torturers to other jurisdictions that are willing and able to prosecute.[108] Notably, unlike the Convention against Torture that calls for extradition to national jurisdictions, the Draft Articles go further to require the State, if it fails to prosecute, to extradite or surrender the alleged perpetrator 'to another State or competent international criminal court or tribunal'.[109] Further, Article 14(9) of the Draft Articles anticipates that states may conclude mutual assistance arrangements 'with international mechanisms that are *established by the United Nations or by other international organizations and that have a* mandate to collect evidence with respect to crimes against humanity' (emphasis added). In so providing, the Draft Articles therefore anticipate the existence of supranational courts or tribunals with international criminal jurisdiction over crimes against humanity.

Of course, these so-called soft-law standards are not binding on states. However, their soft-law nature 'does not [necessarily] mean that they do not constitute obligations'[110] since

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[104] Christopher Muttukumaru, 'Reparations to Victims' in Roy S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (Kluwer Law International 1999) 270; Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' (2017) 17 International Criminal Law Review 351, 355 & 368.

[105] Orentlicher Principles, principles 32, 20 & 19.

[106] *See* Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford University Press 2018).

[107] Draft Articles on Prevention and Punishment of Crimes against Humanity 2019, arts 3, 6–10. *See also* Charles Chernor Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?' (2020) 52 Case Western Reserve Journal of International Law 331.

[108] Draft Articles on Prevention and Punishment of Crimes against Humanity, A/74/10, 71st Session of the ILC (April-August 2019), arts 10 &13.

[109] Draft Articles, art 10.

[110] Juan E. Méndez, 'Accountability for Past Abuses' (1997) 19 Human Rights Quarterly 255, 262; See also Busingye Kabumba, 'Soft Law and Legitimacy in the African Union: The Case of the Pretoria Principles on Ending Mass Atrocities Pursuant to Article 4(h) of the AU Constitutive Act' in Ololade Shyllon (ed), *The Model*

they may reflect states' attitude towards questions of international law.[111] They not only provide clarity on and enrich those binding obligations discussed above, but can also provide additional basis upon which states can be encouraged to live up to contemporary standards of justice and anti-impunity or upon which society can judge states' commitment to justice for international crimes.

1.4.2.4 Contemporary Practice

Despite the lack of international consensus on an express international law obligation on states to ensure criminal accountability for all international crimes, states have nonetheless undertaken prosecutions for international crimes either as directly affected states themselves, or through international mechanisms established through a multilateral treaty like the Rome Statute or established by the Security Council. Over the past three decades, the practice of the international community has served to reinforce the argument for accountability for international crimes through a judicial criminal process. Notable in this regard are the: creation by the Security Council of the ICTY and the ICTR in 1993 and 1994 respectively; the creation of the SCSL, ECCC and the STL through joint initiatives of the UN and the governments of Sierra Leone, Cambodia and Lebanon respectively; adoption of the Rome Statute and consequent establishment of the ICC as the first (and so far, only) permanent international criminal mechanism; the creation of the *Chambres Africaines Extraordinaires au Sénégal* as a joint initiative of the AU and the government of Senegal; creation of the Kosovo Specialist Chambers with primary involvement of the EU; and the proposed Hybrid Court for South Sudan as a joint initiative of the AU and the government of South Sudan. Also indicative is state practice evidenced in prosecution of international crimes by affected states[112] or by third states through the exercise of the principle of universal jurisdiction, though the latter is limited in scope and far more controversial.

1.4.3 Position of the Research on International Criminal Accountability

This historical context, normative underpinning and practice highlighted above signify the existence of considerable international agreement on the need for accountability for grave and systematic violations of human rights law and humanitarian law. Some commentators have in fact concluded that based on the above normative framework, it can be argued that there is an emergence of a 'principle in international law that states have affirmative obligations in response to massive and systematic violations of fundamental rights'.[113] In other words, while some of the relevant instruments may be quite vague on obligations or duties to prosecute and punish, and while state practice in this regard may be limited and inconsistent, a logical

Law on Access to Information for Africa and other Regional Instruments: Soft Law and Human Rights in Africa (Pretoria University Law Press 2018).

[111] See for example the ICJ's opinion on the normative value of UNGA resolutions in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965,* International Court of Justice, Advisory Opinion, 25 February 2019, I.C.J. Reports 2019, p. 95.

[112] Notable examples include the Ethiopian prosecution of Mengistu Haile Mariam and other Derg members, the *Cour Pénal Spéciale de la Republique Centrafrique,* and prosecutions in former Yugoslav states.

[113] Juan E. Méndez (n 110) 259.

conclusion from a reasonable interpretation of the instruments, read together, is that they 'in fact impose a legal duty on states to prosecute and punish atrocious crimes'.[114] This, at the very least, is recognition of what Méndez identifies as a 'moral' justification for punishing international crimes because of the 'heightened value' of the norms prohibiting such massive and systematic violations and the need to vindicate such norms.[115]

Of course, while 'moral' justifications may have a pride of place in informing public opinion and in shaping public response to atrocities, they do not amount to an obligation in international law, and while most international crimes discussed above and their prohibition are either codified in treaty law or considered as having crystallised into customary international law thereby transcending the boundaries of conventional consent, this is quite different from the procedural obligation to prosecute them. While significant progress has been made 'toward the recognition that a legacy of grave and systematic violations generates obligations'[116] of states towards victims, survivors and society, 'the content of those obligations and … how they should be fulfilled'[117] are still a matter of contention. According to Obura, what is contentious is not so much whether there exists an obligation to prosecute and punish international crimes under international law, as is 'the content of the duty to prosecute and punish these crimes under the substantive body of international law'.[118]

This research takes the position that regardless of a lack of an express international law obligation for states to prosecute perpetrators of *all* international crimes, prosecutions and judicial trials are a fundamental element of accountability for international crimes. While accountability may entail different obligations and envision different measures through which these obligations can be discharged, prosecution is a basic, primary, necessary and desirable component of accountability initiatives. This position is supported by the practice of states either individually or collectively and in the growing body of 'soft-law' instruments as highlighted above, all of which point to a general convergence around the idea that, at the very least, the content of obligations in international law relevant to international crimes aspires to investigation, prosecution and punishment of international crimes.

1.4.4 Position of the Research on What Constitutes International Crimes

The focus of this research is criminal accountability for those crimes considered to be 'international crimes'. These are violations of a massive and systematic nature of the most fundamental of rights such as right to life, liberty and physical integrity of the person, otherwise generally categorised as crimes against humanity; genocide; war crimes; and the crime of aggression. In other words, these are crimes proscribed in international law and of such gravity as to 'harm the fundamental interests of the whole international community'[119] and which are

[114] Ken Obura (n 100) 12.
[115] Juan E. Méndez (n 110) 277.
[116] Juan E. Méndez (n 110) 255.
[117] Juan E. Méndez (n 110) 255.
[118] Ken Obura (n 100) 11.
[119] Yoram Dinstein, 'International Criminal Law' (1985) 20 Israel Law Review 206, 221.

'punishable as such by the imposition of individual criminal liability'.[120] Collectively, this is the corpus of crimes referred to as international crimes. However, contrary to the assumption of contemporary discussions, the definition of 'international crimes' is not quite as straight-forward.

While the global codification of international crimes has historically excluded other serious matters such as 'piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting of currency, and damage to submarine cables',[121] the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) has sought to expand the understanding of international crimes to include some of these crimes and more, that is, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.[122] This position has also found support among some commentators who have compiled even longer lists of what potentially qualify as international crimes.[123] However, for the reason that general consensus has not been achieved on this expansive understanding of international crimes,[124] the understanding of international crimes for purposes of this research is, unless expressly stated otherwise, restricted to the so-called 'core' crimes highlighted below and as codified in the Rome Statute, that is, genocide, crimes against humanity, war crimes and aggression.

1.4.4.1 Genocide

Prior to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) in 1948 and its entry into force in 1951,[125] the UNGA in its Resolution 96(I) of 11 December 1946 recognised genocide as 'a crime under international law' despite the absence at the time of a clear definition and prohibition of genocide under international law. On 9 December 1948, the Genocide Convention became the first core international text to provide a legal definition of genocide and hence on 12 January 1951, genocide became expressly prohibited and punishable under international law with the entry into force of the Genocide Convention. Article II of the Genocide Convention defines genocide as–

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[120] Ken Obura (n 100) 13.
[121] The defining moment of this can be traced to the decision of the International Law Commission to limit its scope to 'offences containing a political element and endangering or disturbing the maintenance of international peace and security' when drafting the draft Code of Offences against the Peace and Security of Mankind. *See* Report of the International Law Commission, 3rd Session, 16 May – 27 July 1951, U.N. Doc. A/1858, (1951) II Yearbook of the International Law Commission 123, para 58.
[122] For a discussion on the expansive understanding of international crimes in the Malabo Protocol, *see* Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?' (2019) 66 Netherlands International Law Review 287, 297–309.
[123] M. Cherif Bassiouni, *Introduction to International Crimial Law* (2 revised, Martinus Nijhoff Publishers 2013) 142–246. *See also* Kamari Maxine Clarke, 'Negotiating Racial Injustice: How International Criminal Law Helps Entrench Structural Inequality' 24 July 2020 <https://www.justsecurity.org/71614/negotiating-racial-injustice-how-international-criminal-law-helps-entrench-structural-inequality/> accessed 25 July 2020.
[124] The Malabo Protocol, for instance, is yet to enter into force.
[125] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

The above definition of 'genocide' has been adopted verbatim by the Rome Statute[126] and almost verbatim by the Malabo Protocol which has added 'acts of rape or any other form of sexual violence' to its definition, in an apparent attempt to reflect the progressive development of international criminal law by international tribunals.[127] While the definition of genocide may be subject to various interpretations in other non-legal disciplines such as sociology and history, and even under different municipal legislations,[128] its legal definition as espoused in the Genocide Convention and the Rome Statute above enjoys general acceptance and is therefore adopted for purposes of this research.

1.4.4.2 Crimes against Humanity

Violations of human dignity, particularly violations pertaining to life, liberty and physical integrity, when committed in a massive and systematic manner constitute the body of international crimes known as crimes against humanity. While there exists no international instrument specific to crimes against humanity, the most concrete definition of crimes against humanity thus far is found in Article 7 of the Rome Statute which provides that–

> For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

This definition has been adopted by the International Law Commission in its final 2019 Draft Articles on Prevention and Punishment of Crimes against Humanity[129] which also

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[126] Rome Statute art 6.

[127] Malabo Protocol art 14 [inserting Article 28B of the Statute of the African Court of Justice and Human and Peoples' Rights]. *See also* Eki Yemisi Omorogbe (n 122) 300–302.

[128] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (n 39) 104.

[129] Draft Articles on Prevention and Punishment of Crimes against Humanity, A/74/10, 71st Session of the ILC (April-August 2019) art 2(1). For a detailed analysis of the ILC Draft Articles, *see* Charles Chernor Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?' (n 107); Leila Nadya Sadat, 'A Contextual and Historical Analysis of the International Law Commission's 2017 Draft Articles for a New Global Treaty on Crimes Against Humanity' (2018) 16 Journal of International Criminal Justice 683.

considers that the prohibition of crimes against humanity is a *jus cogens* norm.[130] Perhaps informed by the important role crimes against humanity play in international criminal law/justice today and the intrigues of the historical evolution of this category of crimes,[131] the ILC has recommended that states through the UNGA or an international conference of plenipotentiaries should consider concluding a treaty on crimes against humanity informed by the ILC 2019 Draft Articles including its definition of crimes against humanity.[132] The Malabo Protocol also adopts this definition, with the significant inclusion of the phrase 'when committed as part of a widespread or systematic attack *or enterprise*' (emphasis added),[133] thereby expanding its understanding of modes of criminal liability for crimes against humanity.[134]

1.4.4.3 War Crimes

War crimes generally refer to those crimes that are considered to be serious violations of international humanitarian law. According to Article 8 of the Rome Statute, 'war crimes' refers to–

> (a) Grave breaches of the Geneva Conventions of 12 August 1949 …
> (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law …
> (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely …[prohibited] acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause …
> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law …

The Malabo Protocol also adopts this definition, with the significant inclusion of 'grave breaches of the First Additional Protocol to the Geneva Conventions'[135] and greater protection of children in armed conflict by criminalising the conscription, enlistment and use of all persons under the age of 18 years.[136]

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[130] For a discussion on the ILC's work on jus cogens norms, see Dire Tladi, 'The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens): Making Wine from Water or More Water than Wine' (2020) 89 Nordic Journal of International Law 244.
[131] For a discussion of the historical evolution, see M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (n 80).
[132] Report of the International Law Commission, 71st Session, 27 April – 7 June and 8 July – 9 August 2019, GAOR Supp. No. 10, U.N. Doc. A/74/10 (2019) para 42.
[133] Malabo Protocol art 14 [inserting Article 28C of the Statute of the African Court of Justice and Human and Peoples' Rights].
[134] Eki Yemisi Omorogbe (n 122) 302–303.
[135] Malabo Protocol art 14 [inserting Article 28D of the Statute of the African Court of Justice and Human and Peoples' Rights].
[136] Malabo Protocol art 14 [inserting Article 28D(b)(xxvii) of the Statute of the African Court of Justice and Human and Peoples' Rights]. *See also* Eki Yemisi Omorogbe (n 122) 303–304.

1.4.4.4 Crime of Aggression

Originally referred to as 'crimes against peace' at the Nuremberg trials, what is today known as the crime of aggression was, and continues to be, the subject of significant debate over its precise nature, elements and parameters.[137] The Assembly of State Parties of the Rome Statute at the Kampala Review Conference in 2010 affirmed the 'crime of aggression' as a core international crime[138] and inserted Article 8 *bis*(1) to the Rome Statute which defines the crime of aggression as–

> [T]he 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.

Relying on the UNGA Resolution 3314 (XXIX) of 14 December 1974 on the definition of aggression, Article 8 *bis*(2) of the Rome Statute further defines 'act of aggression' as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. The Malabo Protocol's definition is slightly more elaborate and expansive and defines the crime of aggression as follows–

> [T]he 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 *or oganization*, *whether connected to the state or not* of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations *or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party* (emphasis added).[139]

1.5 Research Hypotheses

As discussed above, global-level administration of international criminal justice is increasingly failing to inspire confidence, the appetite for global-level administration of international criminal accountability is decreasing, and most (post)conflict states are still plagued by weak domestic systems that are genuinely unable to effectively pursue accountability for international crimes. Consequently, an impunity gap is imminent if alternatives are not explored. This research maintains that with the increasing political power and relevance of RIGOs comes (political) responsibility of these RIGOs, and that the possible impunity gap could very well be forestalled by taking advantage of the increasing political power of RIGOs as tools for states' collective political action and harnessing this power and potential to provide effective accountability for international crimes at the regional level. Considering the current

[137] *For some of these debates and the evolution of the crime of aggression, see the edited volume* Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press 2016); Dire Tladi, 'The International Criminal Court and the Adoption of a Definition for the Crime of Aggression: A Dream Deferred' (2010) 35 South African Yearbook of International Law 80; Jackson Nyamuya Maogoto, 'Aggression: Supreme International Offence Still in Search of Definition' (2002) 5 Southern Cross University Law Review 278; Carrie McDougall, *The Crime of Aggression Under the Rome Statute of the International Criminal Court* (Cambridge University Press 2021).

[138] Assembly of State Parties Resolution RC/Res.6 of 11 June 2010.

[139] Malabo Protocol art 14 [inserting Article 28M of the Statute of the African Court of Justice and Human and Peoples' Rights].

state of global politics, the success of accountability initiatives for international crimes will be significantly influenced by the role played by RIGOs.[140]

Additionally, this is a cosmopolitan and secular universalist challenge to classical assumptions of states as the sole subjects and drivers of international law, and an argument for international law as the 'law of humanity', in the words of Teitel.[141] The research argues for collective action by states through RIGOs in ensuring accountability for international crimes, with the ultimate aim of highlighting the potential for RIGOs to take a lead role in championing accountability for international crimes and to make a case for more direct and active involvement of RIGOs in this regard. The thesis argues that the prevention of and accountability for international crimes are values of a cosmopolitan nature and of concern to the international community. While states have the primary responsibility to uphold these values, genuine inability or failure to do so would warrant that responsibility being performed by the wider international community, defined as humanity as a whole.

Contrary to the assumption of some commentators,[142] this research argues that the legitimacy and relevance of international criminal accountability mechanisms are determined as much by the questions of where and by whom such accountability is delivered as they are by effective prosecutions. Nonetheless, the research is not quite as concerned with the question of appropriate forum as it is with the potential of RIGOs to take a lead and direct role in championing accountability for international crimes. In other words, this is not an 'appropriate forum' argument. In arguing the case for direct and active involvement of RIGOs in international criminal accountability, this research does not purport to advance regional mechanisms as the preferred or appropriate fora for international criminal accountability *vis-à-vis* global mechanisms,[143] neither does it repudiate the authority of basic (universal) international criminal justice principles. Rather, the research's hypothesis is that there exists a significant and largely untapped potential in RIGOs to lead in accountability for international crimes, and that there is utility in identifying and harnessing this potential. The research

[140] Brian Kagoro, 'The Paradox of Alien Knowledge, Narrative and Praxis: Transitional Justice and the Politics of Agenda Setting in Africa' in Moses Chrispus Okello and others (eds), *Where Law Meets Reality: Forging African Transitional Justice* (Pambazuka Press 2012) 12.

[141] *See for example* Ruti G. Teitel, *Humanity's Law* (Oxford University Press 2011); Ruti G. Teitel, *Globalizing Transitional Justice: Essays for the New Millennium* (Oxford University Press 2014); Richard A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000); Chandra Lekha Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability* (Routledge 2013); Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press 2015); Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford University Press 2009); Makau Mutua, 'Is the Age of Human Rights Over?' in Sophia A. McClennen and Alexandra Schultheis (eds), *Routledge Companion to Literature and Human Rights* (Routledge 2016).

[142] Mahmoud Cherif Bassiouni, 'International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press 2009) 131.

[143] The 'appropriate forum' debate is not new, and there are valid points on both sides of the debate. See for example Vincent Nmehielle, 'Taking Credible Ownership of Justice for Atrocity Crimes in Africa: The African Union and the Complementarity Principle of the Rome Statute' in Vincent Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012); Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007); Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (3rd edn, Oxford University Press 2013).

hypothesises that a regional approach to international criminal accountability centred around RIGOs stands a good chance of plugging or forestalling an accountability gap left by a disintegrating global approach and by weak domestic systems. This would call for reconsideration of the political and administrative architecture of international criminal justice and the exploration of an active and direct role for RIGOs in the administration of international criminal accountability. In other words, this requires rethinking the field's approach and 'de-globalising' international criminal justice. While there is quite some commentary on regionalisation of international criminal justice,[144] the particular role of RIGOs remains underexplored.

1.6 Research Objectives

The overall objective of the research is to investigate the potential role of RIGOs in the administration of international criminal accountability, specifically through the establishment of international criminal accountability mechanisms, in order to make a case for proactive engagement by RIGOs in this regard. Because the authority of RIGOs derives from states, the research also engages, as a preliminary issue, with the question of state sovereignty and the exercise of elements of this sovereign authority by inter-governmental organisations generally, and RIGOs in particular. The specific aims of the research are therefore to–

i) determine the theoretical and conceptual basis for RIGOs' exercise of elements of sovereign authority, particularly in the establishment of international criminal accountability mechanisms;
ii) determine the legal basis upon which RIGOs (can) establish mechanisms for accountability for international crimes, and consequently how this influences the legal legitimacy of the mechanisms so established;
iii) identify possible approaches for the establishment of international criminal accountability mechanisms by RIGOs; and
iv) suggest possible design models that would bolster these mechanism's efficiency and overall legitimacy.

1.7 Statement of the Problem (Rationale)

While the power of RIGOs as vehicles for states' collective political action at the international level increases, and while states' appetite for accountability for international crimes through global-level institutional mechanisms wanes, there is little movement towards identifying and championing the potential role that RIGOs can play in accountability for international crimes in order to mitigate both the waning appetite for global-level responses and prevailing weaknesses at the domestic level and forestall a possible impunity gap.

[144] *See* Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (n 40); William W. Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration' (2003) 38 Texas International Law Journal 729.

1.8 Significance (Contribution to Knowledge)

While there exists significant literature regarding the role of the UN in the administration of international criminal accountability through UN-backed mechanisms and regarding the ICC, the engagement (or lack thereof) of RIGOs in international criminal accountability is largely unexamined. As mentioned above, RIGOs are increasingly becoming powerful entities and political 'agents' through which states advocate collective regional and international agenda. However, the place of RIGOs in accountability for international crimes remains largely under-explored, under-documented and under-examined. As a result, the nature of this involvement and the potential role that RIGOs can play in regional accountability for international crimes remains unclear.

This research complements existing literature by critically analysing the prevailing state of RIGOs' engagement with accountability for international crimes at the regional level and making a case for more direct and active involvement of RIGOs in this regard. This research seeks to shift attention from 'globalised' criminal accountability to 'regionalised' accountability for international crimes. Hopefully, this will stimulate constructive discussion around enhancing the capacity of RIGOs to take a lead role in order to forestall the impunity gap likely to be occasioned by states' increasing resistance to 'global' administration of criminal accountability. In so doing, the research hopes to contribute towards not only promoting RIGOs' positive contribution to international criminal justice initiatives, but also ensuring that this contribution is grounded on solid principles of international criminal law and justice.

1.9 Research Questions

The principal question that the research examines is: should regional inter-governmental organisations play a direct and active role in international criminal accountability? As building blocks towards answering the main question, the research addresses the following sub-questions:

i) Can RIGOs engage in international criminal accountability, specifically by establishing accountability mechanisms?
ii) What would be the basis in international law for the establishment of international criminal accountability mechanisms by RIGOs?
iii) How can RIGOs establish international criminal accountability mechanisms?

1.10 Research Methodology

This research is underpinned by certain theoretical and conceptual frameworks. While accountability for international crimes is primarily a function of states, this research argues for collective action by states through RIGOs. The research therefore engages in an analysis of the theoretical foundations or justifications of international criminal accountability and collective action, and relies primarily on the theory of (secular) cosmopolitanism as a foundation for

advancing arguments on 'common good' of humanity and collective action to validate humanity's fundamental values. The thesis also undertakes a theoretical analysis of the relevant concept of sovereignty, as it is appreciated that the authority of RIGOs derives from states in exercise of their sovereign authority. This theoretical analysis is useful in understanding the case for collective action regarding accountability for international crimes, and in justifying 'regionalisation' of international criminal accountability.

This research is primarily qualitative desk-based research utilising both primary and secondary sources, and mainly adopting a critical analysis, with a descriptive approach being adopted in the analysis where appropriate. The critical analysis is aimed at identifying the legal tensions and contradictions in RIGOs' involvement in international criminal accountability as well as possible opportunities for reconciling these tensions and contradictions in order to articulate a legally defensible approach. The research relies on primary sources including treaties and core legal instruments of international organisations, particularly the UN, EU and AU, and on the relevant jurisprudence of domestic and international courts. The research also relies on secondary sources including books, journal articles, reports and other commentaries. The research collects and analyses relevant material from the above sources in order to develop a deeper understanding of the exercise of elements of sovereign authority by RIGOs and the application of this authority to the administration of international criminal accountability. The existing literature provides a conceptual framework for theoretical analysis.

In order to determine the position of international law on the question of elements of sovereign authority exercised by inter-governmental organisations generally, and RIGOs in particular, the research engaged in a doctrinal analysis of general international law and relevant legal instruments specific to RIGOs and the interaction of these sources of law. This doctrinal analysis is also employed in analysing the interaction of these sources of law with domestic law, specifically in the case of the EU and Kosovo and the AU and South Sudan. This analysis is particularly relevant because despite the fact that inter-governmental organisations do indeed exercise powers that at the very least have elements of sovereign authority, the basis for this practice in international law is unsettled. The analysis therefore sought to determine the legal basis for the exercise of elements of sovereign authority by RIGOS generally, and specifically as regards international criminal accountability.

In order to achieve its overall objective and demonstrate the application of international law to real challenges faced by the international community, that is, to demonstrate the '*application* of more abstract concepts to more concrete problems',[145] the research undertook to interrogate the practical application of authority by RIGOs by examining the role RIGOs have so far played in the administration of international criminal accountability at the regional level. This is because the research considers that a wholesome understanding of RIGOs' authority in respect of international criminal accountability requires both a theoretical understanding of RIGOs' authority as well as an empirical understanding of RIGOs' practical involvement in international criminal accountability. This examination was intended to

[145] Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 American Journal of International Law 291.

determine the legal basis for these RIGOs' involvement; appreciate different regional systems and their various legal and policy regimes and approaches; identify good practices as well as potential challenges and opportunities for learning; and devise a framework for direct and active engagement. Specifically, the research examines the EU's political, legal and policy architecture relevant to international criminal accountability and the EU's specific practice in relation to the establishment and operation of the Kosovo Specialist Chambers (KSC) and Specialist Prosecutor's Office (SPO). The research also examines the AU's political, legal and policy architecture relevant to international criminal accountability and the AU's proposed role in the establishment and operation of the Hybrid Court for South Sudan (Hybrid Court). The purpose of this interrogation is to determine various legal justifications RIGOs have relied upon for their involvement and/or any other considerations informing their approach, determine the nature and degree of this involvement and identify good practices and opportunities for learning which may inform arguments in favour of RIGOs' ability to actively and directly take the lead in 'regionalised' international criminal accountability. The choice of these case studies is informed by the fact that both the EU and AU are the only RIGOs so far with identifiable, though nascent, relevant practice in the establishment and administration of international criminal accountability mechanisms at the regional level, and also because they have significant potential for direct and active involvement owing to their significant political authority. Notably, however, the research does not focus on any one specific RIGO as its main research subject, but rather uses the EU and AU as case studies to concretise the research's aims and to highlight both current practice of RIGOs and the potential for RIGOs to be more directly and actively involved. The research's argument, as mentioned above, is that there is utility in identifying the potential that RIGOs have to lead in accountability for international crimes and in tapping into this potential.

The thesis also benefitted significantly from discussions with key resource persons. Specifically, the research benefitted from discussions with current and former staff of the KSC and the SPO, through e-mail correspondence on diverse dates in 2022 and conversations at the International Nuremberg Principles Academy International Conference from 12–14 May 2022. The research also benefitted from discussions held with key sources in Juba, South Sudan from 06–08 October 2021 during the Multi-Stakeholder Convening on Transitional Justice in South Sudan convened by Trust Africa and the African Union Commission and which the author attended on-site, and in Nairobi, Kenya from 13–15 December 2021 during the Conference on Sustaining Momentum for Transitional Justice in South Sudan convened by the United Nations Commission on Human Rights in South Sudan, United Nations Office of the High Commissioner for Human Rights and the United Nations Mission in South Sudan and which the author attended virtually. Earlier drafts of parts of this research were also presented and discussed at the International Seminar on International Human Rights Mechanisms from a Cross-Cultural Perspective in Changsha, China in December 2019, Centre of Excellence for International Courts (iCourts) at the University of Copenhagen, Faculty of Law in October 2021 and at the International Nuremberg Principles Academy in May 2022. These discussions provided important perspectives, insight and suggestions on relevant issues, and were instrumental in assisting the researcher to interpret relevant material and practice.

1.11 Chapter Outline

This thesis is divided into seven chapters as follows:

CHAPTER ONE: INTRODUCTION TO THE RESEARCH

This Chapter is the introductory section to the research. It contains the general background and context of the research, a clarification of terminologies used in the research (specifically of international criminal accountability and international crimes), the research hypotheses, the research objective(s), the problem statement (rationale), significance of the research (contribution to knowledge), research question(s) and research methodology.

CHAPTER TWO: OBLIGATIONS TO 'STRANGERS' – COSMOPOLITANISM AS A THEORETICAL AND CONCEPTUAL BASIS FOR INTERNATIONAL CRIMINAL ACCOUNTABILITY

The Chapter lays down the theoretical foundation for the research by advancing cosmopolitanism as a theoretical grounding for collective action by states in ensuring accountability for international crimes. The Chapter articulates the research's understanding of cosmopolitanism, cosmopolitan values and cosmopolitan action. It defines, in broad terms, what the research considers as the building blocks of the concept of cosmopolitanism, particularly the ideas of humanity, humanity's values, shared humanity, human dignity, cosmopolitan obligations, and unity of the human family. It then engages with the perceived conflicts and contradictions in the definition of cosmopolitanism and its building blocks in order to attempt a reconciliation, and offers a reconceptualised understanding of cosmopolitanism applicable to the research. The Chapter also advances the idea of collective action as a cosmopolitan endeavour to guarantee fundamental cosmopolitan values, particularly human dignity, and discusses the translation of 'abstract' cosmopolitan values into legal entitlements and the necessary institutional frameworks to guarantee these values.

CHAPTER THREE: RECONCILING THE CONCEPT OF SOVEREIGNTY WITH THE EXERCISE OF ELEMENTS OF SOVEREIGN GOVERNMENTAL AUTHORITY BY INTERNATIONAL ORGANISATIONS

This Chapter conceptualises the exercise of states' 'collective sovereign powers' by RIGOs by examining the 'contested' authority of inter-governmental organisations generally, and RIGOs specifically, to exercise elements of 'sovereign' powers traditionally the province of states. This conceptualisation is important especially since the authority of RIGOs derives from states who are traditionally the 'holders' of sovereign authority, and also considering the traditional conception of states as the primary subjects of international law. An understanding of the concept and its relevance to the functioning of IOs therefore foregrounds the determination of the legal basis for the exercise of sovereign authority by RIGOs explored in the subsequent chapter, and arguments advanced in the thesis for proactive involvement of RIGOs in international criminal justice, particularly in the establishment and administration of

international criminal accountability mechanisms. The Chapter first interrogates the concept of sovereignty as a general contestable question of international law, then explores the concepts of divided or shared sovereignty, RIGOs as international institutional bypasses, and RIGOs as organisations with (independent) value systems, to explain the acquisition and exercise of elements of sovereign authority by RIGOs. Ultimately, the Chapter advances a reconceptualised understanding of sovereignty that privileges human dignity as a fundamental cosmopolitan value of humanity. This Chapter partially answers the question as to whether RIGOs can engage in international criminal accountability, specifically by establishing accountability mechanisms.

CHAPTER FOUR: LEGAL BASIS FOR THE EXERCISE OF ELEMENTS OF SOVEREIGN GOVERNMENTAL AUTHORITY BY REGIONAL INTER-GOVERNMENTAL ORGANISATIONS

This chapter investigates the legal basis for the exercise of elements of sovereign governmental powers by international organisations generally, and RIGOs in particular, in order to understand whence these powers derive. This Chapter doctrinally reviews relevant international legal instruments, policy documents, jurisprudence and literature in order to: determine the position of international law on the question of sovereign authority exercised by IOs generally, and RIGOs in particular; determine the legality of these powers; and explain RIGOs as organisations with a rule-based degree of latitude or autonomy and a value system. In so doing, and as possible explanations for RIGOs' authority, the chapter interrogates the doctrine of attributed or conferred powers, doctrine of implied powers and the doctrine of inherent powers as well as the theory of constitutionalism. The Chapter answers the question as to whether there is a basis in international law for the exercise of sovereign authority by RIGOs generally and specifically to establish international criminal accountability mechanisms, and partially answers the question as to whether RIGOs can engage in international criminal accountability specifically by establishing accountability mechanisms.

CHAPTER FIVE: THE EUROPEAN UNION AND THE KOSOVO SPECIALIST CHAMBERS AND SPECIALIST PROSECUTOR'S OFFICE

This Chapter applies the theoretical foundation and the conceptual framework laid down in Chapters II and III respectively by testing the practical applicability of the cosmopolitan arguments advanced that international criminal justice as a cosmopolitan project demands that a tenable conception of state sovereignty guarantees humanity's fundamental values, specifically human dignity, and by building on the general legal basis laid down in and conclusions arrived at in Chapter IV. The Chapter does so by interrogating the practical role of RIGOs in the pursuit of international criminal accountability as a cosmopolitan project, specifically the European Union's role in the establishment and operation of the Kosovo Specialist Chambers (KSC) and the Specialist Prosecutor's Office (SPO). The chapter analyses the exercise of this authority at various stages of the process, being, the investigative stage, the establishment stage and the operation stage, and also engages with the dynamics of allocation of authority between the EU and Kosovo in relation to the KSC and SPO. The Chapter answers

the question as to whether RIGOs can indeed engage in international criminal accountability, specifically by establishing accountability mechanisms, and the question of how RIGOs can engage in such endeavours.

CHAPTER SIX: THE AFRICAN UNION AND THE (PROPOSED) HYBRID COURT FOR SOUTH SUDAN

This Chapter applies the theoretical foundation and the conceptual framework laid down in Chapters II and III respectively by testing the practical applicability of the cosmopolitan arguments advanced that international criminal justice as a cosmopolitan project demands that a tenable conception of state sovereignty guarantees humanity's fundamental values, specifically human dignity, and by building on the general legal basis laid down in and conclusions arrived at in Chapter IV. The Chapter does so by interrogating the practical role of RIGOs in the pursuit of international criminal accountability as a cosmopolitan project, specifically the African Union's proposed role in the establishment and operation of the Hybrid Court for South Sudan. The chapter analyses the exercise of this authority at various stages of the process, being, the investigative stage, the establishment stage and the operation stage, and also engages with the dynamics of proposed allocation of authority between the AU and South Sudan in relation to the Hybrid Court. The Chapter answers the question as to whether RIGOs can indeed engage in international criminal accountability, specifically by establishing accountability mechanisms, and the question of how RIGOs can engage in such endeavours.

CHAPTER VII: THE CASE FOR ACTIVE INVOLVEMENT OF REGIONAL INTER-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL CRIMNAL ACCOUNTABILITY

The Chapter summarises the value-based cosmopolitan basis for the involvement of RIGOs in international criminal accountability and the conceptual arguments on reconceptualised sovereignty advanced in Chapters II and III respectively. The Chapter then summarises whether such direct and active engagement would find a basis in international law, particularly when the general legal authority of RIGOs is considered, arguments advanced in Chapter IV. Drawing from the theoretical and conceptual arguments advanced in the thesis and the practical application of these arguments in the thesis, this Chapter summarises the thesis' main arguments for direct and active engagement by RIGOs in international criminal accountability and makes a case for such engagement, relying on two primary arguments: that international law does not preclude RIGOs from exercising elements of sovereign authority necessary for the establishment and administration of international criminal accountability mechanisms; and that as the experience of the EU and the AU have demonstrated, RIGOs do have the legal and practical capacity to undertake such engagement. The Chapter also provides a guide on possible legal approaches to the engagement of RIGOs in the establishment and administration of international criminal accountability mechanisms.

CHAPTER TWO

OBLIGATIONS TO 'STRANGERS':[146] COSMOPOLITANISM AS A THEORETICAL AND CONCEPTUAL BASIS FOR INTERNATIONAL CRIMINAL ACCOUNTABILITY

2.1 Introduction

The research advances cosmopolitanism as a theoretical foundation for collective action by states – through regional inter-governmental organisations (RIGOs) – in ensuring accountability for international crimes. The research argues that international crimes violate cosmopolitan values, that is, values common to and necessary for the continued survival of the human family. Consequently, the prevention of and accountability for international crimes are common concerns of all humankind. The research is therefore a cosmopolitan challenge to classical assumptions of states as the sole subjects and drivers of international law, and an argument for a cosmopolitan understanding of international criminal accountability. To lay the foundation for the research's main argument for collective action through RIGOs in ensuring accountability for international crimes, this chapter articulates the research's understanding of cosmopolitanism, cosmopolitan values and cosmopolitan action. The chapter is structured as follows. Section 2.2 defines, in broad terms, what the research considers as the building blocks of the concept of cosmopolitanism, particularly the ideas of humanity, humanity's values, shared humanity, human dignity, cosmopolitan obligations, and unity of the human family. Section 2.3 engages with the perceived conflicts and contradictions in the definition of cosmopolitanism and its building blocks in order to attempt a reconciliation. In particular, the section addresses concerns around what particular values are considered cosmopolitan values and how and by whom this determination is or should be made. The section then offers a reconceptualised understanding of cosmopolitanism applicable to the research, that is, a cosmopolitanism premised on the understanding of humanity as 'referr[ing] to *all* humans, people of all races, genders, classes, and not merely the [hegemonic] actors that often dominate'.[147] Section 2.4 engages with the idea of collective action as a cosmopolitan endeavour to guarantee cosmopolitan values, particularly human dignity. The section argues that the protection of human dignity as a cosmopolitan value entails an appreciation of the legitimacy of a multiplicity of approaches ranging from the local, national, regional and global. Section 2.5 discusses the translation of seemingly 'abstract' cosmopolitan values into 'tangible' legal entitlements capable of legal protection and institutional enforcement. In particular, the section discusses protection of human dignity through the international legal regimes upon which international criminal justice is anchored. Section 2.6 then discusses the institutionalisation

[146] Adapted from Kwame Anthony Appiah's phraseology. *See* Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Penguin Books 2006) ch 10.
[147] Oumar Ba, Kelly-Jo Bluen and Owiso Owiso. 'The International Criminal Court: The Geopolitics of Race, Empire and Expertise' (2022) Oxford Research Encyclopedia of International Studies (forthcoming).

of international criminal justice – particularly through mechanisms established by RIGOs – as a cosmopolitan endeavour to validate human dignity by ensuring accountability for international crimes.

2.2 The Cosmopolitan Idea of Humanity

There is significant contestation over the precise meaning(s) of cosmopolitanism, and it has been variously conceived across disciplines and used to champion a variety of causes.[148] This contestation is partly attributable to how cosmopolitanism has been understood (and misunderstood) across time and disciplines.[149] However, as Lu argues, cosmopolitanism's salience 'may be measured more by the level of contestation than of acceptance'[150] and despite the lack of a common understanding, it is possible to identify the common building blocks of the concept. Cosmopolitanism, as Grovogui summarises it, is a theory that primarily considers 'humanity itself as the primary source of value, … insist[ing] on the unity of the human species and aspir[ing] to foster a global community'.[151] As understood herein, humanity means both 'the universal principle of respect for the dignity of the human person, or the sense of *humaneness*'[152] as well as the human family as a collective extended across time and space. Cosmopolitanism also proceeds from the understanding reflected in the Universal Declaration of Human Rights that all members of the human family are equal and have inherent human dignity and that this equality and inherent dignity are the 'foundation[s] of freedom, justice and peace' in the human family.[153] These are some of humanity's most basic values.

By simply being human – the 'uniqueness of being human'[154] – every person is therefore entitled to acknowledgment and respect of their humanity by other members of the human family; they equally owe other members similar obligations. Members of the human family owe all its members recognition of the respect due to them as humans, that is, their humanity, an inherent attribute common to all members of the family.[155] Put

[148] For a highlight of the 'evolution' of cosmopolitanism as a theory, *see* Ileana M. Porras, 'Liberal Cosmopolitanism or Cosmopolitan Liberalism?' in Mortimer Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press 2012); See also Catherine Lu, 'The One and Many Faces of Cosmopolitanism' (2000) 8 The Journal of Political Philosophy 244.
[149] Catherine Lu (n 148) 244.
[150] Catherine Lu (n 148) 244.
[151] Siba N'Zatioula Grovogui, 'The New Cosmopolitanisms: Subtexts, Pretexts and Context of Ethics' (2005) 19 International Relations 103, 103; See also Thomas W. Pogge, 'Cosmopolitanism and Sovereignty' (1992) 103 Ethics 48, 48–49; Charles Beitz, 'Cosmopolitanism and Global Justice' (2005) 9 The Journal of Ethics 11, 17.
[152] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Martinus Nijhoff Publishers 2010) 280.
[153] Even though adopted at a time when the very nations adopting it were actively engaged in colonialism, an inherently discriminatory and repugnant practice, the UDHR reflected an aspiration to the belief that all humans have inherent right to dignity and equality. For a discussion of the concept of human dignity, see Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 Metaphilosophy 464; Adeno Addis, 'The Role of Human Dignity in a World of Plural Values and Ethical Commitments' (2013) 31 Netherlands Quarterly of Human Rights 403.
[154] Chaloka Beyani, 'Reconstituting the Universal: Human Rights as a Regional Idea' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 174.
[155] Antony Duff, 'Authority and Responsibility in International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 601.

differently, the utility of an individual human being's humanity therefore depends on the utility of the humanity of all other humans.[156] This understanding of humanity indeed also finds expression in the Ubuntu philosophy according to which the humanity of an individual is inseparable from the humanity of the entire human society, and that the individual's well-being derives from that of the human society, and vice versa.[157] Arguing along similar lines in defence of the sanctity of the personality of all humans, Lauterpacht opined that, 'The happiness and well-being of one human soul are of the same absolute value when conceived in relation to an isolated individual as when weighed against the happiness and well-being of millions.'[158] Therefore, 'the *equal* moral worth of *all* persons and the existence of derivative *obligations to all* to preserve this equal moral worth of persons'[159] are the fulcra upon which cosmopolitanism is anchored, hence common humanity. As Lu argues, 'The idea of common or shared humanity entails common circumstances that make the idea of a human condition intelligible'[160] and it is this 'notion of common humanity that translates ethically into an idea of shared or common moral duties toward others'.[161] This is the consequential normative translation of cosmopolitanism's basic premises of shared humanity and inherent human dignity.

Of course, the human family comprises smaller communities organised on some distinctive basis such as political (in the form of states), social, cultural on linguistic. It is therefore unsurprising that cosmopolitanism as a concept is indeed in a constant struggle to reconcile its two principal ideals or strands: universal concern, that is, obligations deriving from shared humanity that humanity owes to all its members regardless of localised or particularistic differences; and acknowledgment of the value in and legitimacy of differences among members of the human family and a commitment to such 'pluralism'.[162] As Appiah notes in this regard, 'There's a sense in which cosmopolitanism is the name not of the solution but of the challenge'.[163] It is therefore important to clarify that a cosmopolitan conception of humanity means that the whole is the basis for human existence, and while its constituent parts are fundamental to the existence and functioning of the whole, they do not transcend the whole. The cosmopolitan insistence on fundamental allegiance to humanity as a whole does not mean the elimination of other identities constituting the human family or allegiances thereto. It merely asserts that acknowledgment of and allegiance to the humanity of all human beings is the basis for the existence of the human family and the foundation upon which other localised allegiances may be built. As Sen eloquently puts it,

[156] Kwame Anthony Appiah, 'Cosmopolitan Patriots' in Martha C. Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press 2002) 25.
[157] Desmond Mpilo Tutu, *No Future without Forgiveness* (Doubleday 1999) ch II.
[158] Hersch Lauterpacht, *International Human Rights Law and Human Rights* (Stevens & Sons 1950) 71.
[159] Roland Pierik and Wouter Werner, 'Cosmopolitanism in Context: An Introduction' in Roland Pierik and Wouter Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge University Press 2010) 3.
[160] Catherine Lu (n 148) 253.
[161] Catherine Lu (n 148) 245.
[162] Kwame Anthony Appiah (n 146) xiii–xix.
[163] Kwame Anthony Appiah (n 146) xiii.

'The assertion that one's fundamental allegiance is to humanity at large brings every other person into the domain of concern, without eliminating anyone.'[164]

The cosmopolitan project therefore envisions 'a cosmopolitan community that overlaps and transcends the group memberships of international politics … [and] aims to articulate, develop, and enforce the global rights of individuals',[165] hence, a cosmopolitan citizenship. As Nussbaum asserts, cosmopolitanism's 'moral courage to recognize humanity and respond to its claim … wherever it is made, is the basic act of world citizenship',[166] and as Fransceschet argues, '[C]osmopolitan order is the project of eliminating, if not reducing, the disorder and violence that threatens individual rights that stem from the structural pathologies in the states system.'[167] Implied herein is the need for collective action to guarantee cosmopolitan values and address interests common to members of the human family, hence the insistence on transcending the limitations of and harnessing the potential of humanity's diversity.[168] This is precisely because, as argued by DeGuzman, attacks on humanity's shared value of human dignity are indeed attacks on this cosmopolitan community and therefore '*both concern and harm* the global community because they strike at the heart of that community's identity'. [169] As a minimum, therefore, cosmopolitanism is premised on the idea of all human beings belonging to a global community and advocates unity of the human family in its efforts to validate, guarantee and protect humanity's fundamental values.

2.3 Reconciling 'Conflicting' Cosmopolitan Realities

The understanding of cosmopolitanism advanced above presupposes the existence of values that are common to the human family, and which the research agues provide the theoretical and conceptual foundation for international criminal accountability. It is, however, important to interrogate exactly what or whose values are (or should be) considered cosmopolitan values or humanity's values for purposes of the research, and how this determination is or should be made. This is the subject of the discussion in this section.

2.3.1 Of Values, Methodology and Community

As mentioned above, the understanding of cosmopolitanism advanced by the research presupposes the existence of common values, or humanity's values. However, as Grovogui

[164] Amartya Sen, 'Humanity and Citizenship' in Martha C. Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press 2002) 114.
[165] Antonio Franceschet, 'Four Cosmopolitan Projects: The International Criminal Court in Context' in Steven C. Roach (ed), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (Oxford University Press 2009) 191.
[166] Martha C. Nussbaum, 'Reply' in Martha C. Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press 2002) 132.
[167] Antonio Franceschet (n 165) 188.
[168] Siba N'Zatioula Grovogui, 'The New Cosmopolitanisms: Subtexts, Pretexts and Context of Ethics' (n 151) 103–104.
[169] Margaret M. deGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law* (Oxford University Press 2020) 94.

helpfully observes, a fundamental analytical error and confusion often made by some commentators is to conflate 'universal morality with collective submission to the will (and desire) of a few presumptive hegemons'.[170] Throughout history, some supposedly cosmopolitan arguments have themselves foregrounded political action which proceeded from the erroneous assumption that in the service of so-called common good, the ideologies and methodologies of dominant segments of society such as politically and militarily powerful states necessarily ought to prevail over the ideologies, interests, experiences, agency and processes of less powerful segments.[171] In particular, one thinks here of so-called humanitarian intervention backed by military force[172] as well as some global-level administration of international criminal accountability initiatives. Commentators have, for example, decried the tendency in contemporary international justice discourse to consider so-called 'global' justice as superior to so-called local justice, a tendency that has resulted in the subordination and marginalisation of institutional responses by and interests of those directly affected by injustice, in favour of global interventions 'in the name of the values and interests of a cosmopolitan community'.[173]

These observations are not unique to international criminal justice. They have also been made in related fields of the liberal justice project where cosmopolitanism is supposedly the underlying concept. As Spivak's powerful work demonstrated over three decades ago, the historical and contemporary relationship between dominant polities and other polities and audiences generally proceeds from a misguided point of paternalism and has the effect of marginalising and disempowering the 'subaltern'.[174] Similar observations have been made by, among others, Mutua, Kapur, Achiume and Rajagopal with regard to the global human rights project,[175] and by Chibundu as regards concepts of international

[170] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' in Kevin C. Dunn and Timothy M. Shaw (eds), *Africa's Challenge to International Relations Theory* (Palgrave 2001) 30.

[171] Siba N'Zatioula Grovogui, 'The New Cosmopolitanisms: Subtexts, Pretexts and Context of Ethics' (n 151) 104–112; Antonio Franceschet (n 165) 181.

[172] *See for example* Kevin Jon Heller, 'The Illegality of "Genuine" Unilateral Humanitarian Intervention' (2021) 32 European Journal of International Law 613; Federica I. Paddeu, 'Humanitarian Intervention and the Law of State Responsibility' (2021) 32 European Journal of International Law 649.

[173] Sarah M.H. Nouwen and Wouter G. Werner, 'Monopolizing Global Justice: International Criminal Law as a Challenge to Human Diversity' (2015) 13 Journal of International Criminal Justice 157, 158. The authors refer to this phenomenon as 'the dark side of the monopolization of global justice'. For similar observations and arguments, *see also* Vincent Nmehielle (n 143); Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019); Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009); Oumar Ba, *States of Justice: The Politics of the International Criminal Court* (Cambridge University Press 2020); Frédéric Mégret, 'What Sort of Global Justice Is "International Criminal Justice?"' (2015) 13 Journal of International Criminal Justice 77; Phil Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge University Press 2018); Dorothy Makaza, 'African States and International Criminal Law: Rethinking the Narrative and Contextualising the Discourse' in Joanna Nicholson (ed), *Strengthening the Validity of International Criminal Tribunals* (Brill 2018).

[174] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press 1988).

[175] See for example Makau Mutua, 'The Ideology of Human Rights' (1996) 36 Virginia Journal of International Law 589; Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201; Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002); Makau Mutua, 'Is the Age of Human Rights Over?' (n 141); Ratna Kapur, 'Human

human rights, international society and human dignity.[176] In critiquing conventional human rights theory and practice and arguing for 'counterhegemonic relational grammars of human dignity', de Sousa Santos similarly decries a monolithic conception of human rights, an illusion which he argues obscures the conceptually, historically and culturally diverse nature of human rights theory and practice.[177] Noting similar patterns in the 'field' of transitional justice, Madlingozi has observed how such tendencies reproduce relationships based on inferiority-superiority dynamics, political subjectivity, disempowerment and trusteeship.[178]

In addition to common values, the understanding of cosmopolitanism advanced by the research also presupposes the existence of an international community, an idea that is itself also controversial and prone to misconstruction. The idea of 'international community' is by no means apolitical. It could, as usefully noted by Abi-Saab, refer to a community 'of the states of the world, that of the peoples of those states or of the world as such (thus merging into the concept of humanity) or, furthermore, of the active part of those peoples, in the form of international public opinion or international civil society'.[179] Similarly, Teitel conceives it as 'a universal community of peoples that underpins and shapes interstate relations'.[180] However, Abi-Saab proceeds to caution that '"community" is a relative concept and its existence is a question of degree'.[181] Clarke similarly asserts, in specific reference to international criminal justice, that, 'The notion of the "international community" is itself an important site of discourse that merges humanitarianism with foreign policy making and international criminal law mechanisms that are sustained by a responsibility to protect discourse.'[182] Acknowledging the relative nature of the idea of international community, Tladi warns that care should be taken in how narratives of 'international community' are used lest these narratives serve to engender unequal, selective and political conceptions of 'community' and justice,[183] a position similarly echoed by Niang who cautions against conceptions of the 'international' that merely seek to extend

Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 8 Sydney Law Review 665; Ratna Kapur, 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject, and Non-Liberal Search for Freedom and Happiness' (2014) 25 Law and Critique 25; E. Tendayi Achiume, 'Putting Racial Equality onto the Global Human Rights Agenda' (2018) 28 SUR International Human Rights Journal 141; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press 2003) chs 7–9.

[176] Maxwell O. Chibundu (n 4).

[177] *See Boaventura de Sousa Santos (n 16).*

[178] Tshepo Madlingozi, 'On Transitional Justice Entrepreneurs and the Production of Victims' (2010) 2 Journal of Human Rights Practice 208; *See also* Makau Mutua, 'What Is the Future of Transitional Justice?' (2015) 9 International Journal of Transitional Justice 1.

[179] Georges Abi-Saab, 'Whither the International Community' (1998) 9 European Journal of International Law 248, 249.

[180] Ruti G. Teitel, *Humanity's Law* (n 141) 32.

[181] Georges Abi-Saab (n 179) 249.

[182] Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (n 173) 67.

[183] Dire Tladi, 'Affective Justice Symposium: Affected Justice–Using Criminal Justice as a Political Tool' (*Opinio Juris*, 27 May 2020) <http://opiniojuris.org/2020/05/27/affective-justice-symposium-affected-justice-using-criminal-justice-as-a-political-tool/> accessed 28 May 2020.

colonial logics of exclusion, subjugation and subservience onto our contemporary reality as a 'postcolonial' world.[184]

Taken together, narrow conceptions of humanity, humanity's values and international community and the resultant assumptions and approaches have served to create a disempowering relationship which perpetuates lazy imperialistic stereotypes, silences, marginalises and excludes entire global populations and sustains exploitative practices based on domination. These conceptions have 'continuously undermined alternative discourses and modes of representations',[185] largely advanced singular and parochial notions of international morality, and advanced narratives and informed practices of deliberate and active exclusion of some societies from productive international life based on, for example, race, ethnicity, nationality and language.[186] Assuming a singular moral code, often the code of the dominant member(s) of the human family, falsely presupposes that the world's various peoples have fundamentally different moral codes and that some of these codes are necessarily superior to others. This marginalises the plurality of conceptions, articulations and interpretations of values inherent in the diverse membership of the human family and fails to 'account for the multiplicity of political languages and ethical idioms from which differently situated individuals and communities derive their notions of common humanity and social justice'.[187] To paraphrase Gobodo-Madikizela, such narratives and assumptions of a hierarchy or superiority of value systems have, throughout history, consciously drawn 'a symbolic line which define[s] who could be included in [and excluded from] this experience of humanity'.[188]

Possible explanations for the existence of the misconceptions of cosmopolitanism denounced above include: indefensibly narrow conceptions of humanity and 'erroneously assuming the existence everywhere of the same ideological processes and practices';[189] failure by some commentators to engage with literature from beyond their narrowly-conceived epistemic locations, hence a limited imagination; and misguided attempts by some to advance 'a universal formulation of the core elements of [human values] while [not] fully recognizing the existence of multiple variations in the conceptions of the idea[s]'.[190] These misconceptions are a result of, at the very least, a fundamental misunderstanding of the concept of cosmopolitanism, or worse, deliberate misconstructions. They say more about theoretical or ideological opportunism than they say about the viability of

[184] Amy Niang, 'The International' in Arlene B. Ticker and Karen Smith (eds), *International Relations from the Global South: Worlds of Difference* (Routledge 2020).
[185] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170) 30.
[186] Dan Sarooshi, 'The Essentially Contested Nature of the Concept of Sovereignty: Implications for the Exercise by International Organizations of Delegated Powers of Government' (2004) 25 Michigan Journal of International Law 1107, 1118.
[187] Siba N'Zatioula Grovogui, 'The New Cosmopolitanisms: Subtexts, Pretexts and Context of Ethics' (n 151) 105.
[188] Pumla Gobodo-Madikizela, 'Healing the Racial Divide? Personal Reflections on the Truth and Reconciliation Commission' (1997) 27 South African Journal of Psychology 271, 272.
[189] Siba N'Zatioula Grovogui, 'The New Cosmopolitanisms: Subtexts, Pretexts and Context of Ethics' (n 151) 106.
[190] Maxwell O. Chibundu (n 4) 179.

cosmopolitanism. Selective (mis)understandings and (mis)application of cosmopolitan ideas do a disservice to its theory and praxis and have in fact been used in the past and present as a pretext for various forms of domination.[191] This is not unique to cosmopolitanism, however. Theories and concepts have been used since the beginning of time both to sustain and to dismantle oppression and domination. As Lu observes, '[I]t is not only universal perspectives like cosmopolitanism that can suffer from absolutism; parochial doctrines like ones that espouse the inherent superiority of a certain racial or national group, for example, have also been known to breed imperialistic and totalitarian enterprises.'[192] It is unsurprising, therefore, as Wallerstein observes, that cosmopolitanism can and has indeed been deployed 'just as easily to sustain privilege as to undermine it'.[193]

Whatever the explanation, however, these assumptions and discourses that presuppose a monopoly and hierarchy of conceptions and approaches cannot genuinely and in good conscience be considered as being anchored on cosmopolitan premises at all. At best, they are perversions of cosmopolitanism. They are, to say the least, fundamentally erroneous, ethically dubious and premised on fantasy and illusion. As Grovogui aptly puts it, '[I]nternational morality has never been founded upon a single standard of moral authority or sovereign legitimacy,'[194] and as Appiah and Lu have separately argued, cosmopolitanism properly conceived 'celebrates the fact that there are different local human ways of being'[195] and 'allows us to recognize not only human plurality, but also the bonds of affinity between individuals and groups that are diverse in other respects'.[196] What are mistaken for different 'moralities' are in fact just distinct historical processes and realities that informed these moralities, values and interests and the different modes of identifying their substance, content, elements and scope. While indeed the peoples of the world may have differing approaches to distilling and articulating values, this does not translate to a lack of shared values or presuppose a hierarchy of value systems. Ideas of common good beyond localised systems and political agency in service of these ideas have existed across communities all over the world and across time. These are not the preserve of a limited segment of humanity.

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[191] For general discussion of how international law has been selectively or deliberately applied over the centuries to justify ill practices, see for example U. Oji Umozurike, 'International Law and Colonialism in Africa: A Critique' (1970) 3 Eastern Africa Law Review 47; U. Oji Umozurike, *Self-Determination in International Law* (Archon Books 1972); U. Oji Umozurike, *International Law and Colonialism in Africa* (Nwamife Publishers 1979); Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979); Siba N'Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (University of Minnesota Press 1996); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004); James Gathii, 'Imperialism, Colonialism and International Law' (2007) 54 Buffalo Law Review 1013; Bhupinder Singh Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017); E. Tendayi Achiume and Devon W. Carbado, 'Critical Race Theory Meets Third World Approaches to International Law' (2021) 67 UCLA Law Review 1462.

[192] Catherine Lu (n 148) 253.

[193] Immanuel Wallerstein, 'Neither Patriotism Nor Cosmopolitanism' in Martha C. Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press 2002) 124.

[194] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170) 32.

[195] Kwame Anthony Appiah (n 156) 25.

[196] Catherine Lu (n 148) 258.

It should be emphasised that the thesis' understanding of the 'criticisms' highlighted above is that they are not *per se* criticism of cosmopolitanism as a theory or concept. Rather, they are appropriate denunciation of: an all-too common tendency by some to misinterpret or selectively apply concepts of cosmopolitanism to justify parochial ideologies or interests or political agenda; the exclusionary process that grounded the translation of otherwise common values into 'usable legal rights',[197] at least at the beginning of the post-World War II international criminal justice project; the privileging of global mechanisms for the vindication of values and rights; and the systematic and systemic marginalisation of epistemologies from outside the European and North American centres in the discourse on cosmopolitan values and rights. Further, they are not *per se* criticisms of cosmopolitan values, but rather a denunciation of the dominant hegemonic methodology for determining whose 'value systems' count as part of these so-called humanity's values. Therefore, far from rejecting cosmopolitanism, these 'criticisms' emphasise the need for genuine and honest engagement with and articulation and application of cosmopolitanism. To adopt the words of Held, 'A distinction must be made between those discourses of rights and autonomy which obscure or underpin particular interests and power systems and those which seek explicitly to test the generalizability of interests and to render power, whether it be political, economic or cultural, accountable'.[198] Indeed, as Paige has pointedly argued, 'idealism can sit alongside cynicism in the study and practice of law',[199] and to adopt and adapt Dharia's words, critique of international criminal justice's theories, assumptions and practices 'is as important as its ambitions, and its appropriation by hegemonic global actors is by no means a reason to blunt its edges'.[200]

2.3.2 Reconceptualising Cosmopolitanism and International Community

The thesis advocates a departure from a singular and hegemonic conception of humanity and humanity's values which assumes a single moral authority or superiority of one peoples' mode of value identification and allocation, to a cosmopolitanism that accords equal prominence and respect to the processes and modes of all of the world's peoples. This, in other words, is recognition of the fact that a viable conception of humanity and sovereignty must assure both the autonomy of all constituent members of the human family as well as the need for them to maintain mutual engagement with one another. If indeed, as Chibundu argues, 'a concept is construed by seeking to model and make sense of the multiple ways in which an idea is interpreted by those entangled in its practice,'[201] it follows then that the thesis advances the idea of cosmopolitan values on the premise that they are necessarily common to all human societies and are also possibly conceived, interpreted, articulated or

[197] Maxwell O. Chibundu (n 4) 174.
[198] David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Polity Press 1995) 282.
[199] Tamsin Phillipa Paige (@Paging_Dr_Paige), Twitter 17 May 2021, <https://twitter.com/Paging_Dr_Paige/status/1394228778667155456?s=20> accessed 17 May 2021.
[200] Rashmi Dharia, 'ICC Sanctions Symposium: Between the Institutional and the Intellectual: The ICC-US "Sanctions" Communications and the Irony of Critique' (*Opinio Juris*, 24 April 2021) <http://opiniojuris.org/2021/04/22/icc-sanctions-symposium-between-the-institutional-and-the-intellectual-the-icc-us-sanctions-communications-and-the-irony-of-critique/> accessed 24 April 2021.
[201] Maxwell O. Chibundu (n 4) 179.

validated differently from one society to the next. This is an appreciation of the fact that while cosmopolitan values are common to all of humanity's disparate societies[202] and are indeed fundamental to the survival of the whole, each of these societies appeals to their own unique practices and cultures to justify, apply and validate these values. As DeGuzman puts it, '[N]o person or group has unique insight into the application of [humanity's] values; and, as such, a global dialogue is crucial to discovering them … [through] robust participation of all segments of the global community in this dialogue.'[203] The primary emphasis here is on the common values, and whatever approach among the multiple possibilities proves more effective in validating or realising these values. Legitimacy is accorded to all possible approaches, and priority given to those most likely to ensure maximum protection of the values in the context.

In a similar vein, conceptions of international community that presuppose or advance the supremacy of a segment or segments of humanity have no utility in contemporary understanding of international community, or at the very least, in the research's understanding thereof. In the words of Annan, 'Humanity is, after all, indivisible,'[204] and as Lu puts it, '[H]umanity is one … [but] the unity implied by this common condition does not entail homogeneity or sameness, for to be human is also to be distinctively individual or particular. In this sense, humanity is many.'[205] Consequently, the phrase 'international community' should be understood in a relative sense, that is, in reference to the existence of a reasonable degree of inter-state relations pertaining to shared interests (and perhaps shared values). It should also usefully be considered as the acknowledgment by members of the collective of the existence of the collective as a 'forum' for contesting or championing values and interests, and not necessarily as the existence of consensus on interests and values. At the very least, an appreciation of the core common values of all national and regional communities (understood as both states and the peoples therein) should underpin what is considered to be the international community.[206] As de Wet ambitiously argues, 'Together the different communities complement one another in order to constitute a larger whole in the form of the international community.'[207]

Therefore, the 'international community' advanced by the thesis is both a community of states and a community of peoples, united and driven not least by their common humanity, but also by shared aspirations, shared interests and shared basic values, of course without romanticising the idea of shared values. In any case, the thesis does not consider 'interests' and 'values' to be mutually exclusive, but rather as mutually reinforcing and

[202] Of course, this is not to argue that all the possible range of human values are common to all societies comprising the human family. Only some of these values can be considered as common, such as human dignity, physical integrity and shared humanity. For a powerful argument on the value pluralism, see Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Henry Hardy ed, 2nd edn, Princeton University Press 2013) ch 1 (The Pursuit of the Ideal).
[203] Margaret M. deGuzman (n 169) 5 & 24–26.
[204] Kofi Annan, 'Two Concepts of Sovereignty' *The Economist* (18 September 1999).
[205] Catherine Lu (n 148) 257.
[206] Erika de Wet, 'The International Constitutional Order' (2006) 55 International and Comparative Law Quarterly 51, 53.
[207] Erika de Wet (n 206) 56.

perhaps even overlapping concepts. In this respect, the thesis quite disagrees with DeGuzman's position that distinguishes between 'global community' and 'international community' thus, 'The former is a cosmopolitan concept that centers the individuals as the unit of moral concern, whereas the latter centers the state.'[208] While this attempted distinction may be valid and useful in surmounting the bastardised usage of 'international community' in common parlance, the thesis nonetheless considers that humanity and its fundamental values are better served by reclaiming the proper and appropriate understanding of 'international community'. The thesis' understanding of 'international community' is an amalgam of the political represented by states and the social and the moral represented by the shared humanity of all humans of the world. In other words, the thesis considers 'international community' properly-conceived as meaning 'the community of all persons in the world–humanity'[209] which DeGuzman terms 'global community', and the community of states as political representations of the various peoples of the world. At the heart of this community's relations is an appreciation of interdependence and a commitment, in the words of Nussbaum, 'to make all human beings part of our community of dialogue and concern'.[210] Arguably, it may appropriately be termed a cosmopolitan community of humankind.

Based on this understanding of international community, the research joins with Grovogui who has argued that the political society (the peoples of the various states) are the ultimate and residual source of sovereign authority, which authority is exercised by their state representatives as symbols of this sovereignty.[211] Consequently, when acting domestically and on the international plane, state conduct should be guided by the will and interests of the people (the sovereign). [212] If construed this way, then it is possible to find merit in Franceschet's argument that, 'Different states' interests are understood and filtered in light of the various fragments of the larger cosmopolitan legal tradition; indeed, national interests and cosmopolitan interests are often mutually constitutive.'[213] This only holds if the interests of states are properly construed as deriving from and reflecting the will of the peoples of these states. Even for those who would maintain a (fallacious) dichotomy between state interests and peoples' interests, it should at the very least be acknowledged that international law in the 21st Century ought to have as its primary concern the protection of human dignity. Indeed, as Klabbers argues, the reality of contemporary international law-making is the emergence of individuals – 'people of flesh and blood' – as international law's direct recipients.[214] Hence, cooperation in the international community is not only desirable,

[208] Margaret M. deGuzman (n 169) 20.
[209] Margaret M. deGuzman (n 169) 19.
[210] Martha C. Nussbaum, 'Patriotism and Cosmopolitanism' in Martha C. Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press 2002) 9. Here, Nussbaum interprets the thinking of ancient Stoic philosophers.
[211] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' in Douglas Howland and Luise White (eds), *The State of Sovereignty: Territories, Laws, Populations* (Indiana University Press 2009) 273.
[212] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 273.
[213] Antonio Franceschet (n 165) 180–181.
[214] Jan Klabbers, 'The Cheshire Cat That Is International Law' (2020) 31 The European Journal of International Law 269.

but inevitable. As Abi-Saab has very usefully argued, '[T]he approach of the law of cooperation is based on the awareness among legal subjects of the existence of a common interest or common value which cannot be protected or promoted unilaterally, but only by a common effort. In other words, it is based on a premise or an essential presumption, which is the existence of a community of interests or of values.'[215]

While there is merited contention as to whether some values passed as those of the international community are indeed commonly shared by all or only by a select few members of the community, the thesis submits that there is consensus, at least through conventional and customary international law as discussed in the introductory chapter, that some of these values are indeed of the community. In particular, the thesis argues that human dignity and the derivative values of physical integrity and the prevention of and accountability for international crimes are shared values of the international community, or at the very least, to adopt the words of Sen, 'all people have reason to respect them'[216] because they are fundamental to the establishment and preservation of an environment where all members of this 'community' can mutually thrive, beyond mere co-existence. All members of the international community have a shared interest in such an environment, and this calls for collective effort.

In summary, therefore, and building on the works mentioned herein, this research advances a relational grammar of cosmopolitanism.[217] Principally, this position argues for the emancipation of cosmopolitanism, the human dignity and rights project generally and the international criminal justice project in particular from what de Sousa Santos describes as their abyssal genealogy which historically and conceptually excluded and continues to exclude from the realm of 'universality' such discourses and practices of human dignity pertaining among the less powerful members of the human family and relegating these marginalised members to the extreme periphery of discourse as mere objects.[218] Bluntly captured by Mutua using the saviours-victims-savages metaphor,[219] this conventional understanding suffers from incompleteness occasioned by its failure to appreciate that a truly universal conception of human dignity must necessarily appreciate the conceptual and practical contribution of the entirety of the human collective and the influence of the experiences and historical realities of all segments of this collective in shaping this conception. An insistence on the inherent human dignity of all members of the human family necessarily means recognition of the agency of all members,[220] not partial recognition of the agency of some while relegating others to the peripheries as mere objects. Therefore, and as Appiah argues, '[C]osmopolitanism shouldn't be seen as some exalted attainment; it begins with the simple idea that in the human community, as in national communities, we need to

[215] Georges Abi-Saab (n 179) 251.
[216] Amartya Sen (n 164) 117.
[217] Adopting and adapting Boaventura de Sousa Santos' 'relational grammar of human dignity' discourse.
[218] Boaventura de Sousa Santos (n 16) 1–9.
[219] Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (n 175).
[220] *See* Darryl Robinson, 'A Cosmopolitan Liberal Account of International Criminal Law' (2013) 26 Leiden Journal of International Law 127.

develop habits of coexistence: conversation in its older meaning, of living together, association. And conversation in its modern sense, too.'[221]

Care must be taken when espousing cosmopolitan ideas to ensure that the understanding of cosmopolitanism advanced is not restricted to epistemologies of historically dominant segments of humanity. Rather, as Grovogui argues, 'The task is to come up with methods of translation that render intelligible beliefs, attitudes and values and, therefore, institutions, idioms and political languages that, although not organically linked, may converge in their teleology.'[222] Ultimately, therefore, '[a] tenable cosmopolitanism tempers a respect for difference with respect for actual human beings'[223] by acknowledging the plurality of values within the human family while drawing a line under certain basic values which are not only common to but also fundamental to the survival of all members of the human family. In so doing, cosmopolitanism can foster a 'deeper and shared common understanding of humanity that can unite all individuals across states and culture'.[224] If appreciated fully, then cosmopolitanism does indeed acknowledge the diversity in genealogy and articulation of the understanding of common humanity among the different members of the human family while emphasising the commonality of the teleology of certain values.

Without this reformulated conception, one cannot in fact speak of cosmopolitanism, but rather of hegemony and subjectivity. The conception of cosmopolitanism advanced in this research therefore advocates for the acknowledgment and valuing of the fundamental and equal humanity of all members of the human family and strives for an understanding of humanity 'in which all of the differences will be nonhierarchically understood … [and which is not] defined in terms of dominance and subordination'.[225] In essence, drawing generally from Habermas' discourse theory according to which 'universal' values should be identified through a discursive process,[226] the process advocated by the thesis should necessarily be discursive, otherwise it cannot lay claim to cosmopolitanism. To adopt and adapt the words of Jayawardane, the thesis therefore argues for a conception of cosmopolitanism that 'rather than producing a cosmopolitanism based on pointing out "simple similarities" between cultures and peoples … fashions, instead, "networks of

[221] Kwame Anthony Appiah (n 146) xvi–xvii.
[222] Siba N'Zatioula Grovogui, 'The New Cosmopolitanisms: Subtexts, Pretexts and Context of Ethics' (n 151) 112.
[223] Kwame Anthony Appiah (n 146) 113.
[224] These exact words, while attributed by Steven C. Roach to David Held, don't appear to be derived from the book by Held. *See* Steven C. Roach, 'Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court' (2005) 4 Journal of Human Rights 475, 483.
[225] Martha C. Nussbaum, 'Reply' (n 166) 138.
[226] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, The MIT Press 1996); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger and Frederick Lawrence trs, The MIT Press 1989).

interconnectedness, to create transnational solidarities and a quest for global justice, as an alternative response to violence and mourning"'.[227]

2.4 Galvanising Collective Action in the Service of the Cosmopolitan Value of Human Dignity

Primarily, the thesis presupposes the existence of basic cosmopolitan values – in particular human dignity and physical integrity – necessary for the survival of the human family. Shared humanity then forms the fundamental basis for organising and coordinating action to preserve human dignity. Adopting this understanding, the thesis argues that the preservation of human dignity and physical integrity are values common to all of the world's human societies, at least in their abstract sense. However, in the service of these values, different societies may adopt different approaches peculiar to their different social contexts and experiences aimed at securing these values. Put differently, while the human family as a whole possesses basic common values, 'their expression is highly particular, thickly enmeshed with local customs and expectations and the facts of social arrangements'.[228] This does not negate the universality of the values at stake, but rather confirms that while all human societies 'have enough overlap in their vocabulary of values [of human dignity] to begin a conversation',[229] no single approach to securing those values can be deemed as the only appropriate approach, forsaking all other possibilities. The legitimacy and viability of cosmopolitan values depends on the equal appreciation of the contribution of all members of the human family to that definition, and recognition of the diversity of approaches is itself also a fundamental part of the process of determining the cosmopolitan status of a particular value.

It is in appealing to the common values that humanity can galvanise collective action to preserve these values where individualised responses are inadequate. As Appiah argues, 'Our language of values is one of the central ways we coordinate our lives with one another. We appeal to values when we are trying to get things done *together*.'[230] Therefore, while the values of human dignity and physical integrity are universal and applicable beyond the state, the practical implementation of these values should not presuppose a singular universal approach. This research does not presuppose uniformity of process as a condition for the articulation, interpretation and application of the cosmopolitan values espoused herein, neither is uniformity an attribute of cosmopolitanism properly conceived. Indeed, to advance a cosmopolitan conception of human dignity and physical integrity is also to acknowledge the inevitability of multiple procedural and institutional implementation

[227] M. Neelika Jayawardane, '"Forget Maps": Documenting Global Apartheid and Creating Novel Cartographies in Ishtiyaq Shukri's The Silent Minaret'' (2014) 45 Research in African Literatures 1, 13 citing and discussing Ishtiyaq Shukri, The Silent Minaret (2005); For a discussion of how radical ideas, tools and language aimed at disrupting and transforming international criminal justice's hegemonic structures can easily be co-opted and performatively instrumentalised to serve these very hegemonic structures, see Vasuki Nesiah, 'Local Ownership of Global Governance' (2016) 14 Journal of International Criminal Justice 985; Rashmi Dharia (n 200).
[228] Kwame Anthony Appiah (n 146) 49.
[229] Kwame Anthony Appiah (n 146) 57.
[230] Kwame Anthony Appiah (n 146) 28.

frameworks. The legitimacy of any one approach – local, national, regional or global – does not presuppose the illegitimacy of another. The beginning of a cosmopolitan conversation acknowledges the legitimacy and validity of a plurality of responses, while galvanising support for the response that is likely to achieve the best results in a particular context. Therefore, cosmopolitanism as advanced by the thesis, and to adopt the words of Chibundu, 'entails a fair opportunity for as many constituent participants in the international system as possible to participate in the interpretative process'.[231]

The theoretical foundation of the research therefore holds that multilateral co-operation across states, be it at a regional level or at the global level, presupposes the existence of common values, or at the very least, common interests. Specific to the subject of the research, the values of human dignity and physical integrity that guarantee the prevention of or remedial action for international crimes are considered to be globally shared by all of the human family's constituent members. In securing these values, the research advances common action led by RIGOs to ensure accountability for international crimes, inspired by a cosmopolitanism which 'prizes a variety of political arrangements, provided, of course, each state grants every individual what he or she deserves'.[232] While various RIGOs represent regional communities whose interests may be similar or dissimilar depending on the subject matter, the values of concern to the thesis, namely human dignity and the resultant values of physical integrity and prevention of and accountability for international crimes, transcend these regional boundaries and are of universal concern.

Emphasis is laid on the values and interests of humanity rather than state interests. As Peters argues, privileging humanity's needs and obligations to its members as opposed to those of states entails an acknowledgment that where a state does not ensure protection of its people from gross violations, this leads, 'in a system of multilevel governance and under the principle of solidarity, to a fall-back responsibility of the international community'.[233] Unlike Peters, however, this research does not consider that a state's sovereignty is suspended if it 'grossly and manifestly' fails to uphold its human rights obligations to its people, or that a legal obligation is emerging in international law for humanitarian intervention, especially of the kind that would conflate humanitarian assistance that privileges the protection needs of human beings with intervention under the guise of humanitarianism. Rather, the research argues that the international community ought to be guided by a human needs approach in plugging the concerned state's shortcomings through regional or global institutional responses aimed at validating and realising the specific values of humanity at stake. Actions that assault, harm or threaten humanity's fundamental values are therefore as much the concern of individual persons and individual states as they are the concern of humanity as a whole since the values implicated are humanity's values. The research therefore advocates a cosmopolitan approach which champions collective

[231] Maxwell O. Chibundu (n 4) 207.
[232] Kwame Anthony Appiah (n 146) 163.
[233] Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 2 The European Journal of international Law, 513, 544; 535–536.

effort to counter injustice; not unbridled coercive interventionism under the guise of protecting humanity.

Appiah describes the above understanding of cosmopolitanism thus, 'Accepting the nation-state means accepting that we have a special responsibility for the life and the justice of our own; but we still have to play our part in ensuring that all states respect the rights and meet the needs of their citizens. If they cannot, then all of us – through our nations, if they will do it, and in spite of them, if they won't – share the collective obligation to change them.'[234] The 'we' as understood by this research means humanity in the inclusive and wholesome form in which it is presented here.[235] In the words of Peters, 'Humanity is no domestic affair, but an international concern',[236] and as Annan insists, humanity's concern for and responsibility to its members ought to be guided by humanity's legitimate and universal values and principles.[237] This, to an extent, revives the debate pioneered by Lauterpacht almost a century ago that the force of international law should not be considered to derive so much from the will and interests of individual states as from the will of the international community, or at least, of an international community of interests and functions.[238]

Consequently, the values and interests that (ought to) undergird international law are those of the international community. While recognising states as primary subjects of international law, this research adopts Lauterpacht's proposition that, 'No doubt it is true to say that international law is made for States, and not States for international law, but it is true only in the sense that the State is made for human beings, and not human beings for the State.'[239] In other words, 'behind the personified institutions called States there are in every case individual human beings to whom the precepts of international law are addressed'.[240] Consequently, as Lauterpacht continues to argue decades later, 'the recognition of the individual … as the ultimate subject of international law … [means that] the collective good is conditioned by the good of the individual human beings who comprise the collectivity.'[241] In the Lauterpacht-ian sense,[242] rights and obligations arising from international law are ultimately those of the peoples of the various nations, that is, humanity. Considered in this

[234] Kwame Anthony Appiah (n 146) 163.
[235] For an intriguing discussion of the various (mis)uses and (mis)understanding of 'we' in international (criminal) law, *see* Immi Tallgren, 'The Voice of the International: Who Is Speaking?' (2015) 13 Journal of International Criminal Justice 135.
[236] Anne Peters (n 233) 543.
[237] Kofi Annan (n 204).
[238] Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) ch XX.
[239] Hersch Lauterpacht, *The Function of Law in the International Community* (n 238) 438–439.
[240] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Longman 1927) 304.
[241] Hersch Lauterpacht, *International Human Rights Law and Human Rights* (n 158) 70; See also Martti Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 Journal of International Criminal Justice 810.
[242] While very well-known for his cosmopolitan approach to international law, Lauterpacht, like many a cosmopolitan international lawyer, sometimes struggled with reconciling his cosmopolitanism with more parochial national sovereignist causes, particularly his involvement in the legal aspects of the establishment of the state of Israel. *See for example* Eliav Lieblich and Yoram Shachar, 'Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence' (2014) 84 British Yearbook of International Law 1.

light, therefore, international law ought to ultimately serve humanity as a collective, with states being the political representations and organisation of members of the collective. Actions of states, particularly on matters that impact humanity as a whole, ought to be evaluated with regard to humanity's fundamental values and interests.

2.5 From Local Troops to a Global Tribe: Cosmopolitan Values as International Legal Entitlements

One of cosmopolitanism's greatest challenges is how 'to take minds and hearts formed over the long millennia of living in local troops and equip them with ideas and institutions that will allow us to live together as the global tribe we have become'.[243] 'Living in local troops' in the modern sense entails a focus on insular local or statist conceptions of security and sovereignty, or as Nussbaum puts it, 'imaginations [that] remain oriented to the local'.[244] 'Living as a global tribe' would entail, as Teitel argues, an acknowledgement and appreciation of the reality that in the 21st Century international legal order, relations 'have shifted from an emphasis on state security … to a focus on human security: the security of persons and peoples',[245] a focus which 'affirms the role of the individual within a layered conception that also takes account of the collective character of violence'.[246] This is also an acknowledgment that the international legal system 'rests on a human ability to perceive common elements, in the nature of humanity, which allow us to live together in peace'.[247] This calls for 'an understanding of human being(s) as members and subjects of a single social concern, not mediated as members of separate states',[248] of course without discounting the fundamental importance of the organisation of peoples into political entities in the form of states or other polities. This appreciation is particularly important when one considers that life as part of 'a global tribe' inevitably raises the stakes for human dignity and the protection of the physical integrity of humanity, and acts of commission and omission in whatever part of the world therefore necessarily impact the rest of the world, of course to differing degrees.

In a highly institutionalised world, however, simply espousing cosmopolitan values does not by itself transform these seemingly abstract ideas into actionable entitlements or guarantee their entrenchment and enforcement. As Pavel aptly puts it, '[M]oral outrage does not help unless we channel it productively into institutional reform.'[249] In order for the cosmopolitan values of inherent human dignity, physical and psychological integrity and shared humanity to be effectively protected, validated and enforced, it follows therefore that

[243] Kwame Anthony Appiah (n 146) xiii.
[244] Martha C. Nussbaum, 'Introduction: Cosmopolitan Emotions?' in Martha C. Nussbaum and Joshua Cohen (eds), *For Love of Country?* (Beacon Press 2002) x.
[245] Ruti G. Teitel, *Humanity's Law* (n 141) 4.
[246] Ruti G. Teitel, *Humanity's Law* (n 141) 33.
[247] Mortimer Sellers, 'Parochialism, Cosmopolitanism, and Justice' in Mortimer Sellers (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (Cambridge University Press 2012) 262.
[248] Luigi D.A. Corrias and Geoffrey M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13 Journal of International Criminal Justice 97, 101.
[249] Carmen E. Pavel, *Divided Sovereignty: International Institutions and the Limits of State Authority* (Oxford University Press 2015) x.

these values must be translated into legal form and legal entitlements and duties capable of legal protection and institutional enforcement through positive law.[250] Acknowledging this need to legally secure cosmopolitan values,[251] and proceeding from an appreciation of contemporary international law's shift from state to human security,[252] Peters argues that the contemporary international legal system is increasingly anchored on humanistic principles, that is, 'the legal principle that human rights, interests, needs, and security must be respected and promoted'.[253] This 'new' relationship is largely governed by three conventional and customary international legal regimes which together constitute the corpus of international criminal justice: international human rights law, international humanitarian law and international criminal law, collectively christened 'the law of humanity' by Teitel.[254] These regimes[255] seek to secure the cosmopolitan values of inherent human dignity and shared humanity by recognising attendant rights and fundamental freedoms, imposing legal obligations and proscribing and providing remedy for crimes that assault these values.[256] These legal regimes therefore signify the cosmopolitan recognition of these values as fundamental to humanity's survival as well as humanity's resolve, desire and commitment to ensure their protection on a global scale. These regimes, mostly evident in the form of positive law, are in turn strengthened by norms such as *jus cogens*[257] and the attendant concept of *erga omnes* obligations. Hence, it is unsurprising that the growth of international criminal justice as a cosmopolitan project has been closely associated with the promotion and protection of human rights values[258] even though the international criminal justice project predates the human rights project.

While these regimes have slight genealogical differences, they are complementary and 'are guided by a basic identity of purpose: the protection of the integrity of the human person in all and any circumstances',[259] an identity that therefore 'constitutes both the moral limit

[250] While translation into legal is certainly not the only way of effectively protecting, validating and enforcing humanity's values of human dignity and shared humanity, the thesis considers such translation to be fundamental to the validation of these values particularly in the form of criminal accountability. For a discussion of some of the legal rights into which human dignity has been translated, see William A. Schabas, *The Customary International Law of Human Rights* (Oxford University Press 2021) ch 4.
[251] Pogge refers to this translation of values into legal entitlements as 'legal cosmopolitanism. *See* Thomas W. Pogge (n 151) 49.
[252] For a discussion of this shift, see for example Ademola Abass and Mashood A. Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the African Union' (2002) 49 Netherlands International Law Review 1; Dan Kuwali, 'The End of Humanitarian Intervention: Evaluation of the African Union's Right of Intervention' (2009) 9 African Journal on Conflict Resolution 41; Ben Kioko, 'The African Union and the Fight against Impunity: A View from the Inside' in Charles Riziki Majinge (ed), *Rule of Law through Human Rights and International Criminal Justice: Essays in Honour of Adama Dieng* (Cambridge Scholars Publishing 2015).
[253] Anne Peters (n 233) 514.
[254] See Ruti G. Teitel, *Humanity's Law* (n 141).
[255] Specific legal instruments under these regimes are highlighted in the Introductory Chapter.
[256] *See also* Kai Ambos, 'Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 Oxford Journal of Legal Studies 293.
[257] For a fascinating debate on *jus cogens,* see Dire Tladi (ed), *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations* (Brill Nijhoff 2021).
[258] Frédéric Mégret (n 173) 86; Makau Mutua, 'What Is the Future of Transitional Justice?' (n 178) 1–9.
[259] Antônio Augusto Cançado Trindade (n 152) 511.

and the justification of the international legal order'.[260] These regimes impose varying degrees of obligations on states relevant to the prevention of, investigation of and accountability for grave violations of the relevant guarantees.[261] Particularly grave or serious violations of these guarantees therefore cause harm to humanity as a universal collective and may amount to international crimes – as discussed in the previous chapter – and necessitate remedial action in the form of international criminal accountability. Some have criticised as rhetorical the cosmopolitan argument that international criminal justice serves humanity's values, arguing that '[t]here is no evident global constituency for international criminal justice aside from a few specialized boutique NGOs and their client relays'.[262] Of course, the research acknowledges, as discussed in previous sections, the fact that the articulation and validation of cosmopolitan values have quite often been hijacked by partisan interests thereby making the cosmopolitan nature of such values seem merely rhetorical. However, such distortions neither strip the values of their cosmopolitan nature, nor do they speak for the cosmopolitan values just because they happen to be advanced by influential or dominant voices. As such, whether or not international criminal justice is hijacked by partisan interests does not negate its appeal to the service of humanity's values. To adopt the words of DeGuzman, 'International criminal [justice's] central contribution to the wellbeing of the world is to promote the [cosmopolitan] value of human dignity,'[263] which value is foundational to the international community's endevours to proscribe and prosecute international crimes.[264]

The 'law of humanity' approach adopted herein – an approach to international law that aspires 'to the fulfilment of the needs of protection and aspirations of human beings and humankind as a whole'[265] – or as Trindade calls it, the humanisation of international law[266] resulting in 'international law for humankind', is evident in the jurisprudence of international criminal accountability mechanisms such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL), and most recently the International Criminal Court (ICC). It is also evident in many international legal instruments, the jurisprudence of regional human rights courts as well as the jurisprudence of the International Court of Justice.[267] Considered through the lense of international law – and with specific reference to this research – cosmopolitanism therefore entails orienting the international legal and institutional framework towards the protection and enforcement of

[260] Hersch Lauterpacht, *International Human Rights Law and Human Rights* (n 158) 71.
[261] These degrees of obligations are discussed in the introductory chapter.
[262] Frédéric Mégret (n 173) 87.
[263] Margaret M. deGuzman (n 169) 13.
[264] Margaret M. deGuzman (n 169) 87–96.
[265] Antônio Augusto Cançado Trindade (n 152) 397.
[266] Antônio Augusto Cançado Trindade (n 152) 278; 281–285; part VI.
[267] Antônio Augusto Cançado Trindade (n 152) 278–280; 285; 395–397. Perhaps the first international criminal mechanism to expressly argue for and adopt this relationship was the International Criminal Tribunal for the former Yugoslavia (ICTY) when it argued in *Prosecutor v Duško Tadić* that, 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being- oriented approach … [which] has gained a firm foothold in the international community as well.' See *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-AR72 of 2 October 1995 Appeals Chamber, para 97.

human dignity through an international criminal justice approach,[268] thereby confirming dignity of the human person and basic considerations of humanity as among the fundamental principles underpinning international law and accounting for its progressive evolution.[269]

2.6 Institutionalisation of International Criminal Justice as A Cosmopolitan Endeavour

As argued in the previous section, this research proceeds from the understanding that international criminal justice is inherently a cosmopolitan endeavour. International law regimes specific to the wellbeing of human beings, like those forming the pillars of international criminal justice, constantly appeal to the cosmopolitan understanding of humanity as a justification for their normative force. For instance, the constituent instrument of the world's first and only permanent international criminal court gives preambular recognition and prominence to the cosmopolitan belief that 'all peoples are united by common bonds, their cultures pieced together in a shared heritage'[270] and that national and international action are necessary to prosecute grave crimes that would shatter this 'delicate mosaic'[271] of humanity.

The often-indeterminate nature of (some) cosmopolitan values means that it is through formal decision-making and enforcement arrangements such as those of the state and international organisations that these values are likely to be realised.[272] The realisation, protection and enforcement of fundamental cosmopolitan values therefore necessarily imply the existence of a legitimate public authority with the power of enforcement. Primarily, that authority is the state, and contrary to common misconceptions, the state is not (or perhaps more appropriately, should not be) inimical to cosmopolitan values.[273] The responsibility of states as primary subjects of international law is here complementary to individual responsibility for international crimes. This state authority can and, as this research argues, ought to be, scaled up to relevant inter-governmental organisations where the state is either genuinely unable or unwilling, or if the protection of the values necessarily requires collective effort. Put differently, states are considered as the primary guarantors of human dignity since they are the primary embodiment of the people's sovereignty, and they can either enforce these rights individually or collectively through pacific supranational institutional frameworks where

[268] Antonio Franceschet (n 165) 184.
[269] Antônio Augusto Cançado Trindade (n 152) 637–638.
[270] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, preamble.
[271] Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, preamble.
[272] Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Massianic World' (2003) 35 New York University Journal of International Law and Politics 471, 476. While here Koskenniemi considers both indeterminacy of cosmopolitan values and their dependence on institutional arrangements as weaknesses (and suggests that cosmopolitanism is utopian and a façade), the research argues the opposite, that is, that institutional structures are *sine qua non* of cosmopolitan values.
[273] For a discussion of the misconception of state as inimical to cosmopolitan conceptions of rights, *see* Maxwell O. Chibundu (n 4) 182–190. *See also* Kwame Anthony Appiah (n 156) 26–29. and Catherine Lu (n 148) 265–266. who eloquently puts it thus, 'Cosmopolitanism thus does not entail the abolition of the society of states, only that such a society should recognize, endorse and uphold cosmopolitanism's ethical commitments to humanity, justice and tolerance.'

appropriate.[274] In contemporary practice, this is exemplified by, among others, resort to international criminal justice mechanisms established through the collective action of states and tasked with validating and realising human dignity in cases of gross violations amounting to international crimes. These mechanisms therefore serve as institutional frameworks for validating and realising otherwise indeterminate or abstract cosmopolitan values. The research therefore proffers cosmopolitanism to justify collective action by states through RIGOs to ensure accountability for international crimes.

However, it must be noted that as a cosmopolitan project, the contemporary practice of international criminal justice does not (or perhaps more appropriately, should not) necessarily serve states even though states are the primary actors in its institutional design; its primary function is the validation of humanity's fundamental cosmopolitan values by resort to international criminal law principles.[275] States should, in this case, more appropriately be considered as 'institutional' instruments or structures for guaranteeing these fundamental values of humanity. Additionally, as the value in question in this instance, human dignity, is a common and cosmopolitan value of humanity and not a parochial interest of the state, scaling enforcement upwards to the regional level does not mean that the state's jurisdiction or sovereignty is usurped. Rather, this should be considered as the international community validating one of its fundamental values, which responsibility the international community owes all the members of the collective wherever they are located, and particularly where the genuine inability or unwillingness of the local polity to validate the value within its localised territory results in the type of violations that amount to international crimes. As some have argued, the very existence of international criminal law and its enforcement by the international community 'attests to the strength of [the] existence [of the international community] as a society, a society whose bonds are strong enough to prompt it to punish offenders'.[276] From a cosmopolitan perspective, the institutional arrangements put in place by states or inter-governmental organisations for the purpose of ensuring accountability for international crimes are therefore considered to discharge their mandate on behalf of a global public, that is, holding individuals to their responsibility to humanity. Therefore, while recognising that states are essential in criminal law adjudication, the thesis argues that those essential features can equally be vested supranationally in institutional mechanisms collectively established by states such as RIGOs.[277]

The work of international criminal accountability mechanisms can therefore be considered as a dual exercise, both as a legitimating exercise whereby these mechanisms validate humanity's fundamental values, as well as a constitutive exercise whereby these

[274] This process of entrusting the protection and validation of these cosmopolitan values to institutional frameworks is close in meaning to what Pogge refers to as institutional cosmopolitanism. *See* Thomas W. Pogge (n 151) 50.
[275] Frédéric Mégret (n 173) 85–86.
[276] Frédéric Mégret (n 173) 80.
[277] See also Darryl Robinson (n 220) 138; Abram Chayes and Anne-Marie Slaughter, 'The ICC and the Future of the Global Legal System' in Sarah B. Sewall and Carl Kaysen (eds), *The United States and the International Criminal Court: National Security and International Law* (Rowman & Littlefield 2000).

mechanisms define the meaning of humanity.[278] As Franceschet has argued, contemporary international criminal justice mechanisms are the culmination of a long process of cosmopolitan evolution in the international legal order aimed at legitimising and augmenting states' capacity as primary enforcers of human dignity and providing avenues for collective enforcement where necessary.[279] In other words, institutionalisation of these norms has become the dominant means of their validation. The evolution of international criminal justice is therefore intrinsically connected to the existence of the state, the exercise of state power and the evolving understanding of state sovereignty, state responsibility and individual responsibility.

Of course, this research is alive to critiques of further institutionalisation of international criminal justice, and arguments for less institutionalisation ostensibly to allow room for the continuous contestation of the meaning(s) of justice.[280] This critique is not unique to international criminal justice, but has in fact been generally raised against cosmopolitanism as a school of thought. Some have argued that there exists a tension between cosmopolitanism's insistence on value-based unity of the human family and the 'reality' that institutional enforcement structures are fragmented or decentralised at local, national, regional and global levels.[281] Connected to this is the observation made by some that international criminal justice's singular focus on the responsibilities that individuals owe to humanity as a collective, hence individual criminal responsibility, may serve to obscure state responsibility and even excuse states' responsibility for system crimes.[282] Further still, others, most prominently McEvoy, have argued against excessive emphasis on 'legalism' in transitional justice (including international criminal justice) which purportedly privileges state-centrism and top-down approaches that ultimately rob directly affected communities of their agency.[283]

While sympathetic to these arguments and observations, and while acknowledging their merits, the argument advanced herein for further institutionalisation of international criminal accountability, specifically by harnessing the power of RIGOs to establish such mechanisms, should not be considered as advancing a singular approach to (international) justice. Indeed, as argued in previous sections, the research advances a cosmopolitan approach to international criminal justice, but a cosmopolitanism premised on respect for the validity and legitimacy of the multiplicity of possible responses to international crimes. This is, to quote Lu, '[a] cosmopolitan recognition of the one *and* many faces of humanity [which] allows us to appreciate the value of [multiple approaches and responses] rather than posing their dichotomization and exalting one at the expense of the other[s]'.[284] It is also recognition of the

[278] For a general discussion of this dual function, see Luigi D.A. Corrias and Geoffrey M. Gordon (n 248).
[279] Antonio Franceschet (n 165) 194–196.
[280] See for example Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (n 173) who decries 'tribunalisation of violence' which has seen an increasing turn toward the use of legal institutions as the primary venues for responding to political conflicts; Sarah M.H. Nouwen and Wouter G. Werner (n 173) 173–176.
[281] See for example Roland Pierik and Wouter Werner (n 159) 5–6.
[282] Frédéric Mégret (n 173) 86–87.
[283] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 411.
[284] Catherine Lu (n 148) 266.

fact that the question of what a legitimate international criminal accountability mechanism is does not have a single universal answer and that in attempting to answer this question, the multiplicity of global approaches, responses and voices must necessarily be considered.[285] In this regard, the thesis' cosmopolitan approach to international criminal accountability therefore advocates 'a willingness to embrace alternative governance structures to supplement state structures'[286] including by 'redefining and/or reassigning the parties in charge of interpreting and applying [international criminal law].'[287]

Cosmopolitanism and plurality of institutional enforcement mechanisms for international criminal law are not mutually exclusive; quite the contrary. As the research maintains, multiple institutional mechanisms are actually desirable, providing pragmatic alternatives for enforcing fundamental human values such as human dignity. The research focuses on just one of such possible approaches, RIGOs, as a potentially effective approach in the event that local and national approaches are ineffective or unavailable, and in light of the increasing difficulty in galvanising global responses.[288] To advocate a cosmopolitan enforcement approach to the cosmopolitan value of human dignity through regional international criminal justice responses is not to delegitimise the cosmopolitan character of the value(s) in question. Neither is it to ignore the legitimacy of or crowd out the multiple possible responses to international crimes, some of which may be local, national or global and which may even address state responsibility. Quite the contrary. To espouse cosmopolitan ideals is to envision cosmopolitan enforcement processes, at least as a backstop. A cosmopolitan approach to international (criminal) justice therefore emphasises the use of international law to establish and sustain an institutional framework for the protection and validation of human dignity as a complement to states' domestic efforts or as a backstop where states are genuinely unable or unwilling to perform their primary obligations in this regard, which institutional arrangements then serve to reinforce international law.

2.7 Chapter Conclusion

In conclusion, the research adopts Trindade's argument that the normative, procedural, institutional and judicial humanisation of international law should be considered as an endeavour to 'improve and strengthen, never to restrict or weaken, the degree of protection of the [human person]'[289] and as strongly implying 'ultimately, the primacy of the *raison*

[285] *See* Asad Kiyani, 'Legitimacy, Legality, and the Possibility of a Pluralist International Criminal Law' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017); Sergey Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017) 77.
[286] Darryl Robinson (n 220) 138.
[287] Dorothy Makaza (n 173) 328.
[288] For an incisive discussion of the waning global response specifically by the UN Security Council to atrocity crimes, *see* Jennifer Trahan (n 7); Charles Chernor Jalloh, 'UNSC Veto Power Symposium: Are There Jus Cogens Limits to UN Security Council Vetoes in Atrocity Crime Contexts?' (n 7); Dire Tladi, 'UNSC Veto Power Symposium: Doing Away with the Veto for Atrocity Crimes? Trimming the Edges of an Illegitimate Institution in Order to Legitimise It' (n 7).
[289] Antônio Augusto Cançado Trindade (n 152) 525.

d'humanité over the old *raison d'État*'.[290] International criminal justice as a cosmopolitan project therefore highlights the contemporary belief that the legitimacy of states' claim to sovereignty should in significant part depend on their ability to guarantee the protection and enforcement of human dignity and fundamental rights, an understanding that should also underpin international relations.[291] In sum, and of relevance to this research, the principle of humanity that underlies a cosmopolitan understanding of international law can be understood as simultaneously emphasising the dignified treatment of all human beings, as prescribing acceptable standards of intra-human behaviour and as privileging matters of common interest to humanity.[292] It is in this spirit therefore that the international legal regimes referred to in the previous chapter, and christened herein as law of humanity, proscribe certain conduct that harm the inherent dignity of the human person. With these legal regimes, the international community is heeding the cosmopolitan call to 'pay attention to the cries of victims in the flesh'.[293] It is also with this understanding that the research advocates collective action to secure and validate human dignity, specifically through regional responses to international crimes. This argument is premised on the understanding, now considered trite, that humanity or humankind, understood as the collective representation of all human beings, is as much a subject of contemporary international law as states and the individual.[294] As a result, international law today is, or should be, primarily concerned with, as Trindade, argues 'the pursuance of the fulfilment of the general and superior interests of the international community'[295] particularly in matters concerning basic considerations of humanity and the international community's most fundamental values.[296] Some of these basic considerations and fundamental values, the research argues, are inherent dignity of the human person and physical integrity of humanity, secured by the international legal regimes constituting 'law of humanity' and validated through international criminal accountability processes.

Having laid the cosmopolitan theoretical basis for international criminal justice, international criminal accountability and collective action, the subsequent chapters will grapple with the practical implementation of international criminal accountability as a cosmopolitan project aimed at validating the cosmopolitan values of human dignity, physical integrity and shared humanity. In particular, the research (at chapters IV and V respectively) will use two case studies to test and apply the cosmopolitan arguments advanced herein: examination of the European Union's role in the establishment and operation of the Kosovo Specialist Chambers; and examination of the role of the African Union in the establishment and operation of the proposed Hybrid Court for South Sudan. However, before considering the practical aspects of these arguments through these case studies, the next chapters (chapters III and IV) will first

[290] Antônio Augusto Cançado Trindade (n 152) 528.
[291] Antonio Franceschet (n 165) 103.
[292] Antônio Augusto Cançado Trindade (n 152) 279–280.
[293] Catherine Lu (n 148) 256.
[294] For a discussion of humanity/humankind as subject of international law, *see* Antônio Augusto Cançado Trindade (n 152) ch XI.
[295] Antônio Augusto Cançado Trindade (n 152) 275.
[296] See also Taslim Olawale Elias, 'New Trends in Contemporary International Law' in David Freestone, Surya Subedi and Scott Davidson (eds), *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* (Kluwer Law International 2002).

conceptualise sovereign authority and collective action by interrogating the exercise of elements of sovereign authority by RIGOs, including determining the basis of such authority in international law.

CHAPTER THREE

RECONCILING THE CONCEPT OF SOVEREIGNTY WITH THE EXERCISE OF ELEMENTS OF SOVEREIGN GOVERNMENTAL AUTHORITY BY INTERNATIONAL ORGANISATIONS

3.1 Introduction

While states remain the primary actors in the identification, interpretation and application of international law, states have increasingly established inter-governmental entities to perform some functions on states' behalf and consequently, these entities are influential in the development and implementation of international law and of states' obligations.[297] Regional inter-governmental organisations (RIGOs) are such entities, established by states to govern their relations at a regional level and perform supranational functions, and for some, to champion the collective stance of these states on global issues. Of course, this conception of RIGOs as functionalist and assertive entities is not without controversy. As Roberts and Sivakumaran assert, acknowledging the significant role that state-empowered entities such as RIGOs perform in the formulation and application of international law would suggest that international law is not entirely based on the practice and consent of states, strictly speaking.[298] In other words, the exercise of elements of sovereign authority by RIGOs is as controversial as the potential challenge this poses for classical conceptions of state sovereignty and state consent.

This chapter conceptualises the exercise of the 'collective sovereign powers' of states by RIGOs by examining the 'contested' authority of international organisations (IOs) generally, and RIGOs in particular, to exercise elements of 'sovereign' authority traditionally the province of states. Because the authority of RIGOs derives from states, and in order to conceptualise the exercise of elements of sovereign governmental powers by IOs generally and RIGOs in particular, it is therefore necessary for the thesis to first engage with and interrogate the question of state sovereignty and the exercise of this sovereign authority by IOs generally, and RIGOs in particular. This is particularly so since traditional conceptions attach the concept of sovereignty solely to states who are also traditionally considered as the primary subjects of international law. An understanding of the concept and its relevance to the functioning of IOs therefore foregrounds the determination of the legal basis for the exercise of sovereign authority by RIGOs explored in the subsequent chapter. This chapter therefore first interrogates the concept of sovereignty as a general question of international law, particularly as a contestable question. It then explores three conceptual arguments for the acquisition and exercise of elements of sovereign authority by RIGOs in order to make sense of the exercise of such authority by RIGOs: the concept of divided or shared sovereignty; RIGOs as

[297] Anthea Roberts and Sandesh Sivakumaran, 'The Theory and Reality of the Sources of International Law' in Malcolm D. Evans (ed), *International Law* (5th edn, Oxford University Press 2018) 108.
[298] Anthea Roberts and Sandesh Sivakumaran (n 297) 115–116.

international institutional bypasses; and RIGOs as organisations with (independent) value systems. In so doing, the chapter argues for a reconceptualised understanding of sovereignty that privileges sovereignty based on shared values, with particular emphasis on human dignity. This chapter thus provides a conceptual basis for the proactive involvement of RIGOs in international criminal justice, particularly in the establishment and administration of international criminal accountability mechanisms.

3.2 Sovereignty as a Contestable Concept in International Law

The discussion that follows in this section is perhaps best introduced by the rather apt words of Klabbers who argued that, 'Following the critical legal tradition, international law is bound to swerve back and forth between the two poles of sovereignty and community, and never the twain shall meet. It is this tension which makes international legal rules often (if not always) ultimately uncertain, and it is this tension that will function as one of the red threads running through much of this [thesis].'[299] While on the one hand the thesis appreciates RIGOs as organisations primarily established to advance the collective interests of states, on the other hand it considers RIGOs as autonomous entities which are expected, in certain instances such as advancing international justice, to privilege the interests of the 'international community' even if this may not always accord with the interests of individual member states. Considering that RIGOs are established by states in collective exercise of their sovereign authority, it is therefore imperative to consider the general question of sovereignty, and its relevance in a world where states are increasingly empowering RIGOs to perform hitherto governmental functions.

3.2.1 What is Sovereignty?

Okeke defines sovereignty as 'power, in the form of legitimised authority over all persons and things within a defined area of jurisdiction, vested in certain bodies or persons who in the exercise of their authority are not subject to any other power.'[300] Ruggie similarly considers the modern understanding of the concept as entailing 'the institutionalization of public authority within mutually exclusive jurisdictional domains'.[301] In other words, 'the essence of sovereignty is understood by the state's ability to make authoritative decisions within its territory'.[302] This means, therefore, that sovereignty determines the legal competence of a political entity such as the state[303] and serves to organise and regulate the inherently unequal internal relationship between states and their subjects or other actors in the internal sphere, and the relationship among different states which is itself also defined by unequal characteristics[304]

[299] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 5.
[300] Chris Nwachukwu Okeke (n 27) 30.
[301] John Gerard Ruggie, 'Continuity and Transformation in the World Polity: Toward a Neorealist Synthesis' in Robert O. Keohane (ed), *Neorealism and Its Critics* (Columbia University Press 1986) 143.
[302] Oumar Ba, 'International Criminal Justice and State Sovereignty: An African Perspective' (Ohio University 2011) 26.
[303] Samantha Besson, 'Sovereignty in Conflict' in Colin Warbrick and Stephen Tierney (eds), *Towards an International Legal Community: The Sovereignty of States and the Sovereignty of International Law* (The British Institute of International and Comparative Law 2006) 150.
[304] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 263.

such as size, economic strength and political influence. The concept of sovereignty therefore 'constitutes the fundamental basis upon which the whole structure of international law as it stands at present is built'[305] and is the basis upon which the international community (of states) exists as this presupposes the existence of sovereign states as equal legal persons with equal rights of participation in international relations. Hence, this is recognition of the constitutional independence of states, that is, recognition under international law of the legal equality of states and of states' supreme authority over their internal and external affairs.[306]

Because this research focuses on RIGOs and the establishment by them of international criminal accountability mechanisms, the primary concern here is the external aspect of sovereignty which governs a state's relationship with other sovereign states. However, the interaction of 'external sovereignty' with 'internal sovereignty' is also central to the research especially because if at all accountability for international crimes is a legal obligation or responsibility, then it is one which individual states primarily have to fulfil within their domestic legal systems. Failure or inability by a state to ensure accountability for international crimes domestically then arguably necessitates accountability at the international level. It is then that so-called external sovereignty interacts with so-called internal sovereignty, resulting in complexities some of which are the concern of this research. In any case, the two forms of sovereignty are inseparable and co-dependent since the boundaries of external sovereignty are determined by internal sovereignty, while some of external sovereignty's inherent limitations also impose limitations on the exercise of internal sovereignty.[307]

3.2.2 Sovereignty as an Essentially Contestable Concept

As discussed below, the above understanding of sovereignty is not definitive, but rather only sketches the concept's outer and broader limits. The concept of sovereignty is generally acknowledged as being essentially contestable. An essentially contestable concept, according to Besson, 'is a concept that not only expresses a normative standard and whose conceptions differ from one person to the other, but whose correct application is to create disagreement over its correct application or, in other words, over what the concept is itself'.[308] Grovogui argues along similar lines, insisting that 'there has never been a uniform international system of sovereignty across time and space'.[309] Instead, there has been plurality in its practice across the different regions of the world and '[t]he resulting institutional arrangements or international regimes gave form to international governance through different but complementary rules, norms and standards of behavior for agents and actors situated in different regions of the world'.[310] Ba endorses this argument, positing that, '[S]overeignty is not immutable and it

[305] Chris Nwachukwu Okeke (n 27) 23.
[306] Georg Sørensen, 'Sovereignty: Change and Continuity in a Fundamental Institution' XLVII Political Studies 590, 592–593.
[307] Samantha Besson (n 303) 151-153.
[308] Samantha Besson (n 303) 144.
[309] Siba N'Zatioula Grovogui, 'Regimes of Sovereignty: International Morality and the African Condition' (2002) 8 European Journal of International Relations 315, 316.
[310] Siba N'Zatioula Grovogui, 'Regimes of Sovereignty: International Morality and the African Condition' (n 309) 316.

evolves in different directions at different times. As such, the meaning of sovereignty is always bound to be subject to political contestation.'[311] In other words, there exists no objectively determined and universally accepted understanding of the concept, and the context and instrument in which the concept appears generally determine its meaning and scope.[312]

Besson argues that for sovereignty to be considered as an essentially contestable concept, it must be normative, intrinsically complex and a-criterial.[313] Normative here refers to the existence of diverse values that undergird the concept and which it seeks to achieve, and upon which evaluation of the concept is based. Intrinsic complexity refers to the diversity in meaning ascribed to the concept, defined based on one's idea of what it should be or on one's idea of what outcomes it should achieve or based on the values one considers as undergirding the concept. Sovereignty as a-criterial refers to the impossibility of prescribing fixed criteria to be satisfied for a sovereign to be considered to exist. Therefore, the 'elements' of the concept of sovereignty are contestable. These 'elements' are often described as dualities, for example, legal sovereignty *versus* political sovereignty, internal sovereignty *versus* external sovereignty, sovereignty as divisible *versus* sovereignty as indivisible, sovereignty as limited *versus* sovereignty as unlimited and governmental sovereignty *versus* popular sovereignty.[314] Due to the fact that the values that sovereignty as a concept seeks to protect are varied and themselves contestable, it follows that different actors will inevitably conceive the concept differently. Consequently, there exists no consensus on the meaning of the concept, or on a standard way of applying the concept, or less still on what precisely the values that undergird the concept or the values that it seeks to achieve are, and valid debates on these aspects abound.[315] The meaning, scope, elements and application of sovereignty should therefore not be assumed to be determinate; these practically depend on the sphere of domestic or international life in which the concept is being applied.

The contestability of sovereignty as a concept proceeds, however, from the assumption of basic cornerstones, that is, the basis for the concept's existence and the 'general conceptual framework within which these contestations can take place'.[316] As Sarooshi suggests, these basic cornerstones are usefully framed around the so-called 'central problem of sovereignty',[317] that is, questions as to 'what are powers reserved to government; who exercises which of them; and how should they be exercised?'.[318] Contestations over the nature and scope of the concept of sovereignty therefore often seek to answer these questions. Since contestations of sovereignty often revolve around the 'powers of government', it is also unsurprising, therefore, that on the international plane, especially where international organisations have been established by states, there exist constant contestations of sovereignty, for example, concerning

[311] Oumar Ba (n 302) 11.
[312] Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005) 3.
[313] Samantha Besson (n 303) 147–164.
[314] Samantha Besson (n 303) 149–156.
[315] Samantha Besson (n 303) 145.
[316] Dan Sarooshi (n 312) 5.
[317] Dan Sarooshi (n 312) 5; See also Dan Sarooshi (n 186).
[318] Dan Sarooshi (n 312) 5.

the precise nature and scope of powers ceded to the organisations by states, the exercise of those powers, how states interact with or relate to the exercise of those powers by the organisations, and perhaps even the value systems underlying the exercise of those powers. International organisations have thus become platforms 'transcendental to the State, where conceptions of sovereignty – and more specifically the content of sovereign values – can be contested and formulated on the international plane'.[319]

The contestable nature of sovereignty also reveals the weaknesses in dominant discourse on sovereignty. Grovogui offers a powerful critique of the dominant discourse.[320] He argues that the prevailing discourse is generally unreflective and fails to appreciate 'the global structures of economic relations and the political processes and ideological contestations that led to post-colonial formulations of sovereignty…. [instead] obscure[ing] significant structures of power and governance and political processes which have sustained subjectivity within the international order'.[321] He strongly and convincingly challenges the Wetsphalian 'commonsense', arguing that uncritical references to Westphalia as the foundation of the concept ignore the various historical manifestations of sovereignty across the world and across time, and fail to appreciate the selectively oppressive role this conception played during colonialism and the enduring negative effects of this conception.[322] Other commentators have made similar observations. Gathii observes that classical conceptions of sovereignty served to justify, legitimate and entrench some of the most despicable processes in human history, being, slavery, imperialism, colonialism and its attendant atrocities, and orientalism, and continue to uphold the effects of these systems in today's world.[323] Anghie traces the evolution of international law, contending that colonialism was a significant basis upon which international law and the concept of sovereignty developed, and that while the Westphalian concept allowed for Europeans to recognise themselves as sovereign states, the same European states contemporaneously racialised the concept and deployed it to subjugate and deny the sovereignty of others across the world.[324]

It would be remiss to elide these historical facts and their effects on international law then and now. Indeed, classical conceptions of sovereignty served to justify the racialised subjugation, oppression, annihilation (in some cases) and dispossession of a significant part of the world's population by European powers. The rules of international law that served to organise peaceful co-existence among European nations were ironically deployed to exclude

[319] Dan Sarooshi (n 312) 12.
[320] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170); Siba N'Zatioula Grovogui, 'Regimes of Sovereignty: International Morality and the African Condition' (n 309).
[321] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170) 29–30.
[322] *See also* Achille Mbembe, 'At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa' (2000) 12 Public Culture 259.
[323] *See* James Gathii (n 191).
[324] See Antony Anghie (n 191); See also U. Oji Umozurike, 'International Law and Colonialism in Africa: A Critique' (n 191); U. Oji Umozurike, *Self-Determination in International Law* (n 191); U. Oji Umozurike, *International Law and Colonialism in Africa* (n 191); Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier 1979).

from the 'international community', exploit and oppress those who were racialised as non-White, or in the words of Frantz Fanon, the wretched of the earth.[325] While serving to organise European nations, and later North American settler colonies, into Westphalian-type states, the same concept of sovereignty served to destroy other nations in Africa, Asia, the Caribbean, the Americas and Australia and to deny them recognition as and admission into its concept of sovereign statehood.[326] Effectively, therefore, the concept of sovereignty has historically served a dual purpose to 'constitute societies but also to exclude from societies'.[327] These historical facts continue to influence the current state of international law where structural and political imbalances persist in the relationship between so-called Western states and other states.

Adopting the critique above, the thesis therefore argues that any useful conception of sovereignty in today's world has to reckon both with the historical realities that have shaped international relations and international law – including how these realities entrenched global inequalities – and with the legitimate right and efforts of historically subjugated nations to assert membership of the international community. Conceptions of sovereignty that fail to recognise the fact that 'sovereignty regimes reflect historical distributions of power and subjectivity within the international order and corresponding symbolic and material economies'[328] cannot be considered as sincere or useful for understanding the relevance of sovereignty in today's international law and relations. This accords with the reality that relations among and actions by sovereigns have never been determined by 'a unified code of ethical standards' precisely because the international community is not premised on 'a single standard of moral authority'.[329]

Considered this way, the thesis' conception of sovereignty would therefore involve a two-fold appreciation. First is an appreciation of states' legitimate desire to preserve their autonomy and independence, a particularly relevant desire of those states that have historically been on the receiving end of sovereignty's role 'in repressing, subordinating and legitimizing colonial, imperial and racist rule',[330] but also of all other states. Second is the legitimate interest of the peoples of the world (international community) to ensure the security and welfare of the world's peoples. In other words, and as Grovogui argues, '[T]he realization of a new international morality requires new discursive and cultural practices that transgress the theoretical and

[325] Frantz Fanon, *The Wretched of the Earth* (Richard Philcox tr, Grove Press 2005).
[326] *See* Edward W. Said, *Orientalism* (Vintage Books 1979); Natsu Taylor Saito, *Settler Colonialism, Race, and the Law: Why Structural Racism Persists* (NYU Press 2020); Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170); Siba N'Zatioula Grovogui, 'Regimes of Sovereignty: International Morality and the African Condition' (n 309); Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211).
[327] Dan Sarooshi (n 312) 11.
[328] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 265.
[329] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170) 32.
[330] James Gathii, 'Burying Sovereignty All Over Again: A Brief Review of Don Herzog's Sovereignty RIP' (07 July 2020) EJIL:Talk! <https://www.ejiltalk.org/burying-sovereignty-all-over-again-a-brief-review-of-don-herzogs-sovereignty-rip/> accessed 07 July 2020.

conceptual limits of the prevailing international institutions and norms.'[331] While doing so, however, care should be taken to guard against this 'reformed' conception of sovereignty itself reproducing imbalances and hegemonies.[332] The silver lining of the contestable nature of the concept of sovereignty is that this contestability is what enables sovereignty to 'both adapt itself to a new reality and stimulate further debate on a better allocation of power'.[333] Of course, acknowledging that sovereignty is a contestable concept does not mean that it is an 'obsolete, confused and pernicious'[334] concept that ought to be retired and buried, as Herzog has argued,[335] or that sovereignty and primacy of states have, to adopt Kokenniemi's words, 'already lost but hang around like zombies, not knowing they died'.[336] Rather, the research's argument is that sovereignty is a concept in need of reconceptualization to accord with the realities of the modern world, including the emergence of IOs and the existence of shared values. It is precisely because of this contestable nature of sovereignty as a concept that such reconceptualization can be imagined.

3.3 Reconceptualising Sovereignty as Based on 'Shared' Values

Grovogui advances a convincing conception of sovereignty where 'the collective or political society [is] the titular sovereign even as legitimately selected representatives retain the symbol of sovereignty and control of the machinery of state'.[337] On the international plane, the state is therefore the 'guardian' of the nation's sovereign authority. As such, the legitimacy of the state's assertion of sovereignty on the international plane significantly depends on whether it privileges the interests and aspirations of its peoples (the sovereign), particularly the disenfranchised segments of this collective. Arguing along similar lines, Maogoto posits that the relevance of contemporary international law lies in acknowledging and appreciating a shift from state-centric conceptions of sovereignty to one which appreciates 'the principal social contract focus on the relationship between the citizen and the state for purposes of defining sovereignty … [and] recognizes that international law has developed direct links between the individual and international law'.[338] Clarke also argues that sovereignty in the contemporary world should be approached as a reconceptualised social contract that privileges those human values that are vital to the protection of the human body.[339] These conceptions of sovereignty acknowledge that the legitimacy of the exercise of political power is dependent upon an understanding of the people as the sovereign from whom such authority derives.

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[331] Siba N'Zatioula Grovogui, 'Sovereignty in Africa: Quasi-Statehood and Other Myths in International Theory' (n 170) 44.
[332] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 272.
[333] Samantha Besson (n 303) 164.
[334] Don Herzog, *Sovereignty, RIP* (Yale University Press 2020) ix.
[335] Don Herzog (n 334).
[336] Martti Koskenniemi (n 272) 485.
[337] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 273.
[338] Jackson Nyamuya Maogoto, 'Sovereignty in Transition: Human Rights and International Justice' (2005) 7 University of Notre Dame Australia Law Review 83, 95.
[339] Kamari Maxine Clarke, 'Rethinking Sovereignty through Hashtag Publics: The New Body Politics' (2017) 32 Cultural Anthropology 359, 359–361.

This inevitably necessitates a discussion of the values protected by the concept of sovereignty and whose advancement the concept pursues. This is so because the exercise of sovereignty should ideally be geared towards preserving or attaining the values it embodies. The proper exercise of sovereign powers by states and by the international organisations they establish must uphold sovereign values which are themselves 'an integral part of the concept of sovereignty'[340] and 'provide objectives for … and normative constraints on, the exercise of sovereign powers'.[341] If the peoples of these states are to be considered as the collective inherent repositories of sovereign will and authority and states as the symbols of the sovereign will and authority, then it follows that a useful conception of sovereignty must account for the need to ensure efficient realisation of the values that are of particular importance to these peoples. Therefore, to adopt and adapt Grovogui's sagacious words, the utility, relevance and legitimacy of the international legal and institutional order lie primarily in its ability to validate the dignity of the world's most disenfranchised.[342]

Sovereign values and their importance to the concept of sovereignty are particularly relevant to this thesis for a number of reasons. Firstly, they are relevant in determining and explaining what the objectives of the relevant RIGOs are. Secondly, they are relevant in determining the sovereign powers conferred upon the RIGOs by states, hence the RIGOs' authority. Thirdly, they are relevant as a benchmark for evaluating the exercise of these powers by the RIGOs. It is indeed acknowledged today that the values underlying conceptions of sovereignty are not only inward-looking exclusionary statist autonomy, but also those that acknowledge the widening of actors in international law, such as values of human rights, freedom, the rule of law, accountability, legitimacy, security and equality.[343] These values are particularly vital for the dignity of the sovereign (the peoples of the different nations of the world) and their continued survival, and they are of particular interest to this research. These values, particularly those relating to human dignity, as values of the international community derive from conventional and customary international law (including *jus cogens* norms) as discussed in the introductory chapter of this thesis. Therefrom arises the question of accountability for those violations of human dignity that are so serious as to amount to genocide, crimes against humanity and war crimes. Consequently, it is possible to argue within reason that the exercise of sovereignty should ideally be conditioned on these values.[344] As actors in the international legal order and subjects of international law, states are considered to have not only rights but also duties, thus the Kelsenian view of sovereignty which considers states as having corresponding duties to their rights in international law. In fact, as will be discussed in subsequent chapters, the constituent instruments of some RIGOs, especially the EU and AU, reflect this view and expressly mention some of these values and the international instruments from which they derive, as guiding principles of these RIGOs.

[340] Dan Sarooshi (n 186) 1116.
[341] Dan Sarooshi (n 312) 2.
[342] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 274.
[343] Dan Sarooshi (n 186) 1115; Dan Sarooshi (n 312) 9–11; See also Oumar Ba (n 173).
[344] *See* Samantha Besson (n 303) 161.

The thesis' conception of sovereignty is therefore primarily, but not exclusively, focused on validating these values as sovereign values (of the international community). The thesis adopts these values as an analytical foundation for examining and evaluating the exercise of sovereign authority by RIGOs in the establishment and administration of international criminal accountability mechanisms. It must, however, be clarified that this is not an argument for (human rights) values as a basis for championing unbridled humanitarian intervention, state sovereignty be damned, as some commentators have argued.[345] Humanitarian interventionism here is understood to mean the use of coercive military force by states within the territory of other states under the pretext of preventing gross human rights violations, without the authorisation of these other states or other inter-governmental organisation with such express authority such as the UN Security Council or the AU Assembly. The research disagrees with humanitarian interventionist arguments in as far as they advocate a so-called 'inherent right' of the international community to intervene regardless of absence of positive legal empowerment by sovereign states. Whatever the supposedly 'good' intentions of interventionists, these do not substitute for legality.

Rather, the thesis argues for the reconsideration of rigid statist conceptions of sovereignty, to conceptions that privilege the interests and aspirations of the international community of peoples. The thesis recognises and appreciates that the international instruments discussed in the previous chapters and which form the legal basis for accountability for international crimes all recognise the primacy of individual states in ensuring the protection of human rights values and ensuring availability of remedies including accountability for international crimes. The argument advanced is therefore not primacy for RIGOs, but rather that in situations where individual states are genuinely unable or unwilling to ensure accountability for international crimes, then RIGOs are potentially better placed to respond in as far as they are legally empowered to do so. Such legal empowerment is itself an expression of states' sovereignty. Without such legal empowerment (discussed in subsequent sections), RIGOs would have no legal basis to engage in international criminal accountability.

The thesis also stops short of calling for the retirement or burial of the concept of sovereignty as Herzog has argued.[346] Because 'the new international criminal law occupies terrain previously hegemonized by sovereignty which, in turn, structured the Westphalian international legal order that exists today',[347] some level of resistance is of course expected in international criminal law institutions' attempt to assert their authority in this environment. The thesis argues that through a realistic conception of sovereignty, it can indeed be harmonised with the contemporary nature of international relations in which cooperation is more prominent and where international law regulates the relationship not only among states, but between states and other subjects including international organisations and people. In other words, the thesis

[345] Francis Mading Deng, 'Reconciling Sovereignty with Responsibility: A Basis for International Humanitarian Action' in John W. Harbeson and Donald Rothschild (eds), *Africa in World Politics: Constructing Political and Economic Order* (Routledge 2017); Henry Shue, 'Limiting Sovereignty' in Jennifer M. Welsh (ed), *Humanitarian Intervention and International Relations* (Oxford University Press 2003); Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999).
[346] *See Don Herzog (n 334).*
[347] Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (n 40) 480.

recognises the resilience and utility of constitutional independence of states vis-à-vis other states as a foundational constitutive element of sovereignty[348] while advocating a conception of sovereignty that recognises 'that paradigms of sovereignty have changed and new conceptions have emerged that conflict with prior ones'[349] and that engages 'multiple frames of reference in accordance with the complexity of the practice of sovereignty – and not simply founded upon international reality as understood through the prism and lived experiences [of a limited segment of the global community]'.[350] Put differently, the rules that regulate interaction and relationship among sovereign states have changed over time,[351] and are arguably in a state of constant flux. As Sørensen argues, the regulative rules of the concept of sovereignty 'have developed and adapted over time in the context of a society of states which has itself undergone dramatic development and change in substantial terms'.[352]

3.4 Regional Inter-Governmental Organisations as Exemplars of Reconceptualised Sovereignty

As argued in preceding sections, and considering the realities of contemporary international law and relations, 'the extreme view of the absolute sovereignty of states as the only subjects of international law would not correspond with the admitted fact that other such subjects do exist'.[353] It would also not accord with the reality of 'the plurality of sources of law and power in the new world order … characterized by the co-existence of autonomous constitutional orders in the same political and legal community and territory'.[354] Even though the concept of sovereignty remains resilient, such classical views have no utility in today's study of international law as they would not explain the reality that the conduct of international relations has increasingly leaned towards cooperation, today exemplified by international organisations. As Amerasinghe aptly puts it, 'Clearly interdependence is increasingly being acknowledged and accepted as a practical reality, which requires an organizational structure in international relations.'[355] One inevitable consequence of the proliferation of IOs is that states are considered to 'have accepted obligations and considerable limitations on their [sovereign] powers and liberties'.[356] This limitation is a consequence of the international instrument establishing the IO, which is a reflection of the collective will of the states involved. As such, it is not really a question of a choice between upholding statist conceptions of sovereignty or discarding the concept altogether. Rather, it is a question of formulating conceptions of sovereignty that while acknowledging the primary role of states in international relations, equally acknowledge the fact of (some) authority shifting from states to IOs. Indeed, as Besson has argued, 'It should be

[348] Georg Sørensen (n 306) 594–595.
[349] Samantha Besson (n 303) 165.
[350] Siba N'Zatioula Grovogui, 'The Secret Lives of the "Sovereign": Rethinking Sovereignty as International Morality' (n 211) 272.
[351] Georg Sørensen (n 306) 595–604.
[352] Georg Sørensen (n 306) 597.
[353] Chris Nwachukwu Okeke (n 27) 24 & 30–31.
[354] Samantha Besson (n 303) 152.
[355] Chittharanjan Felix Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis' (2004) 1 International Organizations Law Review 9, 12.
[356] Chittharanjan Felix Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis' (n 355) 12.

possible to retain the concept of sovereignty while allowing it to fluctuate along the lines of current changes in the international community and to adapt to the new reality of constitutional pluralism.'[357]

Contemporary practice recognises international organisations, particularly intergovernmental organisations, as capable of undertaking 'the forms of regulation associated with the executive branches of government or national administrative agencies'.[358] At the European level, the European Court of Justice recognised as early as 1963 in *Van Gend & Loos v Nederlandse Administratie der Belastingen*[359] the fact that the establishment of an intergovernmental organisation is necessarily a limitation of state sovereignty and results in such limitation. The Court held that, '[T]he Community constitutes a new legal order of international law for the benefit of which *states have limited their sovereign rights, albeit in limited fields,* and the subjects of which comprise not only Member states but also their nationals.'[360] The Court reiterated this position a year later in *Flaminio Costa v E.N.E.L.*[361] Due to the manner in which EU law is made and enforced today, it appears that some member states of the EU have transferred specific aspects of their individual sovereignty to the EU.[362] Indeed, one of the effects of the transfer by EU member states to the EU of competence over some hitherto domestic matters has been the shrinking of internal sovereignty at the domestic level.[363] Additionally, member states' individual external sovereignty has also reduced especially as the EU increasingly undertakes representation on behalf of its members on a variety of external affairs.[364] While the AU's practice does not reveal as assertive a role for the AU vis-à-vis its members especially on domestic competence, the AU is increasingly making moves towards claiming primacy, particularly on matters of continental trade and external policy.[365]

The above practice is not restricted to the continental level. The International Court of Justice (ICJ) in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* implied that by establishing intergovernmental organisations and empowering them to undertake broad and sometimes vaguely-defined tasks, states could very well be assumed to be expressing (and not necessarily as clawing back on) their sovereignty by committing to limitations of aspects of their sovereignty resulting from the creation of the organisation.[366] Also relevant is the earlier observation by the Permanent Court

[357] Samantha Besson (n 303) 136.
[358] José E. Alvarez, 'International Organizations: Then and Now' (2006) 100 American Journal of International Law 324, 333.
[359] Case 26/62 [1963] ECR 2 (Judgment of 5 February 1963).
[360] Case 26/62 [1963] ECR 2 (Judgment of 5 February 1963) p. 12 [emphasis added].
[361] Case 6/64 [1964] ECR 587 (Judgment of 15 July 1964) p. 593. The Court held that, 'By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.'
[362] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 26–27.
[363] Samantha Besson (n 303) 152.
[364] Samantha Besson (n 303) 152.
[365] *See Olufemi Amao (n 29).*
[366] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, Judgment, 27 June 1996, I.C.J. Reports 1986, p.14 [259].

of International Justice (PCIJ) in *Case of the S.S.* '*Wimbledon'* where it pronounced that, '[T]he conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act [is not] an abandonment of its sovereignty … [but is] a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.'[367]

The interpretation and elaboration of the principles of the UN Charter by the UN General Assembly is also quite revelatory of the international community's understanding of sovereignty in the contemporary world. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[368] for example, reveals an acknowledgment by states that while 'the principle of sovereign equality formally retains its central role as the defining principle of the system's structure, this role is relativized to a certain extent by …[the principles of] equal rights of peoples and their right of self-determination and that of the duty to cooperate'.[369] This appreciation that sovereignty in the contemporary world must be understood in light of possible limitations also finds expression in the constituent instruments of major RIGOs such as the EU and the AU which recognise respect for human rights and fundamental freedoms as one such important consideration in the exercise of sovereignty. [370]

It must, however, be clarified that this thesis does not necessarily focus on the nature of sovereignty as such, but rather on how the concept of sovereignty affects the legal powers of and decision-making in and by RIGOs. This is especially so because the thesis does not consider RIGOs as themselves being sovereign or as exercising sovereign authority of their own, but rather as exercising elements of sovereign authority that are originally and residually of their member states and their peoples. The thesis therefore seeks to locate the decision-making authority within RIGOs, interrogate the legal basis for the exercise of this authority and test the limits and boundaries of this decision-making, all with specific reference to the role of international law and international cooperation in the protection of human dignity generally, and accountability for international crimes specifically. As Amerasinghe has ambitiously argued, some 'problems have overflowed national boundaries, or called for attention beyond national limits, become international and demanded regulation and treatment in a wide sphere, with the consequence that governments have sought increasingly to deal with them through international organizations'.[371] By becoming members of IOs or parties to international legal instruments, states therefore acknowledge the idea that the protection of people even in their territories is a collective effort.[372] The thesis argues that international crimes are such problems

[367] *Case of the S.S. 'Wimbledon',* Permanent Court of International Justice, Judgment, 17 August 1923*,* P.I.C.J. Series A, No 01, p. 15, 25.
[368] UN General Assembly Resolution 2625 (XXV) (24 October 1970).
[369] Georges Abi-Saab (n 179) 261. *See also* Taslim Olawale Elias (n 296) 7–8.
[370] Treaty on European Union, arts 2, 3(5), 6 & 21; Constitutive Act of the African Union, arts 3(e) & (h) & 4(m).
[371] Chittharanjan Felix Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis' (n 355) 11.
[372] See generally Jackson Nyamuya Maogoto, 'Sovereignty in Transition: Human Rights and International Justice' (n 338).

which call for accountability to be approached as not just a concern of the directly affected state, but of the international community. As Maogoto argues, a reconceptualised approach to sovereignty entails appreciation of the acceptance of international human rights norms by states as well as recognition of the need to transcend individual states and seek an international approach to the protection of these rights.[373] Specifically, the thesis argues for a prominent role for RIGOs in this regard for reasons which are explored in greater detail in subsequent chapters. If indeed '[t]he present state of … [international organisations] lies in the eye of the beholder',[374] then the thesis considers IOs, and in particular RIGOs, as organisations whose golden age is just dawning, and whose authority can, if responsibly exercised, be deployed to address global challenges which states cannot or have failed to individually address.

However, the legal and practical impact of the emergence of IOs on the concept of sovereignty has not always been warmly received, by states and commentators alike. Indeed, as Barnett and Finnemore have noted, the existence of IOs may restrict the unilateral and arbitrary exercise of sovereignty by powerful states on some (national) aspects such that states necessarily have to engage the IO in order to achieve their goals in this respect, while also providing a 'neutral' platform for 'weaker' states to assert and protect their interests.[375] It is this possibility that has informed a number of criticisms, precisely because it is also possible to flip this seeming advantage on its head such that IOs become potential tools for just the opposite, that is, undemocratic governance or hegemonic control by some states. As Alvarez notes, IOs have been criticised for, among others, possibly lacking democratic legitimacy (not being representative of domestic constituencies) and for allegedly being the anti-thesis of sovereign equality and enabling hegemonic control by 'powerful' states.[376] Amerasinghe also usefully acknowledges the enormous financial burden of sustaining the many international organisations in existence, some of which may have overlapping competence.[377] Chimni has argued strongly that the proliferation of international organisations signifies an emerging imperial capitalist global 'state' which undermines intra- and inter- state democracy, disadvantages the world's socio-economic 'subaltern' and hampers global redistributive justice.[378] Wallace has noted with respect to integration in Europe that despite the benefits of cooperation and common policies, this has had the effect of reducing accountability to national populations as decision-making and action increasingly moves to the continental level.[379]

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[373] Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (Transnational Publishers 2003) 285.
[374] José E. Alvarez (n 358) 135.
[375] Michael Barnett and Martha Finnemore, 'The Power of Liberal International Organizations' in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press 2004) 169–181.
[376] José E. Alvarez (n 358) 339–347.
[377] Chittharanjan Felix Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis' (n 355) 12.
[378] *See* Bhupinder Singh Chimni, 'International Institutions Today: An Imperial Global State' (2004) 15 European Journal of International Law 1. Notably, however, Chimni's very erudite observations primarily concern the operation of IOs in the economic and political spheres. He does in fact acknowledge the possibility that IOs have indeed provided a platform for empowering the citizenry in the area of human rights, albeit with its attendant challenges such as limited authority and resources and an inordinate focus on civil and political rights at the expense of economic, social and cultural rights.
[379] William Wallace (n 28) 520.

There is, of course, legitimacy in these concerns and they have indeed manifested in the operations of some IOs, in some more than others. However, at worst, some of these criticisms reveal a rather fixed and indeterminate conception of sovereignty, or a binary 'either or' approach to sovereignty. At best, these criticisms make the case for a reconceptualised understanding of sovereignty even more pressing. What indeed this apparent tension between 'sovereignism' and 'internationalism' discloses is not necessarily a struggle for dominance, but a quest for an elusive balance between states' sovereign authority and states' place within an international cooperative environment. To paraphrase Okeke, recognition of state sovereignty must necessarily appreciate the fact that international relationships cannot be regulated without cooperation among states.[380] This perhaps confirms Sørensen's argument that, 'There is a stable element of continuity in sovereignty, embodied in the constitutive rule of constitutional independence. And there is a dynamic element of change in sovereignty, embodied in the institution's regulative rules … [and] the concrete features of statehood.'[381] Considered this way, it could be argued that while the constitutive elements of sovereignty, that is, juridical equality of states and states' authority over their internal and external affairs, remain fairly stable, the rules by which sovereignty is actually practised have been and continue to be contested and modified through enhanced cooperation among states. To recall the general function of an intergovernmental organisation proffered in its definition in the introductory chapter, these organisations are established primarily to pursue members' common or agreed-upon objectives, albeit with a latitude of functional autonomy. In establishing the organisation, states therefore cede or delegate some of their authority to be exercised on their collective behalf by the organisation, hence a basis for assessing the legality of the organisation's actions. As discussed above, sovereignty is an essentially contestable concept which is therefore too fluid to be theorised along absolutist 'either/or' lines. If understood as a fluid concept and within the limits of reason, IOs can, in this regard, be considered as providing a platform for the political management of the exercise of sovereignty by and among states.[382]

The thesis' argument is that RIGOs are better placed to ensure the protection or realisation of the sovereign values of human dignity and accountability (specifically for international crimes) in cases where individual states are genuinely unable or unwilling to do so because it is through RIGOs that states that share close geographical, social, cultural and political ties can effectively cooperate to protect these values. In a way, regional formations like the EU and the AU can be considered as attempts by states with significant commonalities (be they historical, social, cultural, political or geographical) to proceed with the business of using international law to address common concerns without necessarily being bogged down by the very divergent interests that arise at a global level and that often frustrate action. In other words, the creation by states of RIGOs such as the AU and EU can be considered as a withdrawal to a considerable extent by individual states of their unitary sovereignty in favour of sovereignty exercised in a

[380] Chris Nwachukwu Okeke (n 27) 23.
[381] Georg Sørensen (n 306) 597.
[382] For a though-provoking argument on how international law generally functions both to enable cooperation as well as conflict and contestation among states, *see* Monica Hakimi, 'The World of International Law' (2017) 58 Harvard International Law Journal 1.

collective and cooperative form, thereby establishing communities of states.[383] These RIGOs provide a platform through which states with more commonalities than differences can galvanise action towards common challenges based on shared values as it is easier to get consensus among fewer (if any) diverging views, thereby circumventing the inadequacies of global approaches.

As alluded to in the introductory chapter, the global administration of international criminal accountability is currently deadlocked due to seemingly irreconcilable ideas on the approach or methodology for validating common values and due to faltering global multilateralism, having spent the energy of its late 20th Century honeymoon. Through RIGOs, states with shared histories and political, social, cultural or geographical realities can fill the accountability vacuum created by faltering global multilateralism and respond to international crimes in their respective regions. This is also recognition of the fundamental role that groups of states and their polities, grouped on the basis of shared geographical, historical, social, ideological or other interests, have played in influencing the rationale, form and direction of IOs in recent decades.[384] The thesis therefore argues for a pooling of sorts of state sovereignty at the level of RIGOs which, it is argued, provide a vital common platform where states' various conceptions of the approach or methodology for validating sovereign values can be contested, while reducing the possibility of deadlock common in global platforms.

3.5 The Authority of Regional Inter-Governmental Organisations as Divided/Shared Sovereignty

To explain the exercise of elements of sovereign authority by RIGOs vis-à-vis the sovereignty of member states, the concept of shared or divided sovereignty has been advanced. Of course, some degree of division of competences between states and RIGOs is today not only a matter of fact, but also a matter of law evidenced by specific provisions of domestic[385] and international law. However, the thesis considers the reference to the exercise of sovereignty by RIGOs vis-à-vis states as a division of sovereignty rather problematic.[386] To speak of 'division' implies that both the individual member states and the RIGO separately have inherent sovereignty, and the 'division' therefore serves to delineate the boundaries of these 'sovereignties' and their harmonious and effective exercise by the two entities. It may also imply that there exists a single independent 'pool' of sovereignty, parts of which are then apportioned to states and to RIGOs separately. These assumptions are erroneous.

Sovereignty, as argued in preceding sections, is inherent to peoples, who for governance and practical purposes are organised into the political formation of states. The peoples to whom sovereignty is inherent and residual bestow sovereign authority on these states. Sovereignty is

[383] Oumar Ba (n 302) 31–32.
[384] For instance, Rajagopal discusses the vital influence of less-industrialised nations and social movements therein in shaping the direction of IOs as a reaction to their marginalisation by the prevailing direction. *See* Balakrishnan Rajagopal, 'From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions' (2000) 41 Harvard International Law Journal 529.
[385] Samantha Besson (n 303) 154.
[386] Many texts, including Carmen E. Pavel (n 249) use the term 'divided sovereignty'.

therefore inherent to peoples, and not to IOs. States as representations of the sovereign (peoples) on the international plane, establish IOs in exercise of the sovereign authority bestowed upon them by the peoples. States can exercise their sovereign authority by making the sovereign decision to transfer the exercise of sovereign competences to the organisation, and this is indeed what states do when they establish the organisation through the constituent instrument. Consequently, any exercise of what may appear to be elements of sovereign authority by IOs is not an exercise of the organisations' own sovereign authority, but that of the member states as representations of the sovereign peoples. The organisations can therefore only exercise what may appear to be elements of sovereign authority to the extent that the member states empower them to do so, and to the extent that the states themselves possess such sovereign authority. This remains a transfer or conferral of competences from an entity that possesses sovereign authority (the state) to one that does not possess sovereign authority, however sophisticated the methodological details. At most, one can speak of a division of competences, but not a division of sovereignty.

It appears, therefore, that what is commonly referred to as divided sovereignty should more appropriately be described as a sharing of competences whereby states transfer or confer upon the IO the competence to undertake certain actions hitherto the preserve of states individually. The organisation therefore exercises elements of sovereign authority on behalf of its member states, not as a matter of its own right. This is recognition of the fact that some competences hitherto exercised exclusively by individual states can today only be efficiently exercised as a cooperative effort 'especially, but not only, when these overlap within the same territory and apply to the same legal and political community'.[387] This is better explained as countries pooling together 'elements of sovereignty with their neighbours'[388] in order to effectively provide benefits to their collective citizenries in common areas. This does not necessarily mean the creation of a super state which consumes the individual sovereignty of its members, but rather that while '[g]overnment remains primarily national, … significant aspects of governance now operate above … the nation-state level',[389] with the effect that common cooperation is enhanced and some degree of 'intrusion' into hitherto exclusive domestic affairs is permitted. As Barnett and Finnemore argue, 'While the state remains the cornerstone of international politics, many IOs attempt to promote the sanctity of the individual and give greater voice to various identity-based associations and collectivities.'[390] To recall the ECJ's assertion in the *Van Gend & Loos* and *Flaminio Costa* cases above, the powers transferred from the exclusive national domain and pooled above the national level are often limited to specific fields in which the states consider common inter-state action to be necessary.

The thesis is also alive to arguments that sovereignty cannot be shared.[391] However, the thesis finds this line of argumentation unpersuasive as it also proceeds from erroneous premises.

[387] Samantha Besson (n 303) 159.
[388] William Wallace (n 28) 506.
[389] William Wallace (n 28) 505.
[390] Michael Barnett and Martha Finnemore (n 375) 167.
[391] This discourse emerges prominently among French interlocutors, prominent among them Jean-Bodin whose 16th Century 'theory of absolute sovereignty' placed sovereigns – considered in this sense to mean monarchs –

Firstly, it presupposes that state sovereignty exists only in its extreme absolute sense, with the political entity of the state as the be-all and end-all of sovereignty. Secondly, it conflates sovereignty with those agents that exercise it, assuming these agents as synonymous with sovereignty.[392] These assumptions are erroneous firstly because sovereignty, as argued above, does not derive from the state and its agents who exercise sovereign authority, and secondly because state sovereignty does not exist in the extreme absolutist form suggested by these assumptions, and has not existed in that form at least since the dawn of contemporary international law and relations. As Pavel has convincingly argued, 'Rather than being a binary concept, sovereignty can be understood more like a continuum, or a bundle of different kinds of functions and authority mandates, some of which can be transferred upward or downward.'[393] The thesis' understanding of sovereignty, which it posits is the (contemporary) reality of sovereignty, conceives sovereignty as deriving from and residual to peoples, with states being the political organisational units of peoples. Sovereignty does not derive from the political entity of the state itself, but rather from the peoples constituting this state. States serve merely as political organisational units through which peoples exercise their sovereignty and not as the origins of sovereignty. This sovereign authority exercised by states is therefore exercised on behalf of peoples and is residual to these peoples. States' exercise of sovereign authority is in service of the peoples from whom the sovereignty derives and resides.

As such, this sovereign authority is not unique to the state, but rather to peoples. The exercise of sovereign authority by states does not (or should not) serve the interests of states as political entities, but rather those of the peoples from whom the authority derives and resides. Its exercise by states is not absolute or unfettered; it is subject to arrangements of restraint and constraint mandated by peoples such as through the principle of separation of powers whereby sovereign authority within a state is shared among the three branches of government and among different levels of government to ensure proper checks and balances.[394] The exercise of sovereignty is also not incapable of being shared since in much the same way that the peoples exercise their sovereignty primarily through political entities of states, so can they exercise this sovereignty or elements thereof through other complementary (supranational) institutional frameworks. The reality of the proliferation of international institutional arrangements over the past century is testament to this fact.[395]

In any case, the argument advanced herein is not *per se* about dividing or sharing of sovereignty. Rather, it is for the sharing of the responsibility for the performance of certain otherwise governmental functions, which sharing is undertaken by bestowing the relevant institution with the authority to perform these functions. These are functions ordinarily

above human-made laws and only subject to so-called laws of god or of nature. *See* Jean Bodin, *Six Books of the Commonwealth* (MJ Tooley tr, Basil Blackwell Oxford 1967).

[392] See Carmen E. Pavel (n 249) 12–13 for a similar observation.

[393] Carmen E. Pavel (n 249) 20.

[394] Thomas W. Pogge (n 151) 59–61.

[395] See for example Samantha Besson (n 303) 155 who points to the 'extremely high degree of complexity of transfers of competence in the EU' as an example of a phenomenon that discounts the argument that sovereignty cannot be shared per se (though notable, Besson uses the problematic characterisation of 'division' and not 'sharing'); See also Carmen E. Pavel (n 249) ch 2.

performed by the state in exercise of its sovereign authority, and the act of sharing is itself an exercise of sovereignty (or a sovereign act). The entity to which the responsibility of performing these functions is shared or transferred does not therefore become a sovereign with inherent sovereignty by virtue of these functions; they are simply exercising elements of sovereign authority which residually belong to the sovereign delegating them. As such, elements of sovereign authority ordinarily exercised by the state on behalf of the sovereign (peoples) can be shared with or transferred to supranational arrangements without undermining the sovereign or the integrity of other agents of the sovereign such as states, especially where such sharing or transfer aims to enhance the ability to guarantee human dignity as a fundamental value of humanity.

3.6 Regional Inter-Governmental Organisations as Organisations with Independent Value Systems

International organisations, and RIGOs in particular, generally exhibit what has been termed as a 'dual image', that is, 'open structures that are vehicles for states and at the same time closed structures that are independent legal actors'.[396] In other words, RIGOs are both a creation of states and therefore their powers derive from and are exercised as against these states, and are also actors that can and do assert increasingly bold independence from their member states. Of course, this 'dual image' has caused significant debate and tension between 'contractualists' and 'constitutionalists'.[397] The thesis nonetheless submits that the existence and functioning (particularly the autonomy) of IOs cannot adequately be explained by any one of these two schools of thought independently. The autonomy of IOs generally, and inter-governmental organisations in particular, is better understood if the constituent instruments of these organisations are considered from a treaty law perspective as 'contracts between sovereign States, creating substantive rights and obligations as in a horizontal and international dimension …[and from] an institutional or constitutional law perspective … [which clarifies] the extent to which this contract can equally be seen as functioning as a constitution'.[398] While a treaty law approach explains the prominent role of member states and general international law in the organisations' operation, a constitutional approach explains the organisations' independence and autonomy.

It has been argued that attempting to reconcile these two approaches often leads to incoherence and contradictions and downplays the tensions between the two approaches.[399] There is perhaps merit in this argument. Indeed, such incoherence or contradiction would arise where one attempts to explain the entirety (creation, functioning, termination) of intergovernmental organisations using one approach. However, the thesis' argument is that intergovernmental organisations, especially their functioning, cannot satisfactorily be explained

[396] Catherine Brölmann (n 21) 1.
[397] See Jean d'Aspremont, 'The Law of International Organizations and the Art of Reconciliation: From Dichotomies to Dialectics' (2014) 11 International Organizations Law Review 428; Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' (n 30).
[398] Christiane Ahlborn, 'The Rules of International Organizations and the Law of International Responsibility' 8 International Organizations Law Review 397, 410 & 413–415.
[399] Jean d'Aspremont (n 397) 439–449.

using only one of the above approaches; both approaches are mutually reinforcing and together explain the practice of international organisations. This is not necessarily a 'reconciliation' or a quest for coherence, but rather an explanation of the constituent elements of the whole, or of the whole itself, using different logical arguments as are applicable to the constituent parts separately.

The quest for a singular approach to explain the existence and functioning of international organisations is a futile exercise considering the unique nature of these organisations. As d'Aspremont has aptly put it, '[T]he law of international organizations, like international law as a whole, does not need to be saved from its inner fundamental tensions. On the contrary … trying to salvage the law of international organizations from its internal paradigmatic dichotomy may well be counter-productive, for it threatens the distinctiveness as much as the identity of this branch of international law.'[400] Barnett and Finnemore argue that an over-reliance on the functionalism prism reduces IOs to mere tools through which states accomplish technical inter-state cooperation, thereby obscuring the nature of IOs as autonomous entities exercising considerable power in global governance, especially in advancing liberal social goals.[401] Viewed in this wholesome light, RIGOs reveal themselves not just as mere vehicles for their member states' collective agenda, but as entities with a 'personality' of their own and a significant degree of autonomy that can be exercised to advance a value system or influence behaviour. This accords with the historical assumption that IOs would, in their operations, advance the values of the (liberal) environment in which they were established even as they provided states with a platform for cooperation.[402]

The extent to which RIGOs can or will be willing to assert their autonomy depends on the values that undergird them. The more liberal-oriented the values, the more RIGOs will likely assert autonomy and seek to influence their members' behaviour. Such 'value system' derives of course from the broad objectives of the particular RIGO as codified in the legal instruments relevant to the organisation. Having assumed obligations and limitations by becoming members of the RIGO, states are bound to accept the value-inducing obligations and restrictions that the RIGO consequently develops in implementing its objectives. Of course, this only holds in as far as the RIGO acts within the legal powers granted by its relevant legal instrument, expressly or impliedly,[403] as further discussed in Chapter IV. Because express provisions in the relevant instruments are often vaguely or broadly drafted, RIGOs have to interpret these provisions when discharging their mandates, and it is in this process of interpretation and implementation that RIGOs (can) exercise their autonomy to advance the values undergirding the provisions of the relevant legal instrument.[404] This idea of RIGOs as organisations with an independent value system from its members is somewhat bolstered when RIGOs are considered with the Kelsenian notion of centralisation in mind. By this understanding, RIGOs, like many other IOs, are considered to have an internal or institutional structure that enables them to perform functions

[400] Jean d'Aspremont (n 397) 450.
[401] Michael Barnett and Martha Finnemore (n 375) 161–162.
[402] Michael Barnett and Martha Finnemore (n 375) 166.
[403] Chittharanjan Felix Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis' (n 355) 12.
[404] Michael Barnett and Martha Finnemore (n 375) 172.

independently of their member states. Consequently, therefore, RIGOs as organisations with international legal personality can rely on their institutional centralisation to undertake actions which advance the relevant sovereign values.

However, while centralisation may mean that the organisation has 'an internal legal order which stands apart from general international law'[405] as some have argued, this is not to say that in exercising its 'internal law' the organisation has *carte blanche* to ignore international law. Quite the contrary. The thesis argues that while the exercise of 'internal law' to regulate the internal operation of a RIGO may not necessarily be the province of general international law, the RIGO can only exercise powers to the extent permitted by general international law particularly if the exercise of these powers entails an interaction or effect with the external element. Whatever the character of international organisations' internal rules, these are subordinate to and must conform to general international law rules. This accords with the view of IOs as subjects of international law bound by obligations arising from international law, as confirmed by the ICJ in its Advisory Opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* where the Court opined that, 'International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.'[406] This is not to say that the internal legal order of RIGOs is itself international law, but rather that it must operate within the bounds of international law since RIGOs, as subjects of international law, are governed by international law. For, to say that an entity is the subject of international law is to acknowledge that the norms of the international legal order apply to and regulate the conduct of that entity, including by prescribing duties and conferring rights upon it.[407]

Based on their legal characteristic as organisations with a latitude of functional autonomy, RIGOs can therefore exercise this autonomy, albeit to a limited extent, in pursuing values which may be considered as those of the 'international community as a whole' even where these 'values' may necessarily encroach on the sovereignty of individual member states. This is particularly possible when one considers the relationship of intergovernmental organisations and their constituent treaties. As Brölmann has argued, once intergovernmental organisations come into existence, they often assume 'ownership' of their constituent treaties and assert their own competence which to some extent is independent of their member states' authority, albeit with an understandable level of controversy.[408] Whatever the degree of control the organisation takes over its constituent instrument, and whatever competence it assumes as a result of that control, it is worth bearing in mind that this instrument is and remains a multilateral treaty governed by international law as discussed below. Consequently, the thesis argues that whatever value system the organisation may seek to champion based on its interpretation of the authority bestowed by its constituent instrument or other legal instrument, such action cannot

[405] Catherine Brölmann (n 21) 28.
[406] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion, 20 December 1980, I.C.J. Reports 1980, p. 73 [37]. *See also* Kristina Daugirdas, 'How and Why International Law Binds International Organizations' (2016) 57 Harvard International Law Journal 325.
[407] Chris Nwachukwu Okeke (n 27) 181.
[408] Catherine Brölmann (n 21) 113.

exceed what is permitted by the treaty. RIGOs cannot exercise more authority than that which their constituent member states can exercise individually or collectively. The limitations that delimit the contours of the exercise of sovereignty by individual states themselves may constrain the exercise of sovereignty by states as a collective, for example, in the form of RIGOs.[409] As Klabbers warns, stretching RIGOs' autonomy beyond the limits of the powers bestowed upon them by their member states may result in the autonomy being a mere 'legal fiction'.[410] It is only by exercising their authority and autonomy within the legal bounds of the relevant legal instruments that RIGOs' pursuit of independent values can be considered legitimate.[411] Since 'legitimate modern authority is invested in legalities, procedures, and rules',[412] it follows therefore that RIGOs' actions, however autonomous they may be, must be performed within the bounds of legality.

3.7 Regional Inter-Governmental Organisations as International Institutional Bypasses

International institutional bypass is a concept of institutional functional reform that 'attempts to fix deficiencies in the existing system'[413] by providing 'alternatives to weak or fragile state institutions that are deficient in the supply of different public goods'.[414] According to Prado and Hoffman, this concept establishes an optional alternative for discharging functions without dismantling the principal institution, aims at addressing a dysfunction in the principal institution, maintains compatibility with the legal requirements of the principal regime while being separate from its governance structure, and is compatible with applicable legal regimes.[415] In other words, the bypass does not replace national institutions, but maintains them and 'seeks to improve their performance while at the same time providing an alternative means to performing governance functions'.[416] The dominant system is 'bypassed' only in so far as is necessary to specifically address what is perceived as dysfunctional and therefore operates 'independently of and without directly disrupting the [general] operation of the dominant institution, which remains in place'.[417] Further, the alternative institution 'offer[s] a choice to actors between it and the dominant institution'[418] by either offering a competing alternative or supporting the dominant institution in order to enhance its performance.

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[409] Dan Sarooshi argues, for example, that principles such as accountability, developed primarily in domestic public and administrative law, may apply generally to international organisations whenever they exercise sovereign powers. Dan Sarooshi (n 312) 14–17.
[410] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 48.
[411] Barnett and Finnemore argue that, 'There is a persuasive and normative element in authority that is tightly linked to its legitimacy. The exercise of authority [by an IO] in reasonable and normatively acceptable ways bolsters its legitimacy'. *See* Michael Barnett and Martha Finnemore (n 375) 170.
[412] Michael Barnett and Martha Finnemore (n 375) 170.
[413] Mariana Mota Prado and Steven J. Hoffman, 'The Concept of an International Institutional Bypass' (2017) 111 American Journal of International Law Unbound 231, 231.
[414] Edefe Ojomo, 'Regional Institutions as Bypasses of States in the Provision of Public Goods: The Case of West Africa' (2017) 111 American Journal of International Law Unbound 247, 247.
[415] Mariana Mota Prado and Steven J. Hoffman (n 413) 232.
[416] Edefe Ojomo (n 414) 250.
[417] Mariana Mota Prado and Steven J. Hoffman (n 413) 232.
[418] Mariana Mota Prado and Steven J. Hoffman (n 413) 232.

From the discussion in the previous sections, RIGOs are generally not designed to provide alternatives to state institutions, but rather to complement state institutions and promote inter-state cooperation in pursuing common goals which states cannot effectively perform individually. As such, it is not immediately obvious how RIGOs can be considered as international institutional bypasses. However, as Ojomo notes in reference to such organisations, 'The bypassing institution may not have been established to offer an alternative, but may be forced to play it because of its relationship with, and the deficiencies of, the bypassed institution. As a result, the bypassing institution may become an unintentional bypass.'[419] Therefore, while not intentionally established as bypasses, RIGOs can indeed become international bypasses, and their function as bypasses is not mutually exclusive with their cooperation role since both can quite appropriately co-exist.[420]

The concept can therefore be applied in explaining the relationship between RIGOs and their member states in certain circumstances, particularly where RIGOs act 'not only as institutional fora for states, but also as independent international actors'.[421] Here, RIGOs do not therefore purport to displace states, whose sovereignty over the majority of state actions remains intact, but exercise their autonomy to undertake actions which provide alternative responses to situations where the concerned state cannot effectively discharge its relevant obligations. Depending on the specific functions of RIGOs, they could either provide alternatives for discharging hitherto state-monopolised functions, or they could complement and reinforce states' efforts by offering reinforcement if states' efforts are insufficient.

However, because of the possible existence of parallel domestic and international actors, the existence of an international institutional bypass may result in institutional or jurisdictional competition with domestic institutions[422] and sovereignty questions. While this may be the case, Ojomo convincingly argues that 'this is not necessarily always a hostile struggle … especially if the bypass sees its primary role as improving the status of the bypassed institution'.[423] Another possible concern with the concept of international institutional bypass is that it may result in 'excessive competitive multilateralism, and an erosion of universal norms'.[424] However, as Stuenkel argues in relation to regional and global lending practices, the resultant multiple standards have not necessarily eroded existing global standards, but have rather led to the development of novel technical ideas and practices and have challenged the inertia of global institutions.[425] Further, this is not necessarily a concern where the norms and values that the national system is supposed to champion (and which it has failed to champion) are fundamentally the same norms that the international institutional bypass champions. This is the case with the norms relevant to international criminal accountability. In any case, it is

[419] Edefe Ojomo (n 414) 247.
[420] Edefe Ojomo (n 414) 251.
[421] Catherine Brölmann (n 21) 1.
[422] Oliver Stuenkel, 'New Development Banks as Horizontal International Bypasses: Towards a Parallel Order' (2017) 111 American Journal of International Law Unbound 236, 239.
[423] Edefe Ojomo (n 414) 251.
[424] Oliver Stuenkel (n 422) 240.
[425] Oliver Stuenkel (n 422) 240.

worth recalling that one of the conditions for an institution to qualify as a bypass is that it complies with the applicable norms, otherwise it would not be an institutional bypass.[426]

According to Ojomo, RIGOs can operate as bypasses either directly or indirectly. Directly, RIGOs 'play roles that are not effectively performed by states'.[427] Specific to international criminal accountability, states remain the primary actors in the administration of international criminal accountability. However, because of genuine inability or unwillingness to effectively ensure accountability for international crimes, RIGOs can indeed perform this function by establishing specialised judicial mechanisms for this purpose without necessarily negating states' primacy over this responsibility. Because the concerned state cannot establish or activate its own domestic accountability processes, the RIGO steps in to establish such mechanism only as a response to this genuine inability or unwillingness. RIGOs can also indirectly operate as bypasses 'by engaging intermediaries to make rules, conduct operations, and regulate the behavior of their targets'.[428] Specific to international criminal accountability, because RIGOs are themselves not judicial mechanisms, they can engage an existing international criminal accountability mechanism or establish such mechanism, and the mechanism can then proceed to perform the specific judicial function. This way, the mechanism acts as an intermediary engaged by the RIGO to dispense international criminal justice in a state.

It appears, therefore, that in establishing a judicial mechanism to ensure accountability for international crimes committed in a state, a RIGO is acting as both a direct bypass and an indirect bypass, the former being in the act of establishing the judicial mechanism and the latter in the act of deferring to the established mechanism to dispense the judicial function. The RIGO does not, therefore, seek to dismantle or delegitimise a state's criminal justice system, but rather to complement it where it is weak, or to provide such system where none exists domestically. The primary responsibility for international criminal accountability remains with the state, and its domestic systems remain legitimate in so far as they exist. While in the short-term the intervention by the RIGO is meant to provide an immediate alternative to an ineffective or non-existent domestic system, the long-term goal is to strengthen the capacity of the primary institution, being the domestic system.

Notably, however, RIGOs engaging in the establishment and administration of international criminal accountability mechanisms can only be considered as international institutional bypasses if this exercise of authority conforms with both international and domestic legal norms. As has been noted above and as will be argued in further detail in the next chapter, the exercise of governmental authority by RIGOs is indeed justifiable in international law if it is exercised strictly in accordance with the RIGOs' attributed or implied powers. Therefore, RIGOs can indeed be considered as international institutional bypasses, not as a matter of design, but as a matter of consequence.

[426] Mariana Mota Prado and Steven J. Hoffman (n 413) 232–233.
[427] Edefe Ojomo (n 414) 248.
[428] Edefe Ojomo (n 414) 248.

3.8 Chapter Conclusion

This chapter has conceptualised the question of state sovereignty generally and the exercise of the 'collective sovereign powers' of states by RIGOs specifically. Indeed, it is appropriate to clarify that this thesis does not argue that RIGOs are sovereign in the sense that states are. As observed by the ILC Special Rapporteur in his 6th report on the question of treaties concluded between States and international organisations or between two or more international organisations, 'International organizations are neither sovereign nor even equal; all their powers are strictly at the service of their member States; it is the function they assume that justifies and circumscribes their activities and their very being'.[429] The thesis' position is that RIGOs can only exercise authority derived from the sovereign authority of their member states, but the exercise of this authority is not necessarily restricted 'strictly at the service of their member States'[430] as suggested in the report above, hence the argument of RIGOs as entities with a degree of autonomy and independent value systems.

Gradually, therefore, and partly through the emergence of IOs generally, and RIGOs in particular, public international law is shedding its traditional image as a 'law of coexistence' regulating inter-state relations, to 'law of cooperation' that is 'geared towards establishing more or less permanent mechanisms for cooperation'.[431] Classical conceptions of sovereignty are therefore taking a (reluctant) hit as reality dawns that most affairs in the relations of states require more coordinated cooperation among states. Thus, the very existence of international organisations is evidence of the datedness of such classical conceptions.[432] Of course, as Abi-Saab argues, this presupposes 'the existence of a sufficient sense of community to give rise to effective legal protection of the common value or interest in question'.[433] One of the thesis' hypotheses as advanced in the Introductory Chapter and discussed further in Chapter II is that human dignity is a universally common and shared value of the human family and that there exists sufficiently strong common interest at the global level generally and particularly at the regional level in ensuring accountability for gross assaults on this fundamental value. Gross violations of international human rights law and serious violations of international humanitarian law that amount to international crimes offend humanity's fundamental value of human dignity. Consequently, responses to such violations, including accountability, are not the unfettered prerogative of a directly affected sovereign state, but rather the concern of the international community.[434]

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[429] Sixth Report on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations, by Mr. Paul Reuter, Special Rapporteur, 11 March 1977, Document A/CN.4/298, (1977) II (1) Yearbook of the International Law Commission 120, para 6.
[430] Sixth Report on the Question of Treaties Concluded between States and International Organizations or between Two or More International Organizations, by Mr. Paul Reuter, Special Rapporteur, 11 March 1977, Document A/CN.4/298, (1977) II (1) Yearbook of the International Law Commission 120, para 6.
[431] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 18.
[432] Montserrat Guibernau, 'Nations without States: Political Communities in the Global Age' (2004) 25 Michigan Journal of International Law 1251, 1256.
[433] Georges Abi-Saab (n 179) 256.
[434] Jackson Nyamuya Maogoto, 'Sovereignty in Transition: Human Rights and International Justice' (n 338) 90.

In a sense, therefore, in fulfilling these international obligations, action is allocated between individual sovereign states and sovereign states as a collective. As Klarke observes, the increased global focus in recent decades on protecting the bodily integrity of the individual calls for a reorientation of our understanding of sovereignty towards contemporary forms that engage multiple actors to better protect vulnerable persons.[435] Far from viewing sovereignty as inimical to accountability, the position taken by this thesis is that, to quote DeGuzman, 'Instead, sovereignty should be one of the values that is considered in determining when global *adjudicative* authority ought to be exercised.'[436] The subjectivity of international law is consequently no longer solely state-centric, but is rather a theatre where, in the words of Teitel, 'diverse voices that are [relatively] new to international law and politics … [are] unleashing new kinds of subjectivity'.[437] Questions of sovereignty, inter-state cooperation and international criminal justice therefore converge and interact in this thesis, revealing tensions and opportunities.

While political reality has quite significantly stifled collective action at a global level, this does not mean that the common interest in ensuring accountability for international crimes is no longer a global concern. An argument advanced by the thesis is that while global action is increasingly proving politically difficult, similar aims can be achieved by harnessing regional political action which is arguably easier to galvanise as there are less political obstacles at this level. As Maogoto argues, classical absolutist conceptions of sovereignty have since given way to contemporary conceptions which recognise that a state's failure of its international obligation to protect its citizens from international crimes may necessitate collective action in defence of international justice.[438] While the thesis does not share Maogoto's humanitarian interventionist slant, the thesis agrees with this observation in as far as it justifies collective action by RIGOs within their legal powers as discernible from their relevant legal instruments, a position explored further in Chapter IV. Depending on the legal powers of the RIGO concerned, RIGOs may be able to establish international criminal accountability mechanisms, a possibility that is practically explored in Chapters V and VI.

The thesis therefore rejects absolutist conceptions of sovereignty, remnants of outdated 16th Century Jean-Bodinian conceptions[439] and the 'Westphalian commonsense'[440] that do not envision a role for RIGOs in accountability for international crimes where individual states are either genuinely unable or unwilling to ensure such accountability. As Lauterpacht posited almost a century ago, '[I]t is inadmissible that a conception of law founded on generalizations from conditions obtaining in the rudimentary stage of legal development should remain intact at a later stage.'[441] In recent decades, such conceptions have, as a matter of fact, 'been eroded

[435] Kamari Maxine Clarke, 'Rethinking Sovereignty through Hashtag Publics: The New Body Politics' (n 339) 360 & 365.
[436] Margaret M. deGuzman (n 169) 97.
[437] Ruti G. Teitel, *Humanity's Law* (n 141) 31.
[438] Jackson Nyamuya Maogoto, 'Sovereignty in Transition: Human Rights and International Justice' (n 338) 92–97.
[439] *See Jean Bodin (n 391).*
[440] Siba N'Zatioula Grovogui, 'Regimes of Sovereignty: International Morality and the African Condition' (n 309).
[441] Hersch Lauterpacht, *The Function of Law in the International Community* (n 238) 441.

to a large extent through the development of the concept of international penal process … [and] have gradually been modified by universalist claims for peace and respect for human rights through limitations on the State's use of its power'.[442] The thesis therefore endorses a flexible understanding of sovereignty 'as a changing continuum that adjusts to the evolving nature of international law'[443] by acknowledging the possibility that RIGOs may have a responsibility to intervene where individual states are either genuinely unable or unwilling to ensure such accountability. This is not a violation of state sovereignty, but rather an appreciation of sovereignty as understood, or as should be understood, in contemporary international relations, in other words, 'as dependent upon the protection of minimum standards of common humanity'.[444]

[442] Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (n 373) 281.
[443] Oumar Ba (n 302) 10.
[444] Dan Kuwali (n 252) 46.

CHAPTER FOUR

LEGAL BASIS FOR THE EXERCISE OF ELEMENTS OF SOVEREIGN GOVERNMENTAL AUTHORITY BY REGIONAL INTER-GOVERNMENTAL ORGANISATIONS

4.1 Introduction

Having (re)conceptualised the exercise of sovereign governmental power by IOs generally and RIGOs in particular in the previous chapter, this chapter seeks to determine the legal basis for the exercise of sovereign governmental powers by IOs generally, and RIGOs in particular, in order to understand whence these powers derive. This interrogation is particularly relevant because while RIGOs continue to exercise, with increasing frequency and assertiveness, powers that at the very least have elements of sovereign authority, the basis for this practice in international law is not sufficiently discussed and is therefore unsettled. This is largely a consequence of a common tendency among commentators to presume the legality of RIGOs' actions. Specific to the thesis' primary concern which is the role of RIGOs in the establishment of international criminal accountability mechanisms, an uncritical presumption of legality is undesirable especially because of the serious implications of such actions.[445] It is therefore vital to interrogate the source(s) and parameters of these powers.

In its understanding of 'powers', the thesis adopts Brölmann's definition of power as 'both the capacity of the organisation to act in general international law and its competence to act within its institutional order vis-à-vis the member states'.[446] This understanding therefore envisions RIGOs as both exercising elements of sovereign authority deriving from member states, hence a functionalist approach to assessing RIGOs, as well as acting as organisations with a rule-based degree of latitude or autonomy and a value system,[447] hence a challenge to pure functionalism. As Klabbers aptly puts it, 'There is constant oscillation between the position of the organization as a party in its own right, and the position of the organization as a vehicle for its own member states.'[448] Therefore, the very existence of a RIGO and its status

[445] Answering this question is also particularly important considering the legal challenges that have previously been raised concerning the UN Security Council's competence to establish international criminal tribunals. See *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Case No IT-94-1-AR72 of 2 October 1995 Appeals Chamber; *Prosecutor v Joseph Kanyabashi,* Decision on the Defence Motion on Jurisdiction Case No ICTR-96-15-T of 18 June 1997 Trial Chamber.
[446] Catherine Brölmann (n 21) 25.
[447] Catherine Brölmann refers to this phenomenon as the 'dual image of organisations', that is, 'open structures that are vehicles for states and at the same time closed structures that are independent legal actors' *See* Catherine Brölmann (n 21) 1.
[448] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 284.

as an organisation with international legal personality and a degree of functional autonomy depends to a significant extent on the RIGO's legal powers.[449]

This chapter doctrinally reviews relevant legal instruments, policy documents, jurisprudence and literature in order to: determine the position of international law on the question of sovereign authority exercised by IOs generally, and RIGOs in particular; determine the legality of these powers; and explain RIGOs as organisations with a rule-based degree of latitude or autonomy and a value system. These determinations and explanations are important especially since the authority of RIGOs derives from states who are traditionally the 'holders' of sovereign authority, and also considering the traditional conception of states as the primary subjects of international law. It is therefore vital that the thesis considers the different but interrelated three-dimensional relationships of IOs, that is, their relationship with their internal structures, their relationship with member states, and their external relationships, the latter two being more relevant to this thesis. The interrogation in this chapter thus explains the basis in international law for the exercise of elements of sovereign governmental power by RIGOs, therefore laying the legal foundation for the proactive involvement of RIGOs in international criminal justice, particularly in the establishment and administration of international criminal accountability mechanisms. The chapter primarily interrogates three possible and commonly advanced explanations for the legal basis for the exercise of sovereign governmental power by RIGOs: doctrine of attribution or conferral of powers; doctrine of implied powers; and doctrine of inherent powers. The chapter also engages briefly with the theory of constitutionalism, and concludes by briefly engaging with RIGOs' capacity to conclude treaties since this is directly relevant to the exercise of legal powers necessary for the establishment and administration of international criminal accountability mechanisms. However, because the question of the legal personality of RIGOs is fundamental to understanding the legal powers of RIGOs, it is appropriate to briefly comment on the question before delving into an interrogation of from whence RIGOs derive their legal powers.

4.2 International Legal Personality of Inter-Governmental Organisations

For participants in the international legal order to be able to participate in the system, they must have 'legal personality' which then bestows upon them the capacity to function within such order. As mentioned in the introductory chapter, this is in fact part of the objective criteria for determining what organisation qualifies as an intergovernmental organisation. Legal personality has been defined variously as 'a juridical concept which is regarded as essential to provide a legal basis for entitling a subject to rights, and submitting it to obligations under international law'[450] and as 'the capacity to have and to maintain certain rights, and being subject to perform specific duties',[451] rights and duties which are capable of being enforced in

[449] Viljam Engström, 'Reasoning on Powers of Organizations' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 58–59.
[450] Chris Nwachukwu Okeke (n 27) 181–182.
[451] Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017) 155. For a historical and theoretical exploration of international legal personality, *see* Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organisations' (1970) 44 British Yearbook of International Law

law. In suggesting a definition of international legal personality, Amerasinghe emphasises independence of the organisation vis-à-vis its members and suggests the following definition:

> International personality vests when there exists
> (i) an association of states or international organizations or both, with lawful objects and with one or more organs which are not subject to the authority of any other organized communities than the participants in those organs acting jointly; (ii) a distinction between the organization and its members in respect of legal rights, duties, powers and liabilities (in the Hohfeldian sense) on the international plane as contrasted with the national or transnational plane, it being clear that the organization was intended to have such rights, duties, powers and liabilities.[452]

By establishing international organisations, states confer legal competences/powers to the organisation whose will then becomes distinct and autonomous from those of its individual member states, an autonomy guaranteed and protected by the organisation's governing instruments. This reflects the organisation's legal personality, described as 'a receptacle for the varying degrees of power or competence, which enable the recipient to be the bearer of rights and obligations at the internal and international plane'.[453] To say that an organisation has international legal personality is therefore to say that 'a series of acts performed by that entity in the field of international law and relations are legal acts, and it is admitted to have the capacity to perform them'.[454] In other words, 'some measure of international personality' is a prerequisite for the organisation to be considered a subject of international law.[455]

How then to determine whether an organisation has international legal personality is itself not exactly an obvious matter. Different approaches have been advanced by scholars, summarised by Okeke as the: formal approach; inductive approach; objective approach; and material approach.[456] The formal approach looks to the organisation's constituent instrument to ascertain whether it is (expressly) endowed with international legal personality.[457] It is therefore safe to assume that the matter is straight-forward where the constituent instrument expressly provides that the organisation possesses international legal personality, and in this case the organisation's legal personality is arguably obvious. The Treaty on European Union, for example, provides at Article 47 that, 'The Union shall have legal personality'. As terse and potentially ambiguous as this provision is, it indeed reflects an expression of the will of member states of the EU to bestow legal personality upon the organisation. Since the EU is established as an intergovernmental organisation, it is logical to interpret this legal personality as one under international law. However, the constituent instruments of many IOs and intergovernmental organisations, the Constitutive Act of the African Union being a prime example, are silent on

111; Janne E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and the Theory of International Law* (TMC Asser Press 2004).

[452] Chittharanjan Felix Amerasinghe, 'Comments on the ILC's Draft Article on the Responsibility of International Organizations' (2012) 9 International Organizations Law Review 29, 29–31; Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd edn, Cambridge University Press 2005) 82–83.

[453] Christiane Ahlborn (n 398) 416–417.

[454] Chris Nwachukwu Okeke (n 27) 181.

[455] Chris Nwachukwu Okeke (n 27) 181–182.

[456] Chris Nwachukwu Okeke (n 27) 183–185; See also Ademola Abass, *Complete International Law: Texts, Cases, and Materials* (Oxford University Press 2012) 203–225.

[457] Chris Nwachukwu Okeke (n 27) 183–184.

the question of legal personality. In such cases, the three other approaches could provide guidance.

The inductive approach looks to the constituent instrument for the express or implied rights and duties of the organisation to be exercised on the international sphere and then holds or assumes that a 'general international personality' springs from these rights and duties.[458] This approach is also variously known as the 'will theory' as it emphasises the will of member states, or the subjective theory. The objective approach derives international legal personality by considering whether or not an organisation fulfils certain conditionalities in international law, and does this by interrogating the organisation's structural aspects such as 'composition, voting procedure, functions and … powers'.[459] The material approach appeals to an 'inherent' legal personality of international organisations, arguing that international law recognises an 'inherent' capacity to engage in those acts on the international plane that they are in a practical position to engage in.[460]

In today's discourse and practice of IOs, a mix of objective, inductive and material approaches appears to be more prominent,[461] otherwise commonly referred to as a presumptive approach. Klabbers defines this contemporary practice thus, '[A]s soon as an organization performs acts which can only be explained on the basis of international legal personality, such an organization will be presumed to be in possession of international legal personality.'[462] Brölmann describes it in more or less the same manner thus, 'If an institution meets the [objective] criteria of an "organisation", and especially if it actually performs legal acts *in externo,* it seems logical that the institution would assume legal shape.'[463] It therefore follows that whether or not the organisation's constituent instrument expressly declares the organisation to have international legal personality, international law tends to treat IOs as having objective legal personality.[464]

The ICJ's consistent jurisprudence supports this position. In its landmark Advisory Opinion in *Reparations for Injuries Suffered in the Service of the United Nations,*[465] the Court opined that the nature of the UN's functions and rights presupposed the existence of an international legal personality, as these can only be explained on the basis of international legal personality. Consequently, the Court concluded that the UN 'is a subject of international law and capable of possessing international rights and duties',[466] but was quick to clarify that this does not mean that the organisation was the same as or superior to a state. The ICJ reiterated

[458] Here Okeke summarises the arguments of David Bowett.
[459] Here Okeke summarises the arguments of Finn Seyersted.
[460] See Finn Seyersted, *Common Law of International Organizations* (n 20).
[461] See Chris Nwachukwu Okeke (n 27) 185; Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 49.
[462] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 49.
[463] Catherine Brölmann (n 21) 87.
[464] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 46–50; Catherine Brölmann (n 21) 68–90; Chittharanjan Felix Amerasinghe, *Principles of the Institutional Law of International Organizations* (n 452) 66–100.
[465] I.C. J. Reports 1949, p. 174.
[466] I.C. J. Reports 1949, p. 174, 179.

this position in its Advisory Opinion in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt.*[467] It is now widely accepted that international organisations, as a matter of general international law, have international legal personality. For instance, even though the Constitutive Act of the African Union is silent on the question of international legal personality, the African Court on Human and Peoples' Rights adopted the ICJ's approach and pronounced in *Femi Falana v. The African Union* that, '[A]s an international organization, the African Union has a legal personality separate from the legal personality of its Member States.'[468] Similarly, the East African Court of Justice, relying on the ICJ's *Reparations* opinion and deducing from the vague formulation of Article 4 of the Treaty for the Establishment of the East African Community,[469] held in *Hon. Dr. Margaret Zziwa v The Secretary General of the East African Community* that being an international organisation established by treaty, the East African Community possesses international legal personality.[470]

As mentioned in the previous chapter, legal personality is a fundamental characteristic of RIGOs, and is directly relevant to the question of the legal powers of RIGOs, that is, the nature and extent of their authority. It therefore determines how RIGOs interact with states and other international law actors, including and of particular relevance to this thesis, their ability to exercise their autonomy and conclude international instruments. For IOs generally, and RIGOs in particular, to be able to assert the rights they maintain and to perform their duties, it logically follows that they must have certain powers. These organisations cannot function without legal powers, and the powers they exercise therefore define the parameters of their legal personality. Evidently, therefore, legal personality and powers are interrelated and interdependent.

4.3 Doctrine of Attributed or Conferred Powers

If understood primarily as an organisation established by states as a vehicle for their collective action, it necessarily follows, therefore, that the member states 'will confer some of their own sovereign powers or competences upon the international organization'[471] to enable the organisation to perform its objectives as set out in its constituent instrument. This conferral can be done either through the constituent instrument itself or on an *ad hoc* basis through a separate legal instrument conferring specific substantive power,[472] but which necessarily traces its basis to the constituent treaty. The process of conferring sovereign governmental powers, either through the constituent treaty or on an *ad hoc* basis through a separate legal instrument, will be

[467] I.C.J. Reports 1980, p. 73.
[468] Application No 001/2011 (Judgment of 26 June 2012) para 68.
[469] Article 4 provides as follows:

> Article 4: Legal Capacity of the Community
> 1. The Community shall have the capacity, within each of the Partner States, of a body corporate with perpetual succession, and shall have power to acquire, hold, manage and dispose of land and other property, and to sue and be sued in its own name.
> 2. The Community shall have power to perform any of the functions conferred upon it by this Treaty and to do all things, including borrowing, that are necessary or desirable for the performance of those functions.
> 3. The Community shall, as a body corporate, be represented by the Secretary General.

[470] East African Court of Justice, Appeal No. 2 of 2017, Judgment, 25 May 2018, para 36.
[471] Christiane Ahlborn (n 398) 413–414.
[472] Dan Sarooshi (n 312) 18–27.

examined in sufficient depth in subsequent practical chapters which will examine the legality of the EU's role in the establishment of the Kosovo Specialist Chamber and the AU's proposed role in the establishment of the Hybrid Court for South Sudan. In this section, it suffices to discuss the doctrine of attribution or conferral in a general manner.

The articulation of the doctrine of attribution or conferral of powers as a possible explanation for the exercise of legal powers by RIGOs can be traced to the 1927 Advisory Opinion of the PCIJ in *Jurisdiction of the European Commission of the Danube between Galatz and Braila* where the Court advised that, 'As the European Commission is not a State, but an international institution with a special purpose, it only has the functions *bestowed upon it* by the Definitive Statute with a view to the fulfilment of that purpose, *but it has power to exercise these functions to their full extent, in so far as the Statute does not impose restrictions upon it*',[473] an apparent departure from its previous position which considered the question of powers as one strictly of interpreting the terms used in the constituent instrument.[474] The ICJ subsequently emphasised in its 1996 Advisory Opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[475] that the constituent instrument is, *inter alia*, a possible source of IOs' powers, stating that, 'The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments'[476] and the express legal provision may elaborate on the procedural aspects of its implementation, or it may be silent on this aspect.[477] Therefore, the principle of attribution holds that organisations can and should only act in accordance with powers attributed or conferred upon them by relevant legal instruments in order to achieve their objectives. Of course, this is a classical rendition of a positivist approach to international law by which free will of states rather than presumption reigns.

However, to recall the definition of RIGOs proffered in the introductory chapter of this thesis, they are organisations: that are established by states through a treaty; that have an international legal personality; that are organised in the form of permanent organs; whose membership is restricted to states within a particular geographic region; and that are established (primarily) to pursue their members' common or agreed-upon objectives, albeit with a latitude of functional 'independence/autonomy'. If the exercise of powers by RIGOs is to be considered as strictly based on powers expressly attributed or conferred by their constituent instruments or other legal instrument, then that would render untenable any claim to autonomy. As Klabbers cautions, an extreme reliance on the principle of attribution would mean that a RIGO is 'merely

[473] P.I.C.J. Series B, No 14, p. 64 [emphasis added].
[474] This was the Court's approach it its previous advisory opinions in: *Competence of the International Labour Organisation in regard to International Regulation of the Conditions of Labour of Persons Employed in Agriculture*, Advisory Opinion, 12 August 1922, P.C.I.J. Series B, No 2; *Competence of the International Labour Organisation to Examine Proposal for the Organisation and Development of the Methods of Agricultural Production,* Advisory Opinion, 12 August 1922, P.C.I.J. Series B, No 3; *Competence of the International Labour Organisation to Regulate Incidentally the Personal Work of the Employer,* Advisory Opinion, 23 July 1926, P.C.I.J. Series B, No 13.
[475] I.C.J Reports 1996, p. 66.
[476] I.C.J Reports 1996, p. 66 [25].
[477] Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 European Law Review 113, 115.

a vehicle for its members rather than an entity with a distinct will of its own',[478] a position that is obviously not the case when the legal definition and functional reality of RIGOs are considered. Further, such restrictive reliance would fail to account for the fact that these organisations are 'dynamic and living creatures, in constant development'[479] and which are inevitably expected to respond to emerging situations that may not have been strictly-speaking anticipated at the time of the adoption of the organisations' constituent instruments.

One of the basic assumptions of this thesis is that RIGOs are emerging as more than mere vehicles for states' collective action and are increasingly exercising functions that may not be expressly obvious from their constituent instruments. A restrictive reliance on the doctrine of attribution would therefore not explain this phenomenon. To insist that every specific power exercised by RIGOs be expressly codified as such in the constituent instrument (or other legal instrument) would be to stretch the consent theory of international law to its extreme and illogical limits. Rather, while the thesis looks to the principle of attribution as the primary doctrine for explaining the exercise of RIGOs' legal powers, the thesis considers this doctrine as one of a number of other equally plausible explanations. This doctrine, especially if considered generously and not restrictively, is particularly useful for its insistence on the constituent instrument as the primary source of RIGOs' powers. In other words, it is the beginning rather than the end of the explanation of RIGOs' legal powers.

4.4 Doctrine of Implied Powers and the Nature and Interpretation of the Constituent Instruments of Inter-Governmental Organisations

Having determined the undesirability of restricting oneself to the express wording of constituent instruments for the entirety of the legal powers of RIGOs, it follows therefore that complementary explanations should be explored. One explanation that has emerged to prominence when explaining the powers of IOs is the doctrine of implied powers. This derives from an appreciation of the limitations of attributed powers as highlighted above and the need for flexibility, arguing that IOs 'must be allowed certain powers which, while not expressly granted [in relevant legal instruments], are granted by implication'.[480] This, essentially, is a question of how the provisions of the constituent instrument or other legal instrument conferring powers on the organisation are interpreted. The argument is that the treaty should be interpreted in a manner that ensures the full effect of the treaty provisions. However, before addressing the question of how the constituent instrument should be interpreted to determine the 'implied' powers of RIGOs, it is important to clarify whether an inter-governmental organisation's constituent instrument is an 'ordinary' international treaty or simply an internal constitution not governed *per se* by international law, as this question has given rise to some level of disagreement among commentators.

[478] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 55.
[479] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 56.
[480] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 56; Manuel Rama-Montaldo, 'International Legal Personality and Implied Powers of International Organizations' (1970) 44 British Yearbook of International Law 111, 147–152.

4.4.1 Is A Constituent Instrument a Treaty?

The thesis' position is that an intergovernmental organisation's constituent instrument is primarily a treaty governed by international law, even when the organisation assumes control of it to assert its independence. In this regard, it is worth mentioning Article 5 of the 1969 VLCT which provides that, 'The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization' and Article 5 of the VCLT 1986 which provides that, 'The present Convention applies to any treaty between one or more States and one or more international organizations which is the constituent instrument of an international organization and to any treaty adopted within an international organization, without prejudice to any relevant rules of the organization.'

These provisions expressly place constituent instruments of IOs within the ambit of international law, but with the apparent caveat[481] exemplified by the common phrase 'without prejudice to any relevant rules of the organization'. Article 2(1)(j) of the 1986 VLCT defines 'rules of the organization' as 'in particular, the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization'. The effect of this 'caveat' is to therefore recognise the dual character of the constituent instrument. In as far as the treaty relates to internal governance of the organisation, it is indeed a 'constitution' specific to that organisation. Additionally, constituent instruments may somewhat depart from the practice of the general law of treaties in respect of specific issues such as accession, amendments, reservations, termination and interpretation.[482] These do not, however, remove constituent treaties from the ambit of the law of treaties; they remain treaties governed by international law. In particular, as relates to the organisation's relationship with its member states and its external relations with third parties, the constituent instrument is a treaty governed by international law. International law as an interpretative guide and the organisation's practice therefore serve to define the practical parameters of the otherwise general/skeletal constituent instrument.[483] As such, the 'disagreement' referred to above is not so much a disagreement, as it is a debate on the 'sphere' of application of the treaty, that is, internal application and external application, and this depends on the particular issue in question.

Notably, this thesis is primarily concerned with RIGOs' relationship with their member states (in the case of the AU and the proposed Hybrid Court for South Sudan) and their relationship with third parties such as non-members (in the case of the EU and the Kosovo Specialist Chambers), that is, their capacity to exercise elements of sovereign authority in the establishment and administration of international criminal accountability mechanisms. This is a question of interpreting the constituent instruments of RIGOs and other relevant legal instruments in order to determine their capacity and competence. As such, for purposes of this

[481] The ILC has referred to this as a 'reservation'. See ILC Commentary on 1966 draft art.4 of what later became art. 5 of 1969 Convention.
[482] See Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 70–89.
[483] Chittharanjan Felix Amerasinghe, 'The Law of International Organizations: A Subject Which Needs Exploration and Analysis' (n 355) 20.

thesis, and in interpreting the legal powers of RIGOs and theorising their authority, the nature of RIGOs' constituent instruments as treaties governed by international law will be more prominent than the instruments' constitutional aspect.

4.4.2 Deriving Implied Powers through Rules of Treaty Interpretation

Having so determined, it is imperative to clarify what rules of treaty interpretation are relevant to expounding upon the provisions of constituent instruments in order to derive 'implied' powers. The jurisprudence of the ICJ provides useful guidance in this regard. As early as 1949, the Court in its Advisory Opinion in *Reparations for Injuries Suffered in the Service of the United Nations*[484] had adopted a rather clumsy approach to the doctrine of 'implied' powers. The Court argued that even though the UN Charter 'does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him',[485] such a power is implied because '[u]nder international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties'.[486] Of course, the Court was careful to emphasise that this implied power derived from a reading of the express provisions of the UN Charter, specifically provisions on objectives and functions of the UN and the duties of its members. In the words of the Court, 'Upon examination of the character of the functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.'[487] Similarly, in its 1954 Advisory Opinion in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the ICJ argued that, '[T]he power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat, and to give effect to the paramount consideration of securing the highest standards of efficiency, competence and integrity. Capacity to do this arises by necessary intendment out of the Charter,'[488] that is, from an interpretation of the UN's express freedom and justice objectives under Article 1 of the UN Charter as well as Article 101(3) which obligates the UN to ensure as a paramount consideration in its employment practice, 'the necessity of securing the highest standards of efficiency, competence, and integrity'.

However, in its 1996 Advisory Opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*,[489] the Court was more circumspect. It refused to imply from the World Health Organisation's express powers in its Constitution a power to concern itself with the legality of the use of nuclear weapons, arguing instead that, '[N]one of the functions of the WHO is dependent upon the legality of the situations upon which it must act'[490] and that, '[T]he

[484] I.C. J. Reports 1949, p. 174.
[485] I.C. J. Reports 1949, p. 174, p. 182.
[486] I.C. J. Reports 1949, p. 174, p. 182.
[487] I.C. J. Reports 1949, p. 174, p. 184.
[488] I.C.J. Reports 1954, p. 47, p. 57.
[489] I.C.J Reports 1996, p. 66.
[490] I.C.J Reports 1996, p. 66 [20].

legality or illegality of the use of nuclear weapons in no way determines the specific measures, regarding health or otherwise … which could be necessary in order to seek to prevent or cure some of their effects … [W]hile it is probable that the use of nuclear weapons might seriously prejudice the WHO's material capability to deliver al1 the necessary services in such an eventuality … this does not raise an issue falling within the scope of the Organization's activities.'[491] Some have read in this Opinion a resort to the attribution doctrine, an undue reliance on textual interpretation and a claw-back on the ICJ's hitherto implied powers approach to determining the powers of international organisations.[492] Akande, for instance, considers the Court's interpretation not only to be wrong in as far as it argues that the WHO has no competence to deal with legality, but also too restrictive even by the standards of the attribution doctrine.[493] He argues that by confining the WHO's competence to dealing with the health effects following the use of nuclear weapons, the Court ignored the WHO's preventive role which supposedly derives from Article 1 of the WHO Constitution which provides 'the attainment by all peoples of the highest possible level of health' as the WHO's objective, and Article 2(v) which empowers the WHO to 'take all necessary action to attain [its] objective'.

However, the thesis' reading of the Opinion reveals quite the opposite observation. If anything, this Opinion was not necessarily an undue reliance on textual interpretation, but rather one where both textual interpretation and teleological interpretation were applied and tested to their logical conclusions, and not beyond. The Court did in fact recognise that while '[t]he powers conferred on international organizations are normally the subject of an express statement in their constituent instruments …, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as "implied" powers'.[494] However, nothing in the WHO Constitution could reasonably be interpreted as empowering it even by implication to question or determine the legality of nuclear weapons. That would have been an interpretative stretch. Rather, the Court was able to determine that, 'Interpreted in accordance with their ordinary meaning, in their context and in the light of the object and purpose of the WHO Constitution, as well as of the practice followed by the Organization, the provisions of its Article 2 may be read as authorizing the Organization to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in.'[495] In the process, the Court recognised that while the settled rules of general treaty interpretation are applicable to the interpretation of the constituent instruments of IOs, the particular nature of these instruments including the nature of the organisation they establish, the objectives of the organisation, the

[491] I.C.J Reports 1996, p. 66 [22].
[492] *See* Jan Klabbers, 'Global Governance at the ICJ: Re-Reading the WHA Opinion' (2009) 13 Max Planck Yearbook of United Nations Law 1; Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 62–63; Viljam Engström (n 449) 62.
[493] Dapo Akande, 'The Competence of International Organisations and the Advisory Jurisdiction of the International Court of Justice' (1998) 9 European Journal of International Law 437, 443–452.
[494] I.C.J Reports 1996, p. 66 [25].
[495] I.C.J Reports 1996, p. 66 [21].

need for effective achievement of these objectives and the organisation's practice 'are all elements which may deserve special attention when … interpret[ing] these constituent treaties'.[496] Here, the Court essentially reiterated and expounded upon its understanding of such treaties as 'having special characteristics', a position the Court had taken decades earlier in its Advisory Opinion *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*.[497]

Going by the Court's approach, it follows that 'textualist' and 'intentionalist' approaches generally favoured by the Court in its general treaty interpretation would not by themselves suffice in interpreting constituent instruments of RIGOs owing to their special nature, particularly where the issues in question relate to the capacity or competence of RIGOs and/or legality of actions taken by RIGOs. A teleological approach which aims at discerning and advancing the 'object and purpose' of the treaty in line with Articles 33(1) common to both the VCLT 1969 and VCLT 1986 is more befitting especially where a textual approach is inappropriate because of textual ambiguity or where such approach would retard the functioning of the organisation. As argued by Brölmann, the 'guiding principle … is the promotion of the effectiveness of the [intergovernmental organisation],'[498] and as Alvarez notes, in order to effectively meet the entirety of the functionalist needs of international organisations including those not *per se* anticipated at the time of drafting the constituent instrument, a teleological interpretation of constituent instruments has become generally accepted.[499]

The implied powers approach was at one point particularly popular within the European system. The jurisprudence of the CJEU is particularly relevant here because 'decisions [of the judicial arms of RIGOs] represent in substance a [contestable] determination … of the values that underlie the sovereign powers being conferred by States on organizations'.[500] In 1987, the Court of Justice of the European Community held in *Federal Republic of Germany and others v Commission of the European Communities* that the Commission has the implied power to take decisions binding on member states on arranging consultations on social policy matters, a power the Court argued derives from the Commission's power under Article 118 of the Treaty of the European Economic Community to promote close cooperation among members on social policy.[501] Specifically, the Court held that, '[I]t must be emphasized that where an article of the EEC Treaty — in this case Article 118 — confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and per se the powers which are indispensable in order to carry out that task. Accordingly, the second paragraph of Article 118 must be interpreted as conferring on the Commission all the powers which are necessary in order to arrange the consultations.'[502]

[496] I.C.J Reports 1996, p. 66 [19].
[497] I.C.J. Reports 1962, p. 151.
[498] Catherine Brölmann (n 21) 118.
[499] José E. Alvarez (n 358) 328.
[500] Dan Sarooshi (n 312) 13.
[501] Joined Cases 281, 283 to 285 and 287/85, [1987] ECR 03203 (9 July 1987).
[502] Joined Cases 281, 283 to 285 and 287/85, [1987] ECR 03203 [28].

In its 1971 decision in *Commission of the European Communities v Council of the European Communities (European Agreement on Road Transport)*,[503] the Court of Justice of the European Community had held that Article 75 of the EEC Treaty [now Article 95 of TFEU] which expressly empowered the Commission to implement a common internal community policy implied an external element, that is, empowered the Commission to conclude transport agreements with third countries since it is only in this way that the express power to internally regulate transport (within member states) could be given full effect. The Court justified this decision based on a holistic reading of Article 75 together with the Treaty's provisions on legal personality and objectives, as well as on 'the whole scheme of the treaty' and the need for community unity.[504] The Court appeared to rely on an interpretation of express provisions in order to determine what was essential to ensure the effective and efficient functioning of the Community as well as a desire to ensure a common and uniform Community approach, determined as such by considering the objectives of the Community. In other words, the Court considered that the Community's authority is either expressed in the provisions of the constituent instrument or could implicitly flow from these express provisions. This understanding of implied powers was upheld in the Court's subsequent decisions and opinions,[505] particularly in *Cornelis Kramer and Others,*[506] *Opinion 1/76 Pursuant to Article 228(1) of the EEC Treaty - Draft Agreement Establishing a European Laying-Up Fund for Inland Waterway Vessels*[507] and *Opinion 2/91 Delivered Pursuant to the Second Subparagraph of Article 228(1) of the EEC Treaty - Convention No. 170 of the International Labour Organization Concerning Safety in the Use of Chemicals at Work.*[508]

However, the CJEU has since adopted a more hesitant approach, especially following the formal adoption of Article 5 of the Maastricht Treaty (Treaty establishing the European Community, 1992) and later Article 5 of the Consolidated Version of the Treaty on European Union [as amended by the Lisbon Treaty 2009]. The provision expressly gives primacy to the principle of conferral as the principle that defines the limits of the EU's competence, while also introducing the principles of subsidiarity and proportionality as governing principles in the discharge of those competences.[509] This provision effectively endorsed the conferral approach

[503] Case 22/70 [1971] ECR 263 (31 March 1971). For a discussion of the Court's approach in this judgment, *see* Panos Koutrakos, *EU International Relations Law* (2nd edn, Hart Publishing 2015) 77–86.
[504] Case 22/70 [1971] ECR 263 [10-32].
[505] For a discussion of the 'evolution' of the doctrine of implied powers/competence in respect of external action within the European system, *see* Panos Koutrakos (n 503) ch 3.
[506] Joined Cases 3, 4 and 6/76 [1976] ECR 1279 (14 July 1976).
[507] Opinion 1/76 [1997] ECR 741 (26 April 1977).
[508] Opinion 2/91 [1993] ECR I-1061 (19 March 1993).
[509] Article 5
(ex Article 5 TEC)
1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.
3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

and introduced the principle of subsidiarity in determining the powers of the EU. The CJEU has, with near-consistency since, followed a conferral approach. Some notable cases include: *Opinion 1/94 on Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property (WTO Agreements)*[510] where the Court concluded that the Community had no exclusive power to conclude the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) since such exclusive power was neither expressly conferred in Community instruments nor was it inextricably linked to the performance of Community objectives as to be implied from conferred powers as being necessary for the effective performance of EU objectives;[511] *Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*[512] where the Court held that without an amendment to the EU's constituent instrument to confer such competence, the EU had no competence at the time to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms as this would modify the EU's human rights protection system by ushering the EU 'into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order';[513] and *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Directive)*[514] where the Court held that the EU's powers are not general or unlimited, but are limited to those specifically conferred and should therefore not be construed too broadly.

While some have interpreted the above cases/opinions to mean that the Court is abandoning the implied powers doctrine,[515] it could very well be interpreted as the Court being unable to deduce any implied powers from the construction of the treaty and therefore being left with attributed powers doctrine as the only approach that would not stretch the legal powers

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The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

[510] Opinion 1/94 [1994] ECR I-5267 (15 November 1994).

[511] For discussions of this 'controversial' opinion, *see* Antti Maunu, 'The Implied External Competence of the European Community after the ECJ Opinion 1/94 - Towards Coherence or Diversity?' (1995) 22 Legal Issues of Economic Integration 115; Panos Koutrakos (n 503) 101–111.

[512] Opinion 2/94 [1996] ECR I-1759 (28 March 1996).

[513] Opinion 2/94 [1996] ECR I-1759 (28 March 1996) [34–35]. Article 6(2) TEU now expressly empowers the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. As at the time of writing, the EU was still renegotiating its possible accession with the Council of Europe following guidance provided by the CJEU when it gave a negative opinion on the first draft accession agreement in *Opinion 2/13 Pursuant to Article 218(11) TFEU – Draft International Agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the Draft Agreement with the EU and FEU Treaties* (18 December 2014). *See also* Marie Lecerf, 'Completion of EU Accession to the European Convention on Human Rights' (21 April 2021) <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-completion-of-eu-accession-to-the-echr> accessed 12 May 2021.

[514] Case C-376/98 [2000] ECR I-08419 (5 October 2000).

[515] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 61–62.

beyond what the treaty envisages. Indeed, as Koutrakos has argued, the Court's approach in and subsequent to *Opinion 1/94* does not 'constru[e] implied competence in too restrictive terms … [but rather] interprete[s] exclusivity in the light of the context within which it had been intended to function'.[516] In any case, the Consolidated Texts of the European Union Treaties recognise the limits of the principle of conferral and provides therefore in Article 352 of the Consolidated Version of the Treaty on the Functioning of the European Union that–

> 1. If action by the Union should prove necessary, within the framework of the policies defined by the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

Effectively, therefore, the TFEU Treaty recognises and endorses both the doctrine of conferral as the primary approach, and the doctrine of implied powers where absolute reliance on the former doctrine proves inadequate. As argued above, and as the wording of Article 352(1) above makes clear, the legal basis for the measures adopted must be traced to the relevant treaty. In fact, the Court in *Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* was emphatic in interpreting what is now Article 352(1) TFEU – then Article 308 of the Treaty Establishing the European Community – that–

> That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.[517]

In other words, resort to the implied powers doctrine to justify measures taken must be grounded on the understanding that the powers derive from and must be traced to the express provisions of the relevant instrument as their original source or foundation. As Dashwood argues, a legal power should only be implied if the constituent instrument specifically provides a function to be performed, and from this provision 'powers that are really indispensable for carrying out the tasks'[518] can then be implied, that is, 'the power is tied to a provision specifically calling for action by the [organisation]'.[519] Koutrakos emphasises this indispensability thus, '[R]ather than being dependent upon a subjective value judgment as to what is desirable in policy terms, the notion of "necessity" is to be applied as an objective one, hence referring to what is factually a sine qua non for the exercise of the internal competence.'[520] Indeed, as Klabbers points out, though with somewhat inconsistent reasoning, Article 352 of TFEU provides a more measured approach to reconciling 'implied powers' with a treaty's express provisions. According to Klabbers, this provision provides flexibility and can be utilised to invoke powers necessary for

[516] Panos Koutrakos (n 503) 106.
[517] Opinion 2/94 [1996] ECR I-1759 (28 March 1996) [30].
[518] Alan Dashwood (n 477) 124.
[519] Alan Dashwood (n 477) 124; 124–126.
[520] Panos Koutrakos (n 503) 108.

discharging the objectives of the EU and as such, 'there is no need to go around creating new powers with the help of the implied powers doctrine'.[521] However, the thesis only partially shares this observation. Firstly, the implied powers doctrine does not 'create new powers' neither does the provision render the doctrine unnecessary as Klabbers argues. Rather, the provision indeed confirms the utility of the implied powers doctrine. The very *raison d'être* of implied powers doctrine is that it derives from the express provisions of legal instruments, such as provisions expressly listing the objectives and functions, such powers as would be necessary to fulfil those express provisions. This is not an invention of any new powers, but rather an interpretation of the skeleton of express provisions in order to effectuate them. Secondly, this provision does in fact confirm the reasonable parameters of the implied powers doctrine, that is, that it must derive from express provisions and should only be resorted to when those express provisions are ambiguous or inexhaustive.

Notably, however, the primacy of the conferral approach is clearly only preferred in the EU's internal relations or where the internal interacts with the external relations, that is, between the EU and its member states or between the EU, its members and external actors. With respect to the EU's external relations, a less-strict construction of implied powers doctrine still prevails, perhaps because of the ambiguity of reconciling the EU's express treaty objectives with its engagement with external actors.[522]

The implied powers doctrine and the teleological approach to the interpretation of constituent instruments have had their fair share of criticism. Some have criticised its appeal to an 'essential to the performance of duties' standard as too flexible and 'not conducive to the creation of legal certainty' precisely because it is susceptible to multiple subjective interpretations.[523] Others discourage teleological interpretation because 'in some of its more extreme forms, will even deny the intentions of the parties'.[524] The teleological approach has consequently been equated to the search for a common intention of the parties, an endeavour which, in the case of multilateral treaties, has been sensationally 'likened to a search for the pot of gold at the end of a rainbow'.[525] Seyersted has gone as far as to dismiss the implied powers doctrine as a fictitious escape route that covers everything and nothing,[526] while White has decried the supposedly restrictive and formalist nature of the doctrine, calling it 'a sham behind which the reality is that of a wider, but not unlimited, doctrine of inherent powers'.[527]

While not without merit, these misgivings, however, appear to be influenced by the imagination of an extreme form of teleological interpretation. Firstly, the thesis argues that by

[521] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 64.
[522] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 64.
[523] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 58. See also the dissenting opinion of Judge Green Hackworth in *Reparations*.
[524] Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 131.
[525] Ian Sinclair (n 524) 130.
[526] Finn Seyersted, *Common Law of International Organizations* (n 20) 29–33; 65–70; 359–362; See also Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend Upon the Conventions Establishing Them?' (1964) 34 Nordisk Tidsskrift for International Ret 3, 15–21.
[527] Nigel D. White, 'The UN Charter and Peacekeeping Forces: Constitutional Issues' (1995) 3 International Peacekeeping 43, 43.

teleologically interpreting a treaty, what is essential and necessary for the efficient performance of an organisation's functions as expressly provided in its constituent instrument can quite easily be discerned from the treaty's own express provisions on object and purpose without resulting in absurd interpretations that cannot be said to flow from the treaty's express provisions, or that are obviously outside the ambit of the treaty or that cannot be reconciled with the treaty. Secondly, to assume that a teleological interpretation is a 'search for common intention' is to misconceive the teleological approach which the thesis argues is not necessarily a 'search for common intention', but rather an elucidation of object and purpose of the treaty. In essence, these criticisms do not quite reveal any incurable shortcomings, but rather emphasise the need to ground the 'implication' of powers on the express provisions of the treaty. As indicated above, a circumscribed teleological interpretation would most certainly assuage such misgivings.

Suffice to say, however, and as a note of caution, teleological interpretation should not itself bestow upon RIGOs powers that are manifestly not discernible from their constituent instruments. This interpretation ought to go only as far as giving logical meaning to the 'object and purpose' of the treaty, clarifying its scope and enabling the RIGO to effectively discharge its functions within the legal bounds of the treaty. While teleologically interpreting the constituent treaty or other relevant legal instrument to determine 'implied' powers, these implied powers primarily derive as such from the provisions of the treaty itself. Therefore, this 'implication' must be restricted to the relevant instruments themselves, and not to some secondary source. In other words, the express provisions of the constituent treaty must form the basis for 'implication'; the express provisions of the constituent instruments remain the substantive or primary basis for competence. As Rama-Montaldo cautions, '[T]his doctrine is not an open door to an unlimited interpretation of the powers of an organization.'[528] An overzealous approach to the interpretation of a constituent instrument risks stretching beyond logic the bounds of state consent as the basis of treaties.

4.5 Doctrine of Inherent Powers: A Road to Nowhere?

Another theory sometimes advanced either as an offshoot of or altogether confused with the implied powers doctrine is the so-called inherent powers doctrine. Loosely defined, the inherent powers doctrine argues that by the mere fact of its establishment as an IO, the organisation automatically possesses any such powers as it may need to achieve its aims. Seyersted, one of the doctrine's most ardent proponents, defines it thus, '*Inherent* powers include jurisdiction and international (and legal) capacity which all States, IGOs and other self-governing communities exercise as a matter of general customary law – *i.e.* without specific legal basis – unless there is a *contrary provision*'.[529] From this understanding, the range of possible actions by an IO are only subject to two conditions, 'that the action in question aims to achieve one of the purposes of the organization, and that it is not expressly prohibited by any of the provisions of the constitution'.[530] The argument here is not that the powers in question are expressly provided for

[528] Manuel Rama-Montaldo (n 480) 148.
[529] Finn Seyersted, *Common Law of International Organizations* (n 20) 35.
[530] Nigel D. White (n 527) 48–49.

in its constituent instrument or in any legal instrument, or even that the powers in question can be implied from express provisions, but rather that these powers are intrinsic to the organisation's identity as an IO.

This perhaps goes back to the rather bold interpretation of the UN's powers by the ICJ in its 1971 Advisory Opinion in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* where the Court considered that the UNGA had the power to terminate South Africa's mandate over Namibia, finding that, '[T]he United Nations as a successor to the League, acting through its competent organs, must be seen above all as the supervisory institution, competent to pronounce, in that capacity, on the conduct of the mandatory with respect to its international obligations, and competent to act accordingly.'[531] Of relevance here is the fact that the Court did not seek to infer this power from any express provision in the UN Charter, but rather from the fact that the UN's predecessor the League of Nations had this express power, a power which the Court assumed automatically transferred to its successor, the UN.

Seyersted considers that the fact that contemporary international law has largely settled on an objective approach in determining an IO's international legal personality means that legal powers necessarily follow from that fact, hence inherent powers.[532] He argues that any organisation that fits the criteria of an inter-governmental organisation 'has the inherent capacity to perform any act of international law which is in a practical position to perform, subject to such negative restrictions which are laid down in its constitution'[533] and that 'intergovernmental organizations, like States, have an inherent legal capacity to perform any "sovereign" or international acts which they are in a practical position to perform'.[534] Put differently, Seyersted's argument is that since the very existence and functioning of an IO presumes its international legal personality, then it inherently possesses any legal powers that it considers necessary for its international life unless the constituent instrument provides otherwise or imposes other conditionalities. White, another ardent proponent of the doctrine, argues that inherent powers doctrine is practical as it enables organisations to function efficiently without being bogged down by reliance on legal provisions, some of which may often be ambiguous, and that it also enables quick and accurate review of the organisation's actions.[535]

While probably attractive from an extreme interventionist perspective, and perhaps also 'as yet another way of emphasizing the autonomy of organizations',[536] this so-called advantage of the inherent powers doctrine is quite the anti-thesis of the Rule of Law and promotes anarchy

[531] I.C.J. Reports 1971, p. 16 [103].
[532] Finn Seyersted, *Common Law of International Organizations* (n 20) 65–70; 359–362; Finn Seyersted, 'United Nations Forces - Some Legal Problems' (1961) 37 British Yearbook of International Law 351, 447–460.
[533] Finn Seyersted, *Common Law of International Organizations* (n 20) 53; Finn Seyersted, *United Nations Forces in the Law of Peace and War* (AW Sijthoff 1966) 155.
[534] Finn Seyersted, 'Objective International Personality of Intergovernmental Organizations - Do Their Capacities Really Depend Upon the Conventions Establishing Them?' (n 526) 28.
[535] Nigel D. White (n 527) 48.
[536] Viljam Engström, *Constructing the Powers of International Institutions* (Martinus Nijhoff Publishers 2012) 71.

by international organisations. Such *carte blanche* authority 'possibly goes against the wishes of the drafters'[537] and cannot possibly be reconciled with the principle of state consent which is itself the basis for the establishment of these organisations. While also probably useful in expanding the debate around the powers of IOs,[538] the thesis considers the inherent powers doctrine as legally and logically indefensible as it seeks to ascribe immanence to international law, a rather problematic endeavour. Being subjects of international law, the existence and functioning of IOs as such must be based on and be governed by law. As Hartwig usefully observes, 'No international organization can create its own powers and competences. These are defined by the will of the Member States, as a rule through international treaties. International organizations must act within the framework of these treaties. They are not only objects of these treaties which create them, but, as acting subjects, they have to keep within the lines drawn by the will of the Member States.'[539]

As discussed in the introductory chapter when defining IOs and intergovernmental organisations, these are entities established by treaties which are of course governed by international law. They are not naturally occurring entities. As further argued in Chapters II and III, RIGOs are not sovereign in and of themselves, but rather exercise elements of sovereign authority residually of the peoples of their member states and conferred upon RIGOs by these member states. To subsequently argue that these RIGOs have legal powers that cannot be traced to the law establishing and governing them, as the inherent powers doctrine argues, is to proffer a logical absurdity. Even if only for the sake of argument it were to be conceded that IOs' legal powers are 'natural' to IOs as the inherent powers doctrine contends, then as Viljam argues, it would be internally incoherent to then proffer, as again the inherent powers doctrine does, that these naturally occurring powers can then be limited by the unnatural act of express provisions of the constituent instrument.[540] Finally, the inherent powers doctrine appears to ignore the fact that a fundamental element of the exercise by states of their sovereign authority to establish an IO is the power to determine the IO's objectives and to define the methodological parameters of achieving these objectives.[541] The inherent powers doctrine purports to divest states of this sovereign authority over their own creation, a phenomenon that is legally and factually untenable. Whatever (political) utility there may be in this doctrine, and whatever its justifications, it sure stands on very rickety legal legs, if any at all.

[537] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 66.
[538] The inherent powers doctrine has long been advanced by judicial mechanisms to justify expansive judicial powers. While also controversial in these judicial contexts, the thesis discusses the doctrine here solely in the context of non-judicial powers of IOs.
[539] Matthias Hartwig, 'International Organizations or Institutions, Responsibility and Liability', *Max Planck Encyclopedias of International Law* (2011) para 16. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion of 8 July 1996, I.C.J Reports 1996, p. 66 [25].
[540] Viljam Engström (n 536) 71.
[541] Manuel Rama-Montaldo (n 480) 121.

4.6 Explaining the Exercise of the Legal Powers of Regional Inter-Governmental Organisations through Constitutionalism

The argument advanced here in respect of the source of RIGOs' authority is that the legal powers that can be properly exercised by RIGOs ought to be traced to provisions of the relevant legal instruments, and not to 'some abstract meaning of the object and purpose of an organization'[542] and most certainly not based on reliance on tenuous justifications such as the inherent powers doctrine. In this regard, therefore, the doctrines of attribution and implied powers attempt to explain whatever legal powers RIGOs have and their source without necessarily displacing each another.

It appears that an explanation of the legal basis for the legal powers of RIGOs inevitably opens the door to questions of how these powers should be exercised. It is worth recalling that the thesis maintains that RIGOs are not merely functional vehicles for realising states' collective or common interests, but have also emerged as organisations with a degree of autonomy from their member states. This understanding means that it is ever more vital to appreciate RIGOs beyond the limiting prism of functionalism, to their dual character, and to link their legal powers to how they are or should be exercised.

The theory of constitutionalism has therefore gained significant traction among commentators in explaining the exercise of the powers of IOs generally. It is important to clarify that the thesis does not find the theory to be at odds with the approach that blends attribution and implied powers. Rather, constitutionalism lays emphasis on the (sovereign) values underpinning the existence and functioning of IOs and upon which their actions should be evaluated, as well as insisting on the imposition of legal controls on IOs in their functioning.[543] As de Wet argues, constitutionalism as advanced in international law argues 'that the powers of international organizations have to be exercised in accordance with certain legal constraints, notably those articulated in its constituent document … [which then creates] the legal framework within which an autonomous community of a functional (sectoral) nature realizes its respective functional goal'.[544]

Constitutionalism does not, therefore, purport to explain the source of IOs' legal powers, but is rather aimed at explaining how IOs should be governed particularly by focusing on the extent or limits of IOs' powers, how these powers should be exercised in relation to members, how IOs can influence members through the exercise of their powers, and how to establish legal and perhaps political unity within the possibly pluralist system in which they operate.[545] In other words, while the source of IOs' powers can quite sufficiently be explained by reference to both attributed powers doctrine and implied powers doctrine as appropriate, constitutionalism seeks to explain how these legal powers should be exercised in a manner that upholds effectiveness,

[542] Viljam Engström (n 449) 63.
[543] See Erika de Wet (n 206); Jan Klabbers, 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism' (n 30).
[544] Erika de Wet (n 206) 53.
[545] Viljam Engström (n 449) 66–76.

accountability and democratic principles. In the thesis' understanding, these are two sides of the same coin.

4.7 Standard-setting and Treaty-making Powers of Inter-Governmental Organisations

One aspect of the exercise of powers by intergovernmental organisations that is particularly relevant to this thesis is the power to engage in standard-setting, which includes but is not limited to the power to make binding decisions and to conclude treaties. RIGOs' capacity to conclude treaties is a direct consequence of their legal powers and is directly relevant to the exercise of powers related to international criminal accountability. Indeed, as subjects of international law with international legal personality, it follows that these organisations must have the ability to interact with other actors in the international legal system.[546] However, the fact of an organisation having international legal personality does not by and of itself mean that the organisation can engage in general standard-setting including general treaty-making. As discussed in the preceding sections, much of what intergovernmental organisations engage in depends on whether they have the legal authority to engage in such acts. In their relations, internal and external, these organisations will perform acts that result in decisions or instruments of a legal nature, otherwise referred to as legal standard-setting. It is therefore imperative to determine the legal nature and effect of these instruments.

4.7.1 Power to Take Binding Decisions

The legal nature and effect of decisions taken or instruments concluded by intergovernmental organisations will depend on the nature of the decision or instrument and the process of its conclusion. For instance, a decision taken by the organisation's competent organ based on a unanimous vote by states (or their representatives) can be considered binding since the unanimity signifies 'the combined will of the participating states'.[547] This is commonly known as the 'treaty analogy' whereby these decisions are considered analogous to treaties.[548] As such, once it is determined that the organisation's competent organ has the power, attributed by or implied from its constituent instrument, to make a decision on a particular matter, it logically follows that a unanimous decision is binding on the members unless the constituent instrument provides otherwise or requires additional processes before the decision becomes binding. However, this does not quite explain the binding nature of decisions of intergovernmental organisations that are not taken unanimously.[549] Indeed, as already mentioned, nature and process are crucial in explaining the binding effect of these organisations' decisions, and the entire range of binding decisions or actions cannot be explained by reference to a single school of thought, leave alone treaty analogy.

[546] Chris Nwachukwu Okeke (n 27) 192.
[547] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 160.
[548] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 160.
[549] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 160.

The so-called theory of delegation has therefore been advanced to explain the binding effect of some acts of intergovernmental organisations that do not derive from unanimous decisions of the competent organs. As explained in the previous sections, states are considered to delegate some of their powers to the intergovernmental organisation when they become parties to the constituent treaty. The theory of delegation therefore holds that if the constituent instrument empowers the organisation to take binding decisions or actions on a particular matter, then the member states have consented to accept the validity and binding nature of those decisions or actions.[550] Of course, this position only holds where authority to take such action or make such decision can be attributed to or implied from the constituent instrument.

4.7.2 Capacity of Inter-Governmental Organisations to Conclude Treaties

Most commentators consider the capacity of intergovernmental organisations to conclude treaties as long having been established as a matter of general international law.[551] Indeed, it is perhaps this consideration that prompted the drafters of the VCLT 1986 to make a bold preambular declaration that 'international organizations possess the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes'. Consequently, the thesis considers as trite the general capacity of intergovernmental organisations to conclude treaties. Being subjects of international law established by treaty, it follows therefore that any treaties concluded by these organisations are generally subject to the law of treaties.[552] However, this general capacity does not mean that intergovernmental organisations can conclude treaties of any kind. The type of treaty an intergovernmental organisation can conclude will depend on the organisation's specific areas of competence and legal powers as delineated by its constituent instrument as the primary source of the organisation's rights and obligations, which powers are either expressly conferred or implied from the constituent instrument. In other words, intergovernmental organisations 'can only conclude treaties which are in the context of their aims and functions',[553] these being ascertainable by resort to the doctrines of attribution or implied powers.[554] Indeed, this position is recognised in Article 6 of the VCLT 1986 which provides that, 'The capacity of an international organization to conclude treaties is governed by the rules of that organization', rules being defined under Article 2(1)(j) as 'the constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization'. The provision assumes the existence of a general capacity under international law to conclude treaties, then defers to the organisation's constituent instrument for the specific extent and procedural aspects of such capacity.

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[550] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 159–160.
[551] See for example Gunther Hartmann, 'The Capacity of International Organizations to Conclude Treaties' in Karl Zemanek (ed), *Agreements of International Organizations and the Vienna Convention on the Law of Treaties* (Springer-Verlag 1971); Hungdah Chiu, *The Capacity of International Organizations to Conclude Treaties, and the Special Legal Aspects of the Treaties so Concluded* (Springer 1966); Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 267–269.
[552] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 71.
[553] Chris Nwachukwu Okeke (n 27) 194.
[554] Jan Wouters and Philip De Man, 'International Organizations as Law-Makers' in Jan Klabbers and Åsa Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Edward Elgar 2011) 205–206.

Intergovernmental organisations often avoid formally designating the agreements they enter into with states or other organisations as 'treaty' or 'convention' largely as a convenient political or tactical choice.[555] Common designations include 'Memorandum of Understanding' and 'Agreement'.[556] Indeed, some commentators appear to assume some sort of distinction between treaties concluded between states and treaties concluded by intergovernmental organisations.[557] Some have even argued that the law of treaties neither plays a role in the organisation's decision-making nor has any effect on the normative force of these decisions/acts.[558] However, this distinction and these arguments neither have a basis in international law nor establish any legal distinction between these 'types' of treaties. From the perspective of the law of treaties, treaties concluded by intergovernmental organisations are legally speaking similar to those concluded by states, even if the 'character' of the parties is different. Further, as discussed above, international law is indeed relevant to the decision-making and actions of international organisations. Earlier attempts to create such a distinction were in fact abandoned by the ILC which resigned itself to the fact of 'international law as a unified legal order in which different legal subjects interact under one set of rules'.[559]

From the analysis above, it is evident that international organisations 'are for all practical purposes a new kind of lawmaking actor, to some degree autonomous from the states that establish them'.[560] In the exercise of this law-making 'function', it must be recalled that IOs are bound and guided by their constituent instruments which are in turn governed by international law. Ultimately, therefore, it follows that any actions taken by intergovernmental organisations that are not anchored on the constituent instruments or any specific legal instrument would be *ultra vires*[561] and therefore invalid. However, an argument could be made that an *ultra vires* act could be considered to have legal effect if the concerned parties, member states of the organisation for example, subsequently acquiesce or accept the act.[562]

4.8 Chapter Conclusion

Following from the previous chapter which conceptualised the question of state sovereignty generally and the exercise of the 'collective sovereign powers' of states by RIGOs specifically, this chapter has interrogated the legal basis for such authority. The chapter has concluded that there is indeed a legal basis in international law for the exercise of elements of sovereign

[555] See Catherine Brölmann (n 21) 130.
[556] Going by the jurisprudence of the ICJ particularly in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain),* Jurisdiction and Admissibility, Judgment, 1 July 1994, I.C.J. Reports 1994, p. 112 and *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (2017), Preliminary Objections, Judgment, 2 February 2017, I.C.J. Reports 2017, p. 3, the name or designation given to a treaty does not determine its status as a treaty; rather, that is determined by the rules of conventional and customary international law.
[557] Henry G. Schermers and Niels M. Blokker (n 14) para 1744.
[558] Christiane Ahlborn (n 398) 420–421.
[559] Catherine Brölmann (n 21) 133.
[560] José E. Alvarez (n 19) 333.
[561] See generally Ebere Osieke, 'Ultra Vires Acts in International Organizations-The Experience of the International Labour Organizations' 48 British Yearbook of International Law 259; Ebere Osieke, 'The Legal Validity of Ultra Vires Decisions of International Organizations' (1983) 77 American Journal of International Law 239.
[562] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 186–188.

authority by RIGOs. Based on this conclusion, the chapter advances the proposition that as a general matter, RIGOs do have a general legal basis in international law for engaging in international criminal accountability, and should indeed intervene to ensure accountability for international crimes where individual states are either genuinely unable or unwilling. However, in so arguing, the chapter maintains that such intervention must be premised on the RIGOs having the requisite legal powers traceable to their constituent instruments or other relevant legal instrument whose basis is the constituent instrument. The thesis' proposed approach argues for intervention by RIGOs not as a matter of natural right, but within the strict boundaries of legality. It is only when intervention by RIGOs is traceable to sufficiently clear legal authority from member states as a collective can the resulting action by RIGOs be legally defensible.

The chapter has therefore answered in the affirmative the specific question as to the existence of a basis in international law for the exercise of elements of sovereign authority by RIGOs. It has also partially answered in the affirmative the question as to whether RIGOs can indeed exercise elements of sovereign authority to engage in international criminal accountability, specifically by establishing accountability mechanisms. The answer to the second question is only partially given at this point because a comprehensive answer to the question can only be proffered upon both a theoretical and practical examination of RIGOs' exercise of sovereign authority in the establishment and administration of international criminal accountability mechanisms. This chapter has only engaged in a theoretical examination. Answering these questions in the affirmative has therefore paved the way for an examination of the practical application of international criminal accountability as a cosmopolitan project aimed at validating the cosmopolitan values of human dignity and shared humanity – a theoretical basis laid down in Chapters II and III. Consequently, the subsequent chapters (Chapters V and VI) test the practical applicability of the cosmopolitan arguments advanced in Chapters II and III and build on the general legal basis laid down in and conclusions arrived at in this chapter. This is done using two case studies. Chapter V examines the European Union's role in the establishment and operation of the Kosovo Specialist Chambers and Specialist Prosecutor's Office, while chapter VI examines the role of the African Union in the establishment and operation of the proposed Hybrid Court for South Sudan.

CHAPTER FIVE

THE EUROPEAN UNION AND THE KOSOVO SPECIALIST CHAMBERS AND SPECIALIST PROSECUTOR'S OFFICE

5.1 Introduction

This chapter, the first of two 'practical' chapters of the thesis, proceeds from the theoretical argument made in Chapter II that international criminal justice as a cosmopolitan project demands that a tenable conception of state sovereignty guarantees humanity's fundamental values, specifically human dignity. Since cosmopolitanism emphasises the equality and unity of the human family, guaranteeing the dignity and humanity of the human family is therefore not a parochial endeavour, but rather a common interest of humanity. Accountability for international crimes is one way through which human dignity can be validated where such dignity has been grossly and systematically assaulted. Therefore, while accountability for international crimes is primarily the obligation of individual sovereign states, this responsibility is ultimately residually one of humanity as a whole, exercisable through collective responses. As such, and as argued in Chapter II, states as collective representations of humanity have an obligation to assist in ensuring accountability for international crimes where an individual state is either unable or unwilling by itself to do so. In conceptualising sovereign authority and collective action by states, Chapters III and IV have interrogated the exercise of elements of sovereign authority by RIGOs and located in general terms the legal basis of such authority in international law. Applying the theoretical foundation and the conceptual framework laid down in Chapters II and III and IV respectively, therefore, this Chapter interrogates the practical role of RIGOs in the pursuit of international criminal accountability as a cosmopolitan project to validate the cosmopolitan values of human dignity and shared humanity. Specifically, the Chapter uses the case study of the European Union's role in the establishment and operation of the Kosovo Specialist Chambers (KSC) and the Specialist Prosecutor's Office (SPO)[563] to test and apply the cosmopolitan arguments that the thesis advances. In so doing, the Chapter grapples with the legal complexities of the EU, a regional inter-governmental organisation, exercising elements of sovereign authority ostensibly on behalf of its member states to facilitate the process of ensuring accountability for international crimes in Kosovo, a non-member 'state'. The chapter analyses the exercise of this authority at various stages of the process, being, the investigative stage, the establishment stage and the operation stage, and also engages with the dynamics of allocation of authority between the EU and Kosovo in relation to the KSC and SPO. This chapter benefitted significantly from discussions held at Centre of Excellence for International Courts (iCourts), University of Copenhagen, where a draft was presented, and from correspondence with staff of the KSC and the SPO.

[563] Despite being theoretically independent of each other, the Kosovo Specialist Chambers (KSC) and the Specialist Prosecutor's Office (SPO) together form one judicial body.

5.2 Evolution of the European Union's Involvement in the Rule of Law and International Criminal Accountability in Kosovo

5.2.1 The EU's Capacity to Conclude International Agreements with Kosovo in Light of Kosovo's Contested Statehood

As discussed in Chapter IV, inter-governmental organisations are considered to have international legal personality under general international law, and this personality endows them with the capacity to engage on the international plane. The Treaty on European Union (TEU) codifies this legal personality in Article 47 which tersely provides that, 'The Union shall have legal personality.' This express confirmation of legal personality – hitherto considered as existing by implication – means that as a matter of general international law, the EU is an international person capable of taking on international obligations including by concluding international agreements within the scope of the specific competences expressly codified in its constituent instruments or implied therefrom.

Specifically, in order to enable the EU's external action[564] or participation on the international scene, the EU is endowed with the specific competence under Article 216 of the Treaty on the Functioning of the European Union (TFEU) to negotiate and conclude international agreements with third countries binding on the EU and its members if expressly empowered to do so by the TEU and TFEU or 'where the conclusion … is necessary in order to achieve … the objectives [of the EU] … or is likely to affect common rules or alter their scope'. What qualifies as 'necessary' to achieve the EU's objectives is unclear from the treaty. However, going by the Court of Justice's *Opinion 1/94 on Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property (WTO Agreements),*[565] it can be concluded that 'necessary' as used in TFEU suggests action without which the effective performance of an EU objective would be impossible to achieve, that is, the effective discharge of the EU objective in question and the external action to be performed by the EU are 'inextricably linked'. What matters, therefore, is whether the EU objective in question can only be achieved through the conclusion of the international agreement, and this is an objective assessment based on the facts and legal context of the situation.[566]

The General Court of CJEU had the occasion in *Kingdom of Spain v European Commission* to consider generally the ability of the EU to conclude agreements with Kosovo and Kosovo's ability to participate in EU initiatives involving third countries in light of its contested statehood, and particularly since some EU member states do not consider Kosovo an independent state. Spain argued that Kosovo was not a 'third country' within the meaning of the term as understood in EU law and could not therefore participate in EU initiatives involving

[564] As Koutrakos argues, 'external action' as used in the TEU 'describe[s] all policies carried out on the international scene, irrespective of their position in the supranationalism-intergovernmentalism spectrum'. Panos Koutrakos (n 503) 9.
[565] Opinion 1/94 [1994] ECR I-5267 (15 November 1994).
[566] Panos Koutrakos (n 503) 108–109.

third countries since such participation presupposed 'an organisation in the nature of a State' which Kosovo is not.[567] The Court disagreed, noting that TFEU's use of the terminology 'third countries' in its external relations provisions (Part Five) as opposed to 'third States' in other provisions was deliberate recognition that 'international society is not made up of "States" alone'[568] and that, 'the concept of "third country" has a broader scope which goes beyond sovereign States alone, with the result that Kosovo is capable of falling within it, without prejudice to the position of the European Union or its Member States as regards the status of Kosovo as an independent State'.[569] Consequently, the Court concluded that these provisions therefore empowered the EU to conclude international agreements 'with entities "other than States" …[including] territorial entities, covered by the flexible concept of "country", which have the capacity to conclude treaties under international law but which are not necessarily "States" for the purposes of international law',[570] and that the term 'third county' as used in TFEU provisions can and has been construed broadly to enable the EU to consider Kosovo as a 'third country' with which it can legally assume international legal obligations through the conclusion of international agreements.[571]

Nothing in general international law precludes Kosovo from concluding international agreements on account of its contested statehood, and neither does EU law, as discussed above. This is because neither international law nor EU law prescribes recognition (as a state) as a precondition for concluding international agreements. The question of recognition (as a state) as understood in general international law is as such not necessarily relevant to Kosovo's capacity to conclude international agreements with the EU.[572] The ability of Kosovo to conclude international agreements therefore depends on its internal law on the one hand, and on the law of the entity with which it seeks to conclude the agreement on the other. Therefore, Kosovo and the EU are legally capable of concluding international agreements between themselves as long as Kosovo's laws empower Kosovo to conclude such agreements and as long as EU law empowers the EU to conclude such agreements with Kosovo. On the one hand, and as established above, EU law empowers the EU to conclude international agreements with

[567] Case T-370/19 (23 September 2020) paras 21-22. An appeal is currently pending before the Court of Justice as C-632/20 P. *See also* Kushtrim Istrefi, 'The Luxembourg Court Rules on the Difference between States and Countries as International Actors' (27 November 2020) <https://www.ejiltalk.org/the-luxembourg-court-rules-on-the-difference-between-states-and-countries-as-international-law-actors/#:~:text=On%2023%20September%202020%2C%20the,dealing%20with%20treaties%20and%20subjects> accessed 10 May 2021; Celia Challet and Pierre Bachelier, 'Can Kosovo Be Considered a "Third Country" in the Meaning of EU Law? Case Note to Spain v. Commission' (2021) 28 Maastricht Journal of European and Comparative Law 399.
[568] Case T-370/19 (23 September 2020) para 29.
[569] Case T-370/19 (23 September 2020) para 36.
[570] Case T-370/19 (23 September 2020) para 30.
[571] Case T-370/19 (23 September 2020) paras 32 & 34. Apparent in the EU's approach to Kosovo is that the EU has pragmatically refrained from taking any collective position on recognition of Kosovo's statehood. Taking such a position would itself be difficult considering the diverging views of EU member states on the question. Instead, the EU treats Kosovo as a 'third country' capable of and for the purposes of concluding international agreements with the EU.
[572] In February 2021, the International Criminal Court also had the occasion to consider a similar question in respect of the State of Palestine, specifically its jurisdiction over the State of Palestine which, despite its contested statehood, acceded to the Rome Statute of the International Criminal Court. See *Situation in the State of Palestine,* Decision on the 'Prosecution Request Pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', International Criminal Court, Pre-Trial Chamber I, ICC-01/18-143 (5 February 2021) paras 89–113.

entities such as Kosovo. On the other hand, Kosovo law, specifically Articles 17–20, not only empowers Kosovo to enter into international agreements, but also to delegate some of its (specific) sovereign powers to international organisations if necessary for the performance of specific functions.

5.2.2 Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo

With specific reference to the EU's involvement in Kosovo and in particular in international criminal accountability, the provisions of the EU's governing instruments discussed above should be read together with Article 2(4) TFEU which provides for the EU's specific competence to 'define and implement a common foreign and security policy', Article 21(2) of the Treaty on European Union (TEU) which empowers the EU to engage in external action in specific areas including 'consolidat[ing] and support[ing] democracy, the rule of law, human rights and the principles of international law; [and] preserv[ing] peace, prevent[ing] conflicts and strengthen[ing] international security, in accordance with … the United Nations Charter', and Articles 28, 42 and 43 TEU which empower the Council of the EU to adopt binding decisions necessary for the EU's operational action within the common foreign, security and defence policy clusters if so required by an international situation. In so doing, this external action of the EU is (ideally) guided by the principles laid down in Article 21(1) TEU, and also recognised in Article 2 TEU as foundational values of the EU, that is: 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'.[573] This commitment also finds general expression at a policy level in the 2015 EU's Policy Framework on Support to Transitional Justice (EU Transitional Justice Policy) which provides that the EU's approach to transitional justice is guided by, among others, the need to end impunity for international crimes by bringing to justice, either nationally or internationally, perpetrators of these crimes.[574]

Of course, involvement in the rule of law in Kosovo and in the establishment and administration of the KSC and SPO as criminal accountability mechanisms are not express powers in the TEU or TFEU which do not in fact provide an exhaustive list of specific external competences. However, and following from the discussion in Chapter IV on the legal basis of the exercise of elements of sovereign authority by RIGOs including the doctrines of attributed/conferred powers and implied powers, this authority is a logical and practical expression of and is reasonably implied from the express authority granted in Article 21(2) of TEU, specifically in the fields of 'the rule of law, human rights and the principles of international law … peace … [and] international security'. The EU treaties do not in fact expressly bestow upon the EU external authority in many fields, but the EU nonetheless 'takes a leap of faith to find such a wide array of powers implied despite the absence of any specific

[573] Article 3(5) of TEU also binds the EU to 'uphold and promote [these] values' in its 'relations with the wider world'.
[574] EU's Policy Framework on Support to Transitional Justice, 13576/15 (16 November 2015), I, III(1)

grant'.[575] Since international relations is very dynamic, it would, in any case, be impossible to expressly list all possible specific instances in which the EU may externally engage. An indicative list as provided in Article 21 of TFEU suffices, and other specific competences can be implied therefrom and from other provisions of TEU and TFEU in as far as these can be logically traced to and derived from express provisions of the constituent instruments.[576] In other words, and as the CJEU opined decades ago in *Opinion 1/94 on Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property (WTO Agreements)*,[577] implied powers must be 'inextricably linked' to the EU's expressed objectives. This position has indeed found express codification in Article 5 TEU which now enshrines the 'principle of conferral' as the primary defining principle governing the limits of EU competence.

In exercise of the above competence, the EU's involvement in the rule of law generally (and international criminal accountability in particular) in Kosovo took shape with the adoption by the Council of the European Union of Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo (Joint Action 2008/124/CFSP),[578] being a decision taken as part of the EU's common foreign and security policy. However, the mere fact that the EU's legal framework empowers it to engage in external rule of law initiatives does not automatically mean that the EU has authority to intervene in a non-member 'state' by virtue of these powers. In adopting Joint Action 2008/124/CFSP, the EU therefore acted on what it considered to be the authority of UN Security Council Resolution 1244 (1999) which was adopted on 10 June 1999 under Chapter VII of the UN Charter to provide legal grounding for the interim administration of Kosovo.[579] Resolution 1244 had authorised international organisations to assist the UN Secretary-General in establishing an interim international civil administration in Kosovo to, inter alia, establish provisional democratic institutions of governance, maintain law and order and protect human rights.[580] Resolution 1244 specifically recognised the EU's ongoing efforts at the time to develop a comprehensive plan to promote stability, democracy and economic development in Kosovo.[581]

Joint Action 2008/124/CFSP established the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) whose general mandate as provided in Article 2 of Joint Action 2008/124/CFSP was to 'assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices'. With specific reference to accountability for international crimes, Article 3(d) of Joint Action 2008/124/CFSP tasked EULEX Kosovo with 'ensur[ing] that cases of war crimes, terrorism,

[575] Jan Klabbers, *An Introduction to International Organizations Law* (n 26) 65.
[576] *See* Chapter III section 3.3.3 on the discussion of implied powers of RIGOs.
[577] Opinion 1/94 [1994] ECR I-5267 (15 November 1994).
[578] 51 Official Journal of the European Union, L 42/92 (16 February 2008).
[579] UN Security Council Resolution 1244 (1999) (10 June 1999).
[580] UN Security Council Resolution 1244 (1999) (10 June 1999) paras 10-11.
[581] UN Security Council Resolution 1244 (1999) (10 June 1999) para 17.

organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities'.[582]

A few days after the EU adopted Joint Action 2008/124/CFSP, however, Kosovo declared independence through a promulgation on 17 February 2008. Notably, the ICJ in its Advisory Opinion in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* concluded that Kosovo's unilateral declaration of independence did not violate international law as there exists no general prohibition in international law against unilateral declarations of independence that are not effected through unlawful use of force or in violation of *jus cogens* norms, neither did Security Council Resolution 1244 (1999) or any other Security Council resolution preclude such declaration.[583] Because the EU adopted Joint Action 2008/124/CFSP based on what it considered as an authorisation emanating from UN Security Council Resolution 1244 (1999) to assist the UN Secretary-General in establishing an interim international civil administration in Kosovo, the independence of Kosovo would have presented a legal challenge to the continued validity of the EU's engagement. However, this appears to have been forestalled by the Declaration of Independence itself in which Kosovo expressly invited the EU's presence, stating that-[584]

> We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

The above invitation was reiterated the same day, 17 February 2008, by the President of Kosovo in a letter to the EU High Representative for Foreign Affairs and Security Policy, and further confirmed at the end of Kosovo's supervised transition to independence through an international agreement between Kosovo and the EU in the form of an exchange of letters between the President of Kosovo and the EU High Representative for Foreign Affairs and Security Policy dated 4 September 2012, which agreement was ratified by Kosovo's Parliament on 7 September 2012.[585] Consequently, the EU has since maintained a civil

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[582] The EU's commitment to assist Kosovo in strengthening and consolidating the rule of law and human rights and ensuring prosecution of international crimes is also reiterated in the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part. However, the Stabilisation and Association Agreement has no direct influence on the EU's relationship with the KSC and SPO which remain governed by the relevant international agreement and its implementing EU and Kosovo laws and the *lex specialis* discussed in subsequent sections. *See* Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, 59 Official Journal of the European Union, L 71/3 (16 March 2016), arts 1, 3,6 , 7, 83.

[583] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, p. 403 [81], [84], [114] & [118-122].

[584] Declaration of Independence of 17 February 2008, para 5 (partially reproduced in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, 22 July 2010, I.C.J. Reports 2010, p. 403 [75]).

[585] Law No. 04/L-148 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo (7 September 2012) (with the 4

presence in Kosovo under its Common Security and Defence Policy and has, through EULEX Kosovo, supplemented Kosovo's new judicial system by assuming some functions such as war crimes investigations and prosecutions from the United Nations Interim Administration Mission in Kosovo (UNMIK) in 2009.

5.2.3 Initial War Crimes Investigation by the Parliamentary Assembly of the Council of Europe

The specific origins of the KSC and SPO can be traced to action taken by the Council of Europe (CoE), a regional inter-governmental organisation different from and independent of the EU. In 2008, former Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) Carla Del Ponte published her memoirs in which she alleged that the Kosovo Liberation Army (KLA) had kidnapped hundreds of people during and immediately after the Kosovo war, inhumanely treated them and engaged in illicit trafficking of human organs allegedly harvested from some of these people.[586] Consequently in April 2008, seventeen members of the Parliamentary Assembly of the Council of Europe (CoE Assembly) led by Russian member Konstantin Kosachev tabled a motion before the CoE Assembly seeking a resolution by the CoE Assembly on the allegations.[587] The motion stated in part that, 'The Assembly believes that a thorough investigation of facts and consequences, provided by Del Ponte, should be carried out in order to find whether they are true and to re-establish justice for victims of crimes and to find those guilty of committing such crimes.'[588] Without being debated in the CoE Assembly, the motion was referred to the Assembly's Committee on Legal Affairs and Human Rights for consideration, and the Committee then tasked Swiss member Dick Marty as Rapporteur to draw up a report on the allegations.[589] Of course, the authority of CoE does not extend to non-member states. At the relevant time, the then-Federal Republic of Yugoslavia of which the territory that is now Kosovo was part, was not a member of the CoE. Presumably, therefore, the legal basis for the CoE Assembly's involvement was Albania's membership of the CoE at the time, having joined on 13 July 1995.[590] Many of the allegations made by Del Ponte were alleged to have occurred on the territory of Albania close to its Northern border with Kosovo, which territory was at the relevant time effectively controlled by the KLA.[591]

September 2014 letters in Annex which allude to the 17 September 2008 letter). *See also* Martina Spernbauer, *EU Peacebuilding in Kosovo and Afghanistan: Legality and Accountability* (Martinus Nijhoff Publishers 2014) 277.

[586] Parliamentary Assembly of the Council of Europe, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick Marty, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Doc. 12462 (07 January 2011, adopted by CoE Parliamentary Assembly on 25 January 2011) [hereinafter CoE Marty Report], para 1.

[587] Motion for a Resolution1 Tabled by Mr Konstantin Kosachev and other Members of the Assembly, Inhumane Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Doc. 11574 (15 April 2008).

[588] Motion for a Resolution1 Tabled by Mr Konstantin Kosachev and other Members of the Assembly, Inhumane Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Doc. 11574 (15 April 2008), para 3.

[589] CoE Marty Report, para 2.

[590] *See* Council of Europe, 'Member States' <https://www.coe.int/en/web/about-us/our-member-states> accessed 20 May 2021.

[591] CoE Marty Report, paras 5, 16–19 & 36–39.

On 12 December 2010, Marty submitted his report titled 'Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo' (CoE Marty Report)[592] to the Committee which subsequently tabled it before the CoE Assembly. The report implicated KLA leaders and commanders in war crimes including: ordering and overseeing 'assassinations, detentions, beatings and interrogations [of mostly ethnic Serb civilians) in various parts of Kosovo and … in the context of KLA-led operations on the territory of Albania, between 1998 and 2000';[593] running irregular and undeclared detention facilities in northern Albania where civilians (mostly ethnic Serbs, but also ethnic Kosovar Albanians and other ethnic groups suspected of being 'collaborators') kidnapped from Kosovo during and in the aftermath of the war were detained, interrogated, beaten, tortured, mistreated, sexually exploited, murdered, forcibly disappeared and – albeit from just a handful of these people – body organs forcibly extracted from some of them and trafficked;[594] and coordinating and covering up vengeful abuses after the war against rivals and persons (mostly ethnic Kosovar Albanians) suspected of collaborating or associating with Serb authorities during the war.[595] Notably, Marty was emphatic that while his mandate or 'aim was not … to conduct a criminal investigation … [he had] gathered evidence compelling enough to demand forcefully that the international bodies and the states concerned finally take every step to ensure that the truth is ascertained and the culprits clearly identified and called to account for their acts'.[596]

On 25 January 2011, the CoE Assembly endorsed the report by adopting Resolution 1782 (2011)[597] and attaching to it the report. Resolution 1782 (2011) 'invited' EU member states (and 'other contributing states') to clarify the investigative mandate of EULEX Kosovo as including jurisdiction over crimes linked to the Kosovo conflict and to provide resource and political support to EULEX Kosovo to enable it discharge its investigative mandate in this regard and ensure justice.[598] The Resolution 'invited' Kosovo 'to co-operate unreservedly with EULEX and/or any other international judicial body mandated to conduct follow-up investigations and in the framework of any other procedures intended to find out the truth about crimes linked to the conflict in Kosovo'. [599] The Resolution also 'invited' Serbia – which maintains a disputed claim over Kosovo as one of its autonomous provinces – to 'co-operate closely with EULEX, particularly by passing on any information which may help to clear up crimes committed during and after the conflict in Kosovo'.[600] The Resolution also 'invited' Albania to co-operate with EULEX Kosovo and Serbia in these investigations.[601]

[592] Parliamentary Assembly of the Council of Europe, Report of the Committee on Legal Affairs and Human Rights, Rapporteur: Mr Dick Marty, Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo, Doc. 12462 (07 January 2011, adopted by CoE Parliamentary Assembly on 25 January 2011).
[593] CoE Marty Report, para 72.
[594] CoE Marty Report, paras 74–75 & 93–174.
[595] CoE Marty Report, paras 86–90.
[596] CoE Marty Report, paras 21 & 175–176.
[597] Parliamentary Assembly of the Council of Europe Resolution 1782 (2011), 'Investigation of Allegations of Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo' 25 January 2011.
[598] ibid, para 19.1
[599] ibid, para 19.6.
[600] ibid, para 19.4.2.
[601] ibid, para 19.5.1.

On the one hand, the CoE Assembly's 'invitation' to the EU to clarify EULEX Kosovo's mandate and to support it in its investigations, and its 'invitation' to the Kosovo administration and to Serbia and Albania to cooperate with EULEX Kosovo suggest that the CoE was aware of the limits of its own political and legal reach. While the EU has a significant presence in Kosovo through EULEX Kosovo, CoE does not have such presence. However, all 27 member states of the EU are also members of CoE. Therefore, recommending cooperation with EULEX Kosovo appears to have been a pragmatic move.

On the other hand, the Resolution is puzzling in its failure to recommend any investigations by Kosovo and/or Serbia. The Resolution did not urge Serbia and the Kosovo administration to conduct follow-up investigations of their own. Rather, the Resolution – ostensibly assuming EULEX Kosovo's competence – only specifically 'invited' Serbia and the Kosovo administration to co-operate with EULEX Kosovo or any international body with competence to conduct such investigations. Considering that Serbia is a sovereign state which claims sovereignty over Kosovo and considering that Kosovo also considers itself to be an independent state, one would have expected the CoE Assembly to recognise Serbia's and/or Kosovo's primary responsibility to ensure accountability for international crimes committed on their territory and/or by their nationals, including by conducting independent investigations. Such recognition is reflected in the CoE Assembly's recommendation to Albania which it not only 'invited' to co-operate with EULEX Kosovo and Serbia in their efforts to unearth the truth about the alleged crimes linked to the Kosovo war, but also expressly invited to independently investigate the crimes alleged to have been committed by the KLA on Albanian territory during and in the aftermath of the Kosovo war.[602] As mentioned above, the CoE Marty Report noted that many of the reported crimes were allegedly committed by the KLA on Albanian territory,[603] hence this specific recommendation to Albania.

5.2.4 Investigation by EULEX Kosovo's Special Investigative Task Force (SITF) of the Special Prosecution Office of the Republic of Kosovo

Following the release of the CoE Marty Report and the adoption by the CoE Assembly of Resolution 1872 (2011) which, *inter alia*, urged EULEX Kosovo to 'persevere with its investigative work' of criminal activities related to the Kosovo conflict,[604] and in exercise of the mandate defined by Joint Action 2008/124/CFSP,[605] the EU through EULEX Kosovo established the Special Investigative Task Force (SITF) under the auspices of the Special Prosecution Office of the Republic of Kosovo, but 'as an autonomous investigative unit, situated outside Kosovo, in Brussels'.[606] SITF was tasked with 'conduct[ing] a full-scale criminal investigation into the allegations contained in the report of Council of Europe

[602] ibid, para 19.5.
[603] CoE Marty Report, paras 5, 16–19 & 36–39.
[604] Parliamentary Assembly of the Council of Europe Resolution 1782 (2011), 'Investigation of Allegations of Inhuman Treatment of People and Illicit Trafficking in Human Organs in Kosovo' 25 January 2011, para 19.2.
[605] 51 Official Journal of the European Union, L 42/92 (16 February 2008).
[606] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 13.

Rapporteur Dick Marty'.[607] SITF received logistical, financial and political support from EULEX and the USA, but it was otherwise independent of EULEX.[608]

The SITF investigation, whose summary of findings was highlighted in July 2014,[609] confirmed most of the findings of the CoE Marty Report, in particular: persecution of Serb, Roma and other minority ethnic groups as well as Kosovo Albanians labelled collaborators or KLA opponents; abductions; illegal detentions; extrajudicial killings; enforced disappearance; sexual violence; other inhumane treatment; destruction or desecration of religious sites; and ethnic cleansing.[610] In respect to the allegation of organ harvesting and trafficking, which spurred the CoE investigation, the SITF investigation arrived at a similar conclusion to the CoE Marty Report, that is, that this practice occurred 'on a very limited scale and that a small number of individuals were killed for [this] purpose'.[611] Upon the conclusion of the international agreement between Kosovo and the EU, its domestication through legislation and the establishment of the KSC and SPO (as discussed in the subsequent section), the functions previously performed by SITF were taken over by the SPO which was then charged with investigating and prosecuting crimes before the KSC.[612]

5.3 Establishment of the Kosovo Specialist Chambers and the Kosovo Specialist Prosecutor's Office

The idea to establish the KSC and the SPO did not originate from Kosovo. Rather, it was mooted by the EU and the United States of America (USA) who in April 2014 proposed to Kosovo the establishment of 'a special court within the Kosovo court system, with international judges and prosecutors, with its seat in Kosovo and sensitive proceedings, including witness hearings, happening outside Kosovo'[613] to adjudicate over serious crimes alleged by the CoE

[607] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 1.
[608] Conversation with former high-ranking official of the KSC/SPO, Nuremberg International Conference, Nuremberg 14 May 2022 (notes on file with author).
[609] As of the time of writing, the report of the SITF investigation had not yet been made public. However, on 29 July 2014, the Chief Prosecutor of SITF issued a public statement summarising SITF's preliminary findings and indicating that the specifics of the findings would remain confidential until the KSC is established and indictments filed. *See* United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 15. However, even after the establishment of the KSC and SPO and the filing of indictments, the specifics of these findings were not made public, understandably to guarantee the integrity of the judicial process. As explained by the SPO in its response to the author's enquiry, this information and material 'forms part of the SPO's body of evidence [and] is made available to defence counsel via disclosure, but is not public' save for redacted indictments which are readily available on the KSC/SPO website. E-mail from ~~C Bennett~~ (Specialist Prosecutor's Office) on 21 January 2022 (on file with author).
[610] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), paras 4–9.
[611] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 11.
[612] Law No. 05/L-053, art 24(2).
[613] Samuel Žbogar, Head of the EU Office in Kosovo and EU Special Representative, 'The Truth Beyond any Doubt' 10 April 2014

Marty Report to have been committed during and immediately after the Kosovo war. In making the proposal, the EU Special Representative cited the complexity, sensitivity, multi-jurisdictional and multi-national nature of the crimes alleged in the CoE Marty Report as justification for proposing a special mechanism as opposed to Kosovo's regular courts.[614] However, because the EU and the USA did not have legal authority to establish such a judicial mechanism by themselves, the legal process had to be initiated by Kosovo. This section traces and discusses the interaction between the EU and Kosovo which resulted in the establishment of the KSC and SPO, including the legal process and legal issues arising in this process.

5.3.1 International Agreement between Kosovo and the European Union on the Establishment of the KSC and SPO

Following the initial investigations by the CoE and SITF discussed above, the relevant authorities of the Republic of Kosovo, namely the President, invited the EU to assist Kosovo in establishing and operating a criminal accountability mechanism to ensure accountability for the alleged international crimes detailed in the CoE Marty report and SITF's investigations. As noted above, this invitation was prompted by the proposal made by the EU and USA for the establishment of a special court.[615] Further, as argued above, the EU and USA had no legal authority to establish such judicial mechanism by themselves. The only legal possibility available, in the absence of UN Security Council action, was for Kosovo itself to initiate the process. This engagement was initiated through an exchange of letters, a form of international engagement recognised in international law as constituting a treaty.[616]

5.3.1.1 Kosovo's Invitation to the EU to Establish Criminal Accountability Mechanism: Kosovo President's Letter of 14 April 2014

By a letter to the EU High Representative for Foreign Affairs and Security Policy dated 14 April 2014, Kosovo's then-President Atifete Jahjaga invited the EU to, *inter alia*, 'assist Kosovo in … operating the judicial chambers and the specialist prosecutor's office through

<http://eeas.europa.eu/archives/delegations/kosovo/documents/statements/140410_the_truth_beyond_any_doubt_en.doc> accessed11 March 2021, para 7. *See also* Maria Stefania Cataleta and Chiara Loiero, *The Kosovo Specialist Chambers: The Last Resort for Justice in Kosovo?* (LAP LAMBERT Academic Publishing 2021) 36–44.

[614] Samuel Žbogar, Head of the EU Office in Kosovo and EU Special Representative, 'The Truth Beyond any Doubt' 10 April 2014 <http://eeas.europa.eu/archives/delegations/kosovo/documents/statements/140410_the_truth_beyond_any_doubt_en.doc> accessed 11 March 2021, para 8; Iva Vukušíc, 'A New Court in The Hague' 2017 <http://www.judicialmonitor.org/spring2017/haguehappenings.html> accessed 11 March 2021.

[615] Samuel Žbogar, Head of the EU Office in Kosovo and EU Special Representative, 'The Truth Beyond any Doubt' 10 April 2014 <http://eeas.europa.eu/archives/delegations/kosovo/documents/statements/140410_the_truth_beyond_any_doubt_en.doc> accessed 11 March 2021.

[616] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art 2(1)(a); See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain),* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (2017), Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 3.

EULEX KOSOVO'.[617] The letter proposed a basic structure for the envisioned mechanism:[618] the dedicated mechanism would be part of Kosovo's domestic judicial system; it would administer justice for criminal proceedings arising from SITF investigations; it would be seated in Kosovo but could operate from a third state upon agreement between Kosovo and such state; it would be governed by a specific statute and rules of procedure and evidence; it would be staffed and operated exclusively by EULEX international staff; it would operate until such time as the Council of the EU notifies Kosovo that the mechanism's mandate has been concluded; and all legal actions connected with the mechanism's establishment would be subject to Kosovo law and subject to review by the Constitutional Court of Kosovo which would perform a judicial supervisory role over the mechanism. The establishment of specialised judicial mechanisms as proposed by the President in the above letter is indeed envisioned in Article 103(7) of the Constitution of Kosovo which provides that, 'Specialized courts may be established by law when necessary, but no extraordinary court may ever be created.'

5.3.1.2 Partial Acceptance by the EU to Assist in Establishing Criminal Accountability Mechanism: EU High Representative's Letter of 17 April 2014

Three days later and by letter dated 17 April 2014, the EU High Representative responded to the President's letter of 14 April 2014. The UE High Representative 'accepted the invitation … to continue to implement the mandate of EULEX'[619] and indicated that 'the work of EULEX KOSOVO's Special Investigative Task Force ("SITF") and any judicial proceedings deriving from it shall continue until such time as the Council of the European Union notifies Kosovo that the investigation and these proceedings have been concluded'.[620] Recalling EULEX Kosovo's mandate under Articles 2 and 3(d) of Joint Action 2008/124/CFSP, EULEX Kosovo did indeed have that authority, as requested by the President, to 'assist Kosovo in … operating the judicial chambers and the specialist prosecutor's office'[621] for purposes of criminal proceedings arising from the SITF investigations.

However, it was unclear at this point whether EULEX Kosovo had the mandate to assist in such an initiative if it were based in a third state, as the President suggested in the 14 April 2014 letter.[622] The High Representative's letter in response therefore made no specific reference to the President's invitation to the EU to assist in the establishment and operation of a judicial mechanism to be based outside Kosovo. The partial and non-committal nature of the response by the EU High Representative appears to have been deliberate considering the decision-making structure within the EU. The EU High Representative does not have the authority by themselves to initiate negotiations and/or bind the EU to external commitments with Kosovo, a third country. As provided in Articles 18, 26 and 30 TEU, the general mandate

[617] Kosovo President's Letter of 14 April 2014 <https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf> accessed 11 March 2021) para 15.
[618] Kosovo President's Letter of 14 April 2014, paras 12-16.
[619] EU High Representative's Letter of 17 April 2014 <https://www.scp-ks.org/sites/default/files/public/04-l-274_a.pdf> accessed. 11 March 2021) para 1.
[620] EU High Representative's Letter of 17 April 2014, para 3.
[621] EU High Representative's Letter of 17 April 2014, para 15.
[622] Kosovo President's Letter of 14 April 2014, para 12-15.

of the High Representative of the Union for Foreign Affairs and Security Policy includes making proposals (to the Council of the EU) for the development of the EU's common foreign and security policy and common defence policy, implementing these policies under the direction of the Council of the EU, coordinating and ensuring consistency of the EU's external action and general responsibility within the European Commission for external relations. In the context of EULEX Kosovo, the High Representative's authority is limited to the mandate as defined in Joint Action 2008/124/CFSP and any amendments thereto, that is, exercising overall authority for EULEX Kosovo under the responsibility, political control and strategic direction of the Council of the EU.[623]

Any additional commitments beyond what Joint Action 2008/124/CFSP authorised at the time would have constituted additional international obligations for the EU. In accordance with the procedure under Article 218 TFEU, the authority to bind the EU to international obligations with third countries in the area of common foreign and security policy rests with the Council of the EU. Specifically, as required by Article 218(6) TFEU, the Council concludes such agreement by adopting a decision. Specific commitment to assist in a judicial mechanism located outside Kosovo would therefore have necessitated an amendment of the objectives of EULEX Kosovo, which authority rested with the Council of the EU as provided in Article 218 TFEU and as confirmed by Article 12(2) of Joint Action 2008/124/CFSP which also tasks the High Representative with making recommendations in this regard to the Council. This clarification is important particularly when the legal consequences of concluding an international agreement in a manner that breaches internal EU rules are considered. As Koutrakos has argued, while an EU act concluding an international agreement would be annulled by the CJEU if it is concluded in breach of EU internal procedural rules, the international agreement remains binding upon the EU under international law since the EU cannot invoke this breach of an internal rule to invalidate the international agreement.[624] Consequently, the EU would find itself in the undesirable position where it must either honour or renegotiate international legal obligations that is has incurred pursuant to a process that is internally unprocedural, or terminate the international agreement altogether[625] and in the process incur liability for such termination. The High Representative therefore only confirmed the general commitments that the EU had already bound itself to vide Joint Action 2008/CFSP of 4 February 2008 while refraining from making any commitment on behalf of the EU to assist in the establishment and operation of a judicial mechanism located outside Kosovo.

[623] Joint Action 2008/124/CFSP, arts 7(2), 11 & 12; Council Joint Action 2008/123/CFSP of 4 February 2008 Appointing a European Union Special Representative in Kosovo, 51 Official Journal of the European Union, L 42/88 (16 February 2008), art 4(1).
[624] Panos Koutrakos (n 503) 159–160. *See also* Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 21 March 1986, art 27(2).
[625] Panos Koutrakos (n 503) 159–160.

5.3.1.3 Full Acceptance of Invitation to Assist in the Establishment of the KSC and SPO Located in a Third State: Council Decision 2014/685/CFSP of 29 September 2014 Extending EULEX Mandate

With the High Representative's response of 17 April 2014 to the invitation by Kosovo's President in her 14 April 2014 letter, the international agreement that emerged from this exchange of letters was therefore specific and limited. It was specific to the obligation of the EU to assist Kosovo in establishing and operating a judicial mechanism within Kosovo's judicial system to ensure accountability for crimes subject of the CoE Marty Report and SITF investigation in as far as that mechanism operated from Kosovo. In order for the specific invitation to assist Kosovo in establishing and operating a special judicial mechanism to be located in a third country to be accepted by the EU and to give rise to international legal obligations in this regard, it required acceptance by the Council of the EU which, as discussed above, is the competent EU organ in accordance with the substantive and procedural law of the EU.

The Council of the EU's Political and Security Committee examined the President's letter and recommended that, 'EULEX KOSOVO should also provide support to relocated criminal judicial proceedings within a Member State, subject to the conclusion of all necessary legal arrangements to cover all stages of these proceedings.'[626] Following the Committee's conclusion, the Council of the EU adopted Council Decision 2014/685/CFSP on 29 September 2014.[627] The Decision amended EULEX's constituent instrument, the Joint Action 2008/124/CFSP of 4 February 2008, by inserting Article 3a which provides, *inter alia,* that, 'EULEX KOSOVO shall support re-located judicial proceedings within a Member State, in order to prosecute and adjudicate criminal charges arising from the investigation into the allegations raised in a report entitled "Inhuman treatment of people and illicit trafficking in human organs in Kosovo" released on 12 December 2010 by the Special Rapporteur for the Committee on Legal Affairs and Human Rights of the Council of Europe.'[628] Notably, however, European Commission bureaucrats were initially reluctant to support EU involvement in the establishment of a criminal accountability mechanism, raising concerns that such involvement was not legally supported by EU legal instruments, as well as concerns about public perception in Kosovo and donor fatigue.[629] However, as the discussion in Section 5.2 has revealed, the EU was indeed legally competent to engage with Kosovo in the manner proposed. In any case, by adopting Council Decision 2014/685/CFSP on 29 September 2014, the Council of the EU indeed confirmed this competence, and the European Commission had to implement the decision in line with its functions as delineated in the EU's constituent

[626] Council Decision 2014/685/CFSP of 29 September 2014 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 57 Official Journal of the European Union, L 284/51 (30 September 2014), preambular para 6.
[627] Council Decision 2014/685/CFSP of 29 September 2014 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 57 Official Journal of the European Union, L 284/51 (30 September 2014).
[628] Council Decision 2014/685/CFSP, art 1(1).
[629] Conversation with former high-ranking official of the KSC/SPO, Nuremberg International Conference, Nuremberg 14 May 2022 (notes on file with author).

instruments. Thus, with the partial acceptance through the EU High Representative's letter of 17 April 2014 and with Council Decision 2014/685/CFSP on 29 September 2014, the EU accepted the entirety of Kosovo's invitation to assist in the establishment and operation of the KSC and SPO including if located outside Kosovo.

5.3.2 Ratification and Domestication of the International Agreement on the Establishment of the KSC and SPO

After the exchange of letters between the President of Kosovo and the EU High Representative in April 2014, Kosovo embarked on the legislative process of domesticating what it considered to be international legal obligations arising from the exchange of letters. This is a process demanded by Articles 18(1) & 65(4) of the Constitution of Kosovo. This domestication was undertaken through a constitutional amendment and legislation.

5.3.2.1 Law No. 04/L-274 on Ratification of the International Agreement between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo

Enacted on 23 April 2014, the overall objective of Law No. 04/L-274 as declared in its preamble was to enhance the capacity of Kosovo's institutions to enable them to better cooperate with the EU and EULEX Kosovo with the overall aim of advancing the rule of law in Kosovo. Specifically, Law No. 04/L-274 'ratifie[d] the international agreement achieved through the exchange of instruments between the Republic of Kosovo and the European Union, on the European Union Rule of Law Mission in Kosovo'.

As argued above, and in specific reference to what later became known as the KSC and SPO, the exchange of letters constituted an international agreement whose obligations were limited to the EU assisting Kosovo in the establishment and operation of a judicial mechanism to ensure accountability for crimes subject of the CoE Marty Report and SITF investigation in as far as that mechanism was located within the territory of Kosovo. Even though the President had proposed support in establishing a mechanism to be located outside Kosovo, this specific obligation had not at this point been accepted because, to recall the argument made earlier, the EU High Representative only had the authority to bind the EU to commitments already made under Joint Action 2008/124/CFSP. The specific obligation to assist in the establishment and operation of a mechanism located outside Kosovo only became part of the international agreement between Kosovo and the EU when the Council of the EU adopted Council Decision 2014/685/CFSP on 29 September 2014 amending EULEX Kosovo's mandate under Joint Action 2008/124/CFSP to include 'support[ing] re-located judicial proceedings within a Member State [of the EU], in order to prosecute and adjudicate criminal charges arising from the investigation into the allegations raised in [the CoE Marty Report]'. [630]

Therefore, Law No. 04/L-274, enacted before Council Decision 2014/685/CFSP on 29 September 2014, must necessarily be interpreted as only domesticating the international

[630] Council Decision 2014/685/CFSP, art 1(1).

agreement between Kosovo and the EU to establish and operate a special judicial mechanism within Kosovo's judicial system to ensure accountability for international crimes subject of the SITF investigation. The additional obligation to operate such mechanism if located outside Kosovo arose on 29 September 2014 when the Council of the EU adopted Council Decision 2014/685/CFSP accepting this specific invitation, five months after the enactment of Law No. 04/L-274.

5.3.2.2 Constitutional Amendment No. 24 of 03 August 2015

On 3 August 2015, the Assembly passed Constitutional Amendment No. 24,[631] amending the Constitution of Kosovo by inserting a new provision, Article 162 of the Constitution. Notably, an earlier first attempt in June 2015 to pass this amendment failed to garner enough support among parliamentarians.[632] The import of this amendment was to empower the Republic of Kosovo with the constitutional authority to establish the KSC and SPO in the form envisioned in the international agreement and to provide general provisions for regulating these new judicial organs. Specifically, the new provision, Article 162(1), provides that, 'To comply with its international obligations in relation to the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011, the Republic of Kosovo may establish Specialist Chambers and a Specialist Prosecutor's Office within the justice system of Kosovo. The organization, functioning and jurisdiction of the Specialist Chambers and Specialist Prosecutor's Office shall be regulated by this Article and by a specific law.'[633]

The compatibility of Amendment 24 (in its draft form) with the Constitution was confirmed by the Constitutional Court of the Republic of Kosovo on 15 April 2015[634] prior to its enactment into law. This confirmation is required by Articles 113(9) and 144(3) of the Constitution of Kosovo which mandates the President of the Assembly to seek confirmation by the Constitutional Court that a proposed constitutional amendment is compatible with constitutionally-guaranteed rights and freedoms before such amendment can be passed by the Assembly. Some have, however, faulted the Constitutional Court's decision. Korenica, Zhubi and Doli have argued that the Court failed to resolve the important constitutional question as to whether, by purporting to supersede any other provisions of the Constitution such as those guaranteeing unity of the judicial system, the amendment had 'establishe[d] an autonomous source of authority that … supersedes other constitutional norms and … installs a parallel self-contained regime within the Constitution whose authority is independent of the rest of the Constitution'.[635] In so doing, they argue, Amendment No. 24 permitted the establishment of a

[631] Amendment to the Constitution of the Republic of Kosovo, Amendment No. 24, Decision of the Assembly of the Republic of Kosovo No. 05-D-139 (adopted 3 August 2015).
[632] Avdylkader Mucaj, 'The Kosovo Specialist Chambers and Specialist Prosecutor's Office Paradox' (2021) 21 International Criminal Law Review 367, 373–375.
[633] Constitution of the Republic of Kosovo 2008 (as amended by Amendment No. 24 of 3 August 2015), art 162(1).
[634] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015.
[635] Fisnik Korenica, Argjend Zhubi and Dren Doli, 'The EU-Engineered Hybrid and International Specialist Court in Kosovo: How "Special" Is It?' (2016) 12 European Constitutional Law Review 474, 482. The relevant part, the opening to Article 162 (Amendment No. 24) provides that, 'Notwithstanding any provision in this Constitution:'

court with 'extra-constitutional' elements, a position that is difficult to reconcile with the unity of the judicial system.

Indeed, a keen reading of the decision confirms that the Constitutional Court restricted itself to a formalistic and cursory 'balancing' of the provisions of Amendment No. 24 as against the chapters of the Constitution guaranteeing rights and fundamental freedoms. That said, however, it appears from a reading of the constitutional provisions granting the Constitutional Court jurisdiction to assess and confirm constitutional compatibility of proposed constitutional amendments prior to their adoption that the Constitutional Court does not have jurisdiction to determine the constitutional question above at this stage. Articles 113(9) and 144(3) specifically restrict the assessment by the Constitutional Court to 'confirm[ing] that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution'.

Predictably, therefore, this and other constitutional questions were raised again before the Constitutional Court after the Assembly enacted Amendment No. 24. In September 2015, a group of opposition parliamentarians challenged the adoption of the amendment on both procedural and substantive grounds. They argued, *inter alia*, that by establishing a court without any deference to Kosovo's constitutional and judicial system, Amendment No. 24 was contrary to Kosovo's constitutional order and inconsistent with Kosovo's judicial system and structure.[636] However, the Constitutional Court declined to examine the substance of the application, holding that it only had the competence to review the substance of proposed constitutional amendments – a review that it had previously affirmatively done – and not to conduct such review once the amendment has been enacted by the Assembly.[637] As mentioned above, however, the review the Court refers to here was of a very limited nature, that is, limited to confirming that the proposed amendment did not violate constitutionally-guaranteed rights and fundamental freedoms. The challenge raised by the parliamentarians after the enactment of Amendment No. 24, however, challenged the substance of the amendment more broadly.

Article 113(5) of the Constitution of Kosovo pursuant to which the constitutional challenge was launched by the parliamentarians empowers parliamentarians 'to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed'. This provision, unlike Articles 113(9) and 144(3) of the Constitution of Kosovo which govern assessment by the Court prior to adoption of a proposed amendment, does not restrict the Court's role to a confirmation of compatibility with constitutional rights and freedoms. Instead, it broadly empowers the Court to resolve any questions of constitutionality of the adopted law's or decision's substance or the procedure followed when enacting it.

[636] Case No. KO107/15, Ref, No. RK 845/15, Constitutional Court of the Republic of Kosovo, Judgment, 21 September 2015, paras 32-44.
[637] Case No. KO107/15, Ref, No. RK 845/15, Constitutional Court of the Republic of Kosovo, Judgment, 21 September 2015, paras 67, 85, 88 & 90.

The legal challenge against Amendment No. 24 required not a mere review, but a constitutional interpretation of the impugned provisions of Amendment No. 24 *vis-à-vis* other provisions of the Constitution, particularly since the applicants argued that they were fundamentally inconsistent with the constitutional order. As 'the final authority for the interpretation of the Constitution',[638] the Constitutional Court not only had the jurisdiction but also the responsibility to examine the application on its merits and resolve the constitutional questions raised, particularly on 'how far a special court may interfere in the unity of the justice system and the constitutional order of Kosovo'.[639] By divesting itself of competence to resolve this dispute at this early stage, the Constitutional Court simply kicked the can down the road.

5.3.2.3 Law No. 05/L-053 of 03 August 2015

Simultaneously on the same day that the Assembly adopted Constitutional Amendment No. 24, the Assembly enacted Law No. 05/L-053, the 'specific law' to regulate the organisation, functioning and jurisdiction of the KSC and SPO as referred to in Article 162(1) of the Constitution of Kosovo (inserted by Amendment No. 24). Some commentators have claimed that Constitutional Amendment No. 24 and Law No. 05/L-053 were in fact drafted and sponsored by the EU and not by the Kosovo administration, and that Kosovo stakeholders were only involved in reviewing the EU drafts, and even then, their involvement was very modest[640] as they allegedly could not change or amend the final versions handed to them by the EU.[641] If this is indeed the case, it would on the one hand be evidence of the near-absolute control that the EU has maintained over the establishment and administration of the KSC and SPO (discussed further in section 5.5), presenting these mechanisms to Kosovo as a *fait accompli* and Kosovo serving as a mere rubberstamp of external actions in order to give them a veneer of legal legitimacy. On the other hand, a generous interpretation could be that drafting (or assisting in the drafting of) Constitutional Amendment No. 24 and Law No. 05/L-053 and financially sponsoring their adoption falls within EULEX's broad mandate under Joint Action 2008/124/CFSP (as amended in 2014 by Council Decision 2014/685/CFSP) to support and assist Kosovo with the investigation, prosecution and adjudication of serious crimes reported in the CoE Marty Report, including through judicial mechanisms relocated to a third country within the EU.[642] Therefore, such technical and financial assistance to the Kosovo administration in drafting Constitutional Amendment No. 24 and Law 05/L-053 and presenting them to the Kosovo Assembly would fall within legally permissible assistance and would not cast a shadow on the legal legitimacy of the KSC and SPO.

[638] Constitution of the Republic of Kosovo 2008, art 112(1).
[639] Fisnik Korenica, Argjend Zhubi and Dren Doli (n 635) 482.
[640] Fisnik Korenica, Argjend Zhubi and Dren Doli (n 635) 478–479.
[641] Avdylkader Mucaj (n 632) 375–376.
[642] Council of the EU of Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo (Joint Action 2008/124/CFSP), 51 Official Journal of the European Union, L 42/92 (16 February 2008), art 3(d); Council Decision 2014/685/CFSP of 29 September 2014 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 57 Official Journal of the European Union, L 284/51 (30 September 2014), art 1(1).

Law No. 04/L-274, Constitutional Amendment No. 24 and Law 05/L-053 together domesticated the entirety of the international agreement between the EU and Kosovo and the obligations flowing therefrom, that is, the establishment of the KSC and SPO to operate from within Kosovo or from a third country. Together, these laws regulate the organisation, jurisdiction and functioning of the KSC and SPO. Having discussed the legal basis for the EU's involvement in the establishment and operation of the KSC and SPO, the subsequent sections will examine the extent and implications of the authority conferred by Kosovo on the EU and the balance of authority between Kosovo and the EU in respect of the KSC and SPO.

5.4 The Kosovo Specialist Chambers

5.4.1 Applicable Law

The KSC functions in accordance with both domestic and international law. As provided in Articles 3(2)-(4) and 12 of Law 05/L-053, the KSC exercises its mandate in accordance with an exclusive list of the laws of Kosovo, being the Constitution of Kosovo, Law No. 05/L-053 and 'other provisions of Kosovo law as expressly incorporated and applied by [Law No. 05/L-053]'. As Okowa has aptly noted when discussing the Special Court for Sierra Leone, the legitimacy of such criminal accountability mechanisms is enhanced if they are 'rooted in international ideas of justice but also in [concerned state's] legal traditions'.[643]

The KSC also exercises its mandate in accordance with customary international law and international human rights law instruments including the European Convention on Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights in as far as they are relevant to criminal justice. Pursuant to Articles 19 and 22 of the Constitution, international law, including international instruments and customary international law, are directly applicable – unless application requires promulgation of specific law – and supersede domestic law. Article 3(3) of Law 05/L-053 empowers the KSC to have recourse to 'sources of international law, including subsidiary sources such as the jurisprudence from the international *ad hoc* tribunals, the International Criminal Court and other criminal courts' in discerning what constitutes customary international law applicable to its adjudication of crimes.

Notably, despite the fact that Kosovo is not a party to these international human rights instruments – European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, International Covenant on Civil and Political Rights and its Protocols, Council of Europe Framework Convention for the Protection of National Minorities, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or

[643] Phoebe Okowa, 'Interpreting Constitutive Instruments of International Criminal Tribunals: Reflections on the Special Court for Sierra Leone' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers 2010) 337.

Punishment – Article 22 of the Constitution adopts the rights and fundamental freedoms guaranteed therein as part its constitutional framework and as superior and directly applicable in Kosovo. Consequently, and as confirmed by Article 3(2) of Law 05/L-053, the KSC is bound by these international standards.

Also of notable interest is the express mention of customary international law as a source of law for the KSC.[644] While at first glance this would appear to be uncontroversial, the incorporation of customary international law in Law 05/L-053 as a source of law applicable before and by the KSC has been vigorously challenged by accused persons.[645] Hashim Thaçi argued, *inter alia*, that the international law sources recognised as applicable before and by the KSC are limited to those expressly codified in Article 19(2) of the Constitution of Kosovo, which he interpreted as being international treaties and *jus cogens* norms, and not as including customary international law. The relevant Article 19(2) provides that, 'Ratified international agreements and legally binding norms of international law have superiority over the laws of the Republic of Kosovo.' Kadri Veseli similarly argued that customary international law was not envisioned under the Constitution as directly applicable before and by the KSC and as such the Constitution should prevail over Article 12 of Law 05/L-053 which he considered unconstitutional. Rexhep Selimi also joined in this argument, submitting that to the extent that Article 3(2)(d) of Law 05/L-053 presumed direct applicability of customary international law and its superiority, it was in conflict with Article 19(2) of the Constitution.

In a few terse sentences, the Appeals Panel agreed with the Pre-Trial Judge's conclusion and dismissed these arguments, holding that '[customary international law] is binding on all states …[c]onsequently, the Court of Appeals Panel finds no contradiction between the language of [Law 05/L-053], and that of the Constitution of Kosovo, which in Article 19(2) uses the term "legally binding norms of international law"',[646] and as such, customary international law was applicable before and by the KSC.[647] This position taken by the KSC is consistent with that adopted by earlier international criminal accountability mechanisms which have previously identified applicable norms that have attained customary international law

[644] Law 05/L-053, art 3(2)(d) and 12.
[645] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021; See also *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021.
[646] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021, paras 23–24.
[647] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions, paras 22–29; See also *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021, paras 88–106.

status, clarified their content and developed a relatively solid body of jurisprudence in this regard.[648]

5.4.2 Jurisdiction of the Kosovo Specialist Chambers

5.4.2.1 Material Jurisdiction

The general mandate of the KSC is to ensure criminal accountability for 'grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 … and which have been the subject of criminal investigation by the [SITF]'.[649] Specifically, Articles 6, 13 and 14 of Law No. 05/L-053 provide the KSC's material jurisdiction as covering crimes against humanity, a detailed catalogue of war crimes and specific crimes under Kosovo law in as far as these relate to administration of justice and proceedings of the KSC. It is noteworthy that the material jurisdiction of the KSC as reflected in its governing law has largely focused on those international crimes (crimes against humanity and war crimes) that the CoE Marty Report and the SITF investigation found to have been committed in a systematic and widespread manner.[650] It has, therefore, largely excluded or at least not expressly included the main allegation made by Del Ponte and which spurred the CoE investigation, that is, organ harvesting and trafficking. This is understandable since the CoE Marty Report found that this particular crime occurred on a limited scale with only 'a handful of people … [being] murdered immediately before having their kidneys removed'[651] while the SITF investigation, observing that organ harvesting and trafficking was not widespread and occurred 'on a very limited scale and that a small number of individuals were killed for [this] purpose',[652] indicated that as of 29 July 2014, it had not yet obtained enough evidence to sustain an indictment on this specific allegation.[653]

However, the fact that Law No. 05/L-053 has 'expanded' the catalogue of crimes beyond organ trafficking which spurred the CoE investigation has been the basis of a judicial challenge by accused persons. Hashim Thaçi and Jakup Krasniqi argued that since the KSC is a result of Kosovo's endeavour to implement the CoE Marty Report, its mandate is therefore appropriately limited to specific crimes identified in this report and investigated by SITF, which they considered as being organ trafficking and inhumane treatment in detention facilities in Albania.[654] A Panel of the Court of Appeals Chamber of the KSC, however, dismissed these

[648] Amit Kumar, 'Custom as a Source Under Article 21 of the Rome Statute' [2021] Asian Journal of International Law 1, 2–5.
[649] Law 05/L-053, art 1(2); *See also* Law 05/L-053, art 6.
[650] Law No. 05/L053 of 3 August 2015, arts 6–15.
[651] CoE Marty Report, paras 156 & 159.
[652] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 11.
[653] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 10.
[654] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021; *The*

arguments and agreed with the Pre-Trial Judge, holding that the KSC's jurisdiction was not limited to the crimes on which the CoE Marty Report focused (organ trafficking and inhumane treatment in detention centres in Albania), but rather that the terms 'in relation to' and 'relate to' as used in the Constitution and in Law 05/L-053 respectively should be interpreted as meaning that the legislature intended the KSC to also have jurisdiction over crimes for which a mere relation to the above crimes in the CoE Marty Report can be established.[655]

The thesis partially concurs with this interpretation to the extent that a proper interpretation of the KSC's material jurisdiction as discernible from the international agreement and Law 05/L-053 includes crimes related to those subject of the CoE Marty Report. Judicial mechanisms would likely be rendered redundant if their jurisdictions were so limited as to exclude competence over matters related to their core mandates. However, the thesis disagrees as to the degree of 'relation'. While the Appeals Chamber adopts a 'mere relation'[656] standard which it nonetheless does not sufficiently expound upon, the thesis considers this to be so overly broad as to imply that the KSC has jurisdiction over anything and everything as long as a tangential or remote link can be established to the CoE Marty Report. This certainly cannot be what the international agreement anticipated, nor what the Assembly intended. The thesis argues that for the sake of legal certainty and precision in defining material jurisdiction, the phrases 'in relation to' and 'relate to' in Article 162(1) of the Constitution and Article 6(1) of Law 05/L-053 respectively should be interpreted restrictively using a 'logical connection/relationship' standard.

That said, the substantive crimes for which the KSC has jurisdiction – crimes against humanity and war crimes – appear to be much more broadly and expansively phrased or defined than other international(ised) criminal mechanisms, many of which deal(t) with a more restrictively defined catalogue of international crimes, that is, the so-called core international crimes: war crimes, crimes against humanity, genocide and aggression.[657] Law No. 05/L-053 achieves this 'expansiveness' of definition in two ways. Firstly, the mandate is framed as covering 'grave trans-boundary and international crimes'.[658] It would appear, therefore, that the KSC's mandate is not *per se* restricted to so-called core international crimes, but rather extends to what Law No. 05/L-053 considers as 'grave trans-boundary' crimes. Law No.05/L-053 does not, however, define what it considers as 'trans-boundary' crimes. Secondly, Law No. 05/L-053 makes a broad (and perhaps controversial) claim that the list of specific acts it

Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021.

[655] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021, paras 66–73, 78–84.

[656] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021, para 66.

[657] See discussion in Chapter I.

[658] Law 05/L-053, art 1(2).

defines as crimes against humanity and war crimes were considered as such 'under customary international law during the temporal jurisdiction of the Specialist Chambers'.[659]

5.4.2.2 Temporal and Territorial Jurisdiction

The temporal and territorial jurisdiction of the KSC covers the above-mentioned category of crimes allegedly committed between 1 January 1998 and 31 December 2000 during the Kosovo War as long as they were committed in Kosovo or their commission was commenced in Kosovo.[660] The temporal jurisdiction is intended to cover the period of the Kosovo War which occurred from 1998–1999, officially ending on 9 June 1999 when the Military Technical Agreement between the International Security Force ('KFOR') and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (Kumanovo Agreement) was concluded. However, considering the relatively protracted nature of the conflict, these timelines may not comprehensively address all the relevant periods of the Kosovo conflict. The lower ceiling potentially prevents an interrogation of crimes possibly committed during confrontation between Serbian forces and the KLA immediately prior to 1 January 1998 – from KLA's prominent entry onto the scene in 1996, but particularly from the last quarter of 1997–[661] which nonetheless have a (causal) link with alleged crimes committed between 1 January 1998 – 31 December 2000. The upper ceiling also forecloses any possibility of accountability for crimes possibly committed after 31 December 2000 even if they have a significant link to events before 31 December 2000.

Nonetheless, the formulation of the KSC's territorial jurisdiction strikes a delicate balance by ensuring, on the one hand, a relatively broad enough territorial jurisdiction designed to overcome possible sovereignty constraints to provide accountability for crimes that while not entirely being committed on the territory of Kosovo, have a significant connection to Kosovo by having been commenced in Kosovo even if the substantial part of the *actus reus* is cross-border. Many of the alleged crimes commenced in Kosovo with the kidnapping of civilians who were then transported to Albanian territory controlled by the KLA where the substantial part of the criminality continued.[662]

On the other hand, by insisting that a crime must either have been committed in Kosovo or its commission commenced in Kosovo, the territorial jurisdiction is narrow enough to ensure a focus on crimes with sufficient enough connection to Kosovo territory while also avoiding unchecked intrusion upon the territorial integrity of third states. Potentially, therefore, and considering the cross-border effects of the Kosovo War and the broader crisis in the Balkans following the disintegration of the former Yugoslavia, it is possible that the KSC will prosecute crimes that were committed in part on the territory of third countries as long as the *actus reus* commenced within the territory of Kosovo. This is particularly relevant to the Kosovo context where both the UN Working Group on Enforced or Involuntary Disappearances (WGEID) and

[659] Law No. 05/L-053 arts 13 & 14.
[660] Law No. 05/L-053, arts 7-8.
[661] CoE Marty Report, paras 37-39.
[662] CoE Marty Report, paras 5, 16–19 & 36–39.

the UN Committee on Enforced Disappearances (CED) found that some serious crimes against persons, specifically enforced disappearances, are reported to have commenced in Kosovo and the victims or their remains removed across borders to Serbia.[663] The CoE Marty Report and the SITF investigation have, in addition to confirming the above findings of WGEID and CED, found reasonable grounds to believe that systematic displacement of populations across borders had occurred.[664]

5.4.2.3 Personal Jurisdiction

The KSC's personal jurisdiction covers natural persons regardless of their nationality. Specifically, Article 9 provides as follows–

> 1. The Specialist Chambers shall have jurisdiction over natural persons pursuant to the provisions of this Law.
> 2. Consistent with the active and passive personality jurisdiction of the Kosovo courts under applicable criminal laws in force between 1 January 1998 and 31 December 2000, and in addition to its territorial jurisdiction set out in Article 8, the Specialist Chambers shall have jurisdiction over persons of Kosovo/FRY citizenship or over persons who committed crimes within its subject matter jurisdiction against persons of Kosovo/FRY citizenship wherever those crimes were committed.

By bestowing to the KSC personal jurisdiction over all persons regardless of their nationality, Law No. 05/L-053 has ensured that accountability efforts will not be hampered by the possible fluidity of nationality of potential actors during the relevant period which was a consequence of the disintegration of the former Yugoslavia, the emergence of multiple states and the contested statehood of Kosovo (at the time).

5.4.2.4 Ambiguities in the Scope of the KSC's Jurisdiction

The KSC's material, temporal, territorial and personal jurisdiction discussed above if read together, however, create significant uncertainty as to the precise scope of the KSC's jurisdiction. Firstly, the material jurisdiction, even though arguably expansive (see section

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[663] Report of the Working Group on Enforced or Involuntary Disappearances on its Visit to Serbia, including Kosovo (19–26 August 2014), A/HRC/30/38/Add.1, 17 August 2015, paras 22 & 37; Committee on Enforced Disappearances Concluding Observations on the Report Submitted by Serbia under Article 29, Paragraph 1 of the Convention, CED/C/SRB/CO/1, 16 March 2015, paras 27–30. *See also* Gabriella Citroni, 'The Specialist Chambers of Kosovo: The Applicable Law and the Special Challenges Related to the Crime of Enforced Disappearance' (2016) 14 Journal of International Criminal Justice 123.

[664] CoE Marty Report, paras 3, 4, 8, 12–14, 19 & 137–140; United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), paras 4–9. The International Criminal Court has similarly discussed, in the Bangladesh/Myanmar situation, territorial jurisdiction dealing with international crimes whose commission commences on the territory of one state and continues or concludes on the territory of another in respect of the crime against humanity of deportation and persecution. See *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, International Criminal Court, Pre-Trial Chamber III, ICC-01/19-27 (14 November 2019).

4.4.2.1 above), is nonetheless restricted by the relation of prosecutable crimes to the CoE Marty Report. As Article 1(2) of Law No. 05/L-053 provides, the KSC has jurisdiction over 'grave trans-boundary and international crimes committed during and in the aftermath of the conflict in Kosovo, *which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 … and which have been the subject of criminal investigation by the [SITF]*'.[665] As discussed in section 5.2.3, the CoE Marty Report's findings were restricted to crimes allegedly committed by the KLA in Kosovo and on Albanian territory, being: assassinations; running illegal detention facilities; kidnaping; illegal detention and interrogation of civilians; torture, mistreatment, sexual exploitation murder, and forcible disappearance of detainees; forcibly extracting from and trafficking body organs of some detainees; and vengeful abuses against civilians.[666] The SITF investigation was similarly limited to 'the allegations contained in the report of Council of Europe Rapporteur Dick Marty'[667] and focused solely on crimes allegedly committed by the KLA.[668] By restricting the KSC's jurisdiction in as far as the crimes in question were reported in the CoE Marty Report and have been investigated by the SITF, the implication is that any other crimes of comparable seriousness allegedly committed in Kosovo at the relevant time would arguably fall outside the KSC's mandate if they had not been revealed in or been the subject of the CoE Marty Report and the SITF investigation.

Secondly, the material jurisdiction read together with personal jurisdiction also raise significant concern over the characterisation of the Kosovo conflict and provides potential impunity for some conflict parties. At first glance, it would appear that the framing of the KSC's material jurisdiction and personal jurisdiction as covering transboundary and international crimes committed by natural persons during the Kosovo conflict suggests that the KSC has jurisdiction, at least in theory, over crimes committed during the non-international armed conflict between the KLA (and other minor Kosovar paramilitary groups) and Serbian forces (and their allied paramilitary groups)[669] and during the international armed conflict between the international coalition of forces under the auspices of the North Atlantic Treaty Organisation (NATO) and Serbia, both conflicts occurring contemporaneously on the same territory. Specifically, NATO's involvement was conducted through a series of bombing campaigns between March–June 1999 which resulted in multiple civilian casualties in Serbia and what is now Kosovo territory.[670]

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[665] Law 05/L-053, art 1(2) [emphasis added]; *See also* Law 05/L-053, art 6(1).
[666] CoE Marty Report, paras 72, 74–75, 86–90 & 93–174.
[667] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 1.
[668] Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014).
[669] At the time (1998–1999), Kosovo was a province in Serbia which was itself part of the larger Federal Republic of Yugoslavia. Before declaring its independence on 17 February 2008, Kosovo was under UN-mandated territorial administration from pursuant to UN Security Council Resolution 1244 of 1999.
[670] PBS News, 'A Kosovo Chronology' <https://www.pbs.org/wgbh/pages/frontline/shows/kosovo/etc/cron.html> accessed 15 May 2021.

However, the personal jurisdiction is subject to the material jurisdiction which is itself restricted under Articles 1(2) and 6 of Law No. 05/L-053 to crimes 'which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("The Council of Europe Assembly Report") and which have been the subject of criminal investigation by the Special Investigative Task Force ("SITF")'. This wording appears to either deftly or through its ambiguous formulation exclude jurisdiction over the international armed conflict by expressly limiting jurisdiction. In other words, the KSC has jurisdiction over transboundary and international crimes committed during the Kosovo conflict only in as far as they relate to the CoE Report and the SITF investigation. Notably, as discussed above, the CoE Marty Report and the SITF investigation focused solely on crimes allegedly committed by the KLA during and after the armed conflict. Consequently, the KSC does not appear to have jurisdiction over any crimes that may have been committed by other warring parties during the non-international armed conflict including Serb forces[671] or that were as a result of the NATO bombing campaign between March–April 1999 during the international armed conflict between states under the umbrella of NATO including on territory that is now Kosovo.

By restricting the KSC's jurisdiction in this manner, an accountability vacuum is created for potentially serious crimes that were nonetheless not revealed in or were not the subject of the CoE Marty Report and SITF investigation, and for crimes that may have been committed by Serbian or NATO forces against citizens of Kosovo or the (former) Federal Republic of Yugoslavia during the Kosovo conflict. Alleged crimes by NATO forces have been subject of multiple litigation before the International Court of Justice[672] and the European Court of Human Rights[673] which have all been unsuccessful solely on jurisdictional grounds and not on merits. Anticipating and addressing this particular shortcoming, the SITF Chief Prosecutor argued that the ICTY had already largely addressed crimes committed by Serbian forces against Kosovar Albanians before and during the Kosovo War, and because the ICTY's temporal jurisdiction did not extend beyond the war, the anticipated mechanism (KSC) would address crimes committed after the war, which coincidentally happen to have been primarily committed by some elements in the KLA.[674] This argument is, however, unconvincing. The ICTY's legacy is chequered,[675] and while it did indeed prosecute a number of individuals for crimes committed in the former Yugoslavia, it has not escaped accusations of inability to address a multiplicity of crimes and actors. Further, it failed to address alleged crimes by

[671] See also Avdylkader Mucaj (n 632) 379–387.
[672] *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, International Court of Justice, Preliminary Objections, Judgment, 15 December 2004, I.C.J. Reports 2004, p. 279. This case was dismissed by the Court for lack of jurisdiction because at the relevant time, Serbia and Montenegro was not a member state of the United Nations and was therefore not a state party to the Court's statute.
[673] *Vlastimir and Borka Banković and Others v Belgium and 16 Other Contracting States*, European Court of Human Rights, Grand Chamber, Decision as to Admissibility of Application No. 52207/99, 12 December 2001; *Agim Behrami and Bekir Behrami v France* and *Ruzhdi Saramati v France, Germany and Norway,* European Court of Human Rights, Grand Chamber, Decision as to Admissibility of Applications No. 71412/01 and 78166/01, 02 May 2007.
[674] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 14.
[675] *See for example* Carsten Stahn and others (eds), *Legacies of the International Criminal Tribunal for the Former Yugoslavia: A Multidisciplinary Approach* (Oxford University Press 2020).

NATO forces after a Committee set up by the ICTY Prosecutor recommended that no investigations should be undertaken against NATO forces[676] because 'either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences'.[677] Ultimately, therefore, this restrictive construction of the KSC's mandate has major implications: it provides a misleading narrative of the Kosovo conflict by misrepresenting the nature of the conflict as simply a non-international armed conflict as opposed to a mixed conflict, thereby disregarding the fact that at the material time, a concurrent international armed conflict was underway on the same territory; it creates a hierarchy of victims and perpetrators; it affords impunity to some parties to the conflict; and it has the overall effect of contradicting the cosmopolitan justifications for international criminal accountability and for the establishment of the KSC/SPO.

Thirdly, reconciling the KSC's territorial jurisdiction under Article 8 of Law No. 05/L-053 which restricts the Court's jurisdiction to 'crimes … either commenced or committed in Kosovo' with the formulation of Article 9 of Law No. 05/L-053 on personal jurisdiction, particularly the phrase 'wherever those crimes were committed' may also portend difficulties. The latter provision appears to imply that the KSC would have jurisdiction over natural persons who committed international crimes against citizens of Kosovo or of the former Federal Republic of Yugoslavia between 1 January 1998 – 31 December 2000 regardless of which territory these crimes were committed on, thereby possibly extending the territorial jurisdiction beyond what is anticipated in Article 8, that is, crimes committed in Kosovo or whose commission commenced in Kosovo. If interpreted strictly, Article 9 would therefore appear to justify the exercise of an absolutist conception of passive personality principle by the KSC whereby the Court could prosecute crimes that were neither commenced nor committed in Kosovo, with the only determining factor being that the victims were citizens of Kosovo or the former Federal Republic of Yugoslavia.

5.4.2.5 Reconciling Ambiguities in the Scope of the KSC's Jurisdiction

The ambiguities in the formulation of the KSC's jurisdiction as discussed above are, however, not entirely irreconcilable. For instance, and as argued in section 5.4.2.1 above when discussing the KSC's decision on a motion challenging its (material) jurisdiction,[678] the restrictive phrase 'which relate to those reported in the Council of Europe Parliamentary Assembly Report Doc

[676] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (accessed 20 May 2021) para 91.
[677] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (13 June 2000) https://www.icty.org/en/press/final-report-prosecutor-committee-established-review-nato-bombing-campaign-against-federal (accessed 20 May 2021) para 90. This report had been commissioned by the ICTY Prosecutor.
[678] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021; *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021.

12462 of 7 January 2011 ("The Council of Europe Assembly Report") and which have been the subject of criminal investigation by the Special Investigative Task Force ("SITF") of the Special Prosecution Office of the Republic of Kosovo ("SPRK")' as appears on Article 1(2) of Law 05/L-053 could nevertheless be generously interpreted to include all (international) crimes committed during the relevant period as long as they have a logical relationship to those reported in the CoE Marty Report and those already investigated by SITF, and not necessarily that they must have been specifically documented in the report. The connection to be assumed in this interpretation is the armed conflict, that is, the conflict as the common context in which all the alleged crimes occurred and which therefore provides the common logical thread or relationship between crimes reported in the CoE Marty Report and those not reported therein. Such interpretation is perhaps more appealing when it is recalled that the CoE Marty Report was not exhaustive and itself acknowledged that due to the political context in post-war Kosovo, the Rapporteur was unable to 'get[…] to the bottom of the crimes committed, at least in cases where there is every indication that they were the misdeeds of persons in positions of power or close to those in power'[679] and emphasised that his investigation was not a criminal investigation, but rather geared towards closely examining, substantiating and shedding light on the allegations and related allegations.[680]

Additionally, a consistent and tenable interpretation may be arrived at by considering Article 8 of Law No. 05/L-053 which restricts the Court's jurisdiction to crimes 'either commenced or committed in Kosovo' and the phrase 'wherever those crimes were committed' in Article 9 of Law No. 05/L-053 on personal jurisdiction in their historical and chronological contexts. An analysis of the genesis of the accountability process heralded by the KSC and SPO reveals that the focus of the process was on international crimes allegedly committed by the KLA, meaning that the focus was on crimes with a connection to the territory of Kosovo even if aspects of the *actus reus* were committed elsewhere. This is evident from the focus in this regard of the CoE Marty Report and the SITF investigation. Further, Article 9 on personal jurisdiction itself expressly requires consistency with Article 8 on territorial jurisdiction. Therefore, it is reasonable to attribute the phrase 'wherever those crimes were committed' that appears in Article 9 either to inadvertence or poor legal drafting. Consequently, Article 9 can be reconciled with Article 8 by interpreting it to mean that the KSC's personal jurisdiction covers natural persons, regardless of their nationality, who committed the relevant crimes during the relevant period against citizens of Kosovo or of the former Federal Republic of Yugoslavia as long as those crimes were committed in Kosovo or their commission commenced in Kosovo.

Whatever the case, however, and at least for the sake of clarity, interpretative guidance is necessary in order to clarify the scope of the KSC's material, territorial and personal jurisdiction in light of the inconsistencies or ambiguities highlighted herein. While the Court of Appeals Chamber of the KSC has indeed clarified the scope of the KSC's material jurisdiction in *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup*

[679] CoE Marty Report, para 7.
[680] CoE Marty Report, paras 21 & 175–176.

Krasniqi[681] as discussed in section 5.4.2.1 above, this clarification was limited to material jurisdiction and did not, therefore, address itself to the entirety of the ambiguities, inconsistencies and uncertainties arising when the KSC's material, territorial and personal jurisdiction are considered together, as discussed in section 5.4.2.4 above. The thesis therefore argues that the precise scope of the KSC's jurisdiction can and should be conclusively clarified by the Specialist Chamber of the Constitutional Court which is the judicial organ with the exclusive authority of constitutional interpretation relating to the KSC and SPO.[682]

5.5 Allocation of Authority between the European Union and Kosovo over the Kosovo Specialist Chambers and Specialist Prosecutor's Office

5.5.1 Location of the KSC and SPO

As discussed in section 5.3, Law No. 04/L-274, Amendment No. 24 and Law 05/L-053 together domesticated the entirety of the international agreement between the European Union and Kosovo and the obligations flowing therefrom, that is, the establishment and operation of the KSC and SPO to operate from within Kosovo or from a third country. Specifically, Article 162(7) of the Constitution (Amendment No. 24) provides that, 'The Specialist Chambers and the Specialist Prosecutor's Office may have a seat in Kosovo and a seat outside Kosovo. The Specialist Chambers and the Specialist Prosecutor's Office may perform their functions at either seat or elsewhere, as required.' The enabling legislation, Law No. 05/L-053 similarly provides at Article 3(6) that, 'The Specialist Chambers shall have a seat in Kosovo. As provided for through an international agreement with the Host State, the Specialist Chambers shall also have a seat in the Host State outside Kosovo, but may sit elsewhere on an exceptional basis if necessary in the interests of proper administration of justice,' while Article 3(7) provides that, 'As provided for through an international agreement with the Host State, the Specialist Prosecutor's Office shall have a seat in the Host State, but may also have a seat in Kosovo. The Specialist Prosecutor's Office may perform its functions at the seat of the Specialist Prosecutor's choosing or elsewhere, as required to fulfil its mandate effectively.'[683]

Consequently, on 26 January 2016, Kosovo through its then-First Deputy Prime Minister Hashim Thaçi and The Netherlands through its Ambassador Gerrie Willems concluded the Interim Agreement between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands to govern the 'preparation of the establishment and the proper functioning of the

[681] *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021. See also *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021.
[682] Constitution of the Republic of Kosovo 2008 (as amended by Amendment No. 24 of 3 August 2015), arts 113 & 162(3); Law No. 05/L053 of 3 August 2015, arts 3(1) & 49.
[683] *See also* Law No. 05/L-053, art 35(11).

[KSC and SPO in The Netherlands].'[684] This was soon followed by the Agreement between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands concluded on 15 February 2016 by Kosovo through its then-First Deputy Prime Minister Hashim Thaçi and The Netherlands through its Ambassador Gerrie Willems, and which governs 'matters relating to or arising out of the presence and the proper functioning of the [KSC and SPO in The Netherlands]'.[685] As a result of these agreements, the KSC and SPO have been located in The Hague, The Netherlands since their establishment.

As provided in Article 3(8) of Law No. 05/L-053, the President of the KSC, the Specialist Prosecutor, Specialist Counsel and the Victims' Counsel have the discretion to invoke a change of venue to the Host State for the conduct of a trial or any other criminal processes if they deem this to be necessary for the proper administration of justice or for security purposes. Similarly, the Specialist Prosecutor or the Presiding Judge of the Specialist Chamber of the Constitutional Court may invoke such change in respect of proceedings before the Specialist Chamber of the Constitutional Court. From the wording of Article 3(6–8) of Law No. 05/L-053, it appears that the default venue of trials and any other criminal proceedings is Kosovo, and an invocation of change of venue must be done for these proceedings to be conducted in the Host State. In practice, however, The Netherlands has become the *de facto* venue of KSC operations as proceedings of the KSC (including the Specialist Chamber of the Constitutional Court) have so far all been conducted in The Hague in accordance with invocations of change under Article 3(8), ostensibly to guarantee the security, safety, efficiency and effectiveness of proceedings.[686] Kosovo as a default *de jure* venue therefore appears to be more a matter of theory than practice, or more accurately as Korenica, Zhubi and Doli have argued, 'the seat of the Special Court in Kosovo has a purely ceremonial status'.[687]

[684] Interim Agreement between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands (26 January 2016), art 2.
[685] Agreement between the Kingdom of the Netherlands and the Republic of Kosovo Concerning the Hosting of the Kosovo Relocated Specialist Judicial Institution in the Netherlands (15 February 2016), art 2.
[686] Memorandum: Venue for Exercise of Functions (KSC-CC-2017-02/F00001/1), Presiding Judge of the Specialist Chamber of the Constitutional Court, 31 March 2017; Decision on the Location of Proceedings Before the Specialist Chamber of the Constitutional Court for the Review of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law, KSC-CC-2017-02, President of the Specialist Chambers, 12 April 2017; Decision on the Location of Proceedings Before the Specialist Chamber of the Constitutional Court for the Review of the Revised Rules of the Rules of Procedure and Evidence Pursuant to Article 19(5) of the Law, KSC-CC-PR-2017-03, President of the Specialist Chambers, 07 June 2017; Decision on the Specialist Prosecutor's Invocation of Change of Venue under Article 3(8)(a) of the Law, KSCPR-2018, President of the Specialist Chambers, 29 May 2018; Decision on the Location of Proceedings Before the Specialist Chamber of the Constitutional Court, KSC-CC-2019-05 and KSC-CC-2019-06, President of the Specialist Chambers, 22 January 2019; Decision on the Invocation of Change of Venue for the Proceedings Before the Specialist Chamber of the Constitutional Court for Referrals Pursuant to Article 19(5) of the Law, KSC-CC-PR-2020-09, President of the Specialist Chambers, 11 May 2020; Decision Invoking a Change of Venue to the Host State, KSC-BC-2020-04, President of the Specialist Chambers, 10 June 2020.
[687] Fisnik Korenica, Argjend Zhubi and Dren Doli (n 635) 479 (footnote 37).

Following on the 'precedent' set by the SPO's predecessor the SITF which was based in Brussels, Belgium,[688] a trend appears to be emerging whereby proceedings relevant to accountability arising from the CoE Marty Report are undertaken from outside Kosovo. Considering that most persons indicted by the KSC are former senior leaders of the KLA and were, until recently, active on Kosovo's political scene, it is reasonable to argue that holding current proceedings in The Hague as opposed to Kosovo minimises potential political interference and guarantees a degree of safety and security to the proceedings. However, The Hague as the default venue for proceedings, as is increasingly becoming the case, raises questions of physical and psychological distance of proceedings from the locus of the alleged crimes and from the affected communities.[689] If, as Okowa argues, the location of such criminal accountability mechanisms is instrumental in 'creat[ing] a special bond between the Court and the people of [the concerned state]',[690] it is difficult to imagine how a court located in and operating from The Hague, over 2,000 kilometres from Kosovo, would facilitate the establishment of such 'special bond'.[691]

5.5.2 Power of Appointment of Judges and the Specialist Prosecutor

Judges of all chambers of the KSC, including the President and Vice-President of the KSC, are internationals – nationals of states other than Kosovo–[692] and are appointed through a two-step process controlled entirely by the EU.[693] An independent selection panel assesses, interviews and recommends candidates for appointment as judges. All the three members of the selection panel are also internationals, that is, are not nationals of Kosovo.[694] It is unclear from the governing law who appoints this selection panel. After recommendation by the selection panel, the Head of EU Common Security and Defence Policy Mission (the Head of EULEX Kosovo) – who is also not a national of Kosovo – then appoints as judges persons recommended by the panel. As at the time of writing, there are 22 judges on the roster, being nationals of EU states (Belgium, France, Germany, Italy, The Netherlands, Czech Republic, Bulgaria and Ireland) and of other contributing states (Norway, Canada, Switzerland and the USA).[695]

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[688] United Nations, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, Annex II, Statement Dated 29 July 2014 of the Chief Prosecutor of the Special Investigative Task Force, S/2014/558 (1 August 2014), para 30.

[689] For a discussion on the relevance of the (distant) location of international criminal accountability mechanisms on perceptions of justice, *see* Vincent Nmehielle (n 143); Oumar Ba (n 173); Phil Clark (n 173).

[690] Phoebe Okowa (n 643) 337.

[691] The limitations of physical distance are exacerbated by the fact that visa requirements make it inordinately difficult for ordinary Kosovars to access The Hague.

[692] Law No. 05/L-053, art 26; Kosovo President's Letter of 14 April 2014, para 14. The current 22 judges on the KSC roster are nationals of EU member states, Norway, Canada, Switzerland and the U.S.A. Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'Chambers' <https://www.scp-ks.org/en/specialist-chambers/chambers> accessed 13 May 2021.

[693] Law No. 05/L-053, arts 26, 28 & 32; Constitution of the Republic of Kosovo, art 162(10) (Amendment No. 24).

[694] Law No. 05/L-053, art 28(2).

[695] Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'Chambers' <https://www.scp-ks.org/en/specialist-chambers/chambers> accessed 13 May 2021.

The Head of EU Common Security and Defence Policy Mission is also the appointing authority for the Specialist Prosecutor.[696] Unlike the selection process of judges, the Head of EU Common Security and Defence Policy Mission is not aided by the selection panel in appointing the Specialist Prosecutor. Instead, the governing law simply requires that the Head of EU Common Security and Defence Policy Mission shall appoint the Specialist Prosecutor 'after consideration of suitably qualified applicants'.[697] The Head of EU Common Security and Defence Policy Mission also appoints personnel within the SPO upon the Specialist Prosecutor's recommendation.[698] In accordance with Article 35(6) of Law No. 05/L-053, the Lead Prosecutor of SITF – a national of the USA – was appointed by the Head of EU Common Security and Defence Policy Mission as the first Specialist Prosecutor of the SPO in 2016,[699] and he was succeeded in 2018 by another national of the USA appointed by the Head of EU Common Security and Defence Policy Mission in accordance with Article 35(7) of Law No. 05/L-053.[700] This procedure for the appointment of KSC judges and Specialist Prosecutor is markedly different from the constitutional procedure of appointing judges and prosecutors in Kosovo whereby judges and prosecutors are appointed by the President upon recommendation by the Kosovo Judicial Council and Kosovo Prosecutorial Council respectively.[701]

5.5.3 Duration and Termination of the Mandate of the KSC and SPO

Another aspect where the allocation of authority between the EU and Kosovo plays out quite prominently is the duration of the operation of the KSC and SPO. In this regard, the question of how the mandate of the KSC and SPO comes to an end and by extension the question of termination of the international agreement between the EU and Kosovo become pertinent.

5.5.3.1 Conclusion of Mandate

Having been established pursuant to an international agreement between Kosovo and the EU, it follows that the duration of the KSC's and SPO's mandate is determined primarily by reference to the provisions of this agreement and general rules of treaty interpretation. The international agreement between Kosovo and the EU provides that the work of the KSC and SPO 'shall continue until such time as Kosovo is notified by the Council of the European Union that the investigations have been concluded and that any proceedings by the judicial chambers resulting therefrom have been concluded'.[702] This position is confirmed by Article 162(13)&(14) of the Constitution (Amendment No. 24) which provides that–

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[696] Law No. 05/L-053, art 35(6–7). Constitution of the Republic of Kosovo, art 162(10) (Amendment No. 24).
[697] Law No. 05/L-053, art 35(7).
[698] Law No. 05/L-053, art 35(9).
[699] David Schwendiman, a national of the United States of America, served as the first Specialist Prosecutor of the SPO, having transitioned into the position from his previous role as Lead Prosecutor of SITF. Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'First Specialist Prosecutor' <https://www.scp-ks.org/en/spo/first-specialist-prosecutor> accessed 13 May 2021.
[700] The current Specialist Prosecutor is Jack Smith, also a national of the United States of America. Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'Specialist Prosecutor' <https://www.scp-ks.org/en/spo/specialist-prosecutor> accessed 13 May 2021.
[701] Constitution of the Republic of Kosovo, arts 104 & 109.
[702] Kosovo President's Letter of 14 April 2014, para 21.

> 13. The mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall be for a period of five (5) years, unless notification of completion of the mandate in accordance with Law No. 04/L-274 occurs earlier.
> 14. In the absence of notification of completion of the mandate under paragraph 12, the mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made in accordance with Law No. 04/L-274 and in consultation with the Government.

It is possible to consider these provisions as providing for the termination of the agreement upon the object of the agreement being achieved. According to this interpretation, therefore, the mandate of the KSC and SPO only terminates upon the conclusion of investigations by the SPO and proceedings by the KSC. This would accord with the international law position as reflected in Article 54(a) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (VCLT 1986) that a treaty can be terminated or a party can withdraw from it in the manner provided in the treaty, if at all the treaty so provides. However, the question of conclusion of the mandate of the KSC and SPO is not as obvious or unambiguous as the argument above may suggest, and especially not in a situation with deep political undertones. This became clear in a referral made by the President of Assembly of Kosovo to the Specialist Chamber of the Constitutional Court in 2020 as discussed below.

The question of ending the KSC's and SPO's mandate came up in 2020 when Kosovo's then-President Hashim Thaçi, against whom an indictment had already been sought by the SPO at the time, proposed amendments to Article 162 of the Constitution, designed to give Kosovo more control over the mechanism's completion strategy.[703] The President's justification for proposing these amendments was that this would cure ambiguities resulting from the current formulation which, in the President's opinion, have created confusion as to the exact duration of the mandate of the KSC and SPO, with popular opinion considering the mechanism's mandate to last for five years from August 2015.[704] Article 162(13) and (14) of the Constitution of Kosovo which the proposal sought to amend provides as follows–

> 13. The mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall be for a period of five (5) years, unless notification of completion of the mandate in accordance with Law No. 04/L-274 occurs earlier.
> 14. In the absence of notification of completion of the mandate under paragraph 12, the mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made in accordance with Law No. 04/L-274 and in consultation with the Government.

The proposed amendment sought to delete the above provisions and replace them with a single provision stating that–[705]

[703] Proposal for Amendments to the Constitution (Amendments No. 26 and 27), 24 August 2020.
[704] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00009, Specialist Chamber of the Constitutional Court, Submissions by the President of the Republic of Kosovo, Process and Reasons for Proposing the Amendment of Article 162 of the Constitution of the Republic of Kosovo, 16 October 2020 (filed 19 October 2020), paras 5-6.
[705] Proposed Amendments No. 26 and No. 27 to the Constitution of the Republic of Kosovo, 24 August 2020.

> 13. The mandate of the Specialist Chambers and the Specialist Prosecutor's Office shall continue until notification of completion is made by Council of the European Union, in consultation with the Government of the Republic of Kosovo.

As required by Articles 144(3) and 162(3) of the Constitution, the President of the Assembly referred the proposed amendments to the Specialist Chamber of the Constitutional Court for a determination of their compatibility with constitutional provisions guaranteeing rights and fundamental proceedings. In determining the constitutional reference, *Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11*, the Chamber adopted a purposive interpretation by considering the socio-political background leading up to the establishment of the KSC and SPO and therefore the purpose of their establishment.[706] The Court concluded that, '[T]he *raison d'être* of the Specialist Chambers and the SPO and hence their legal regime is to realise, in their own specific context, the respective fundamental rights and freedoms in relation to allegations contained in the [CoE Marty] Report and proceedings arising out of the related SITF investigations in particular'[707] and that Kosovo's obligations under the international agreement entails ensuring the autonomous functioning of the KSC and SPO by delegating relevant and specific sovereign powers in order to facilitate proper administration of justice.[708]

With this understanding in mind, the Chamber considered that the proposed amendment affected the autonomy and legal stability of the KSC and SPO and further disagreed with the President's interpretation that Article 162(13) and (14) in its current form was ambiguous. Instead, the Chamber considered that the provision as well as the international agreement already provide that the mechanism's mandate shall continue until such time as the Council of the European Union notifies Kosovo of the conclusion of the mechanism's work.[709] Consequently, the Chamber concluded that by proposing to delete reference to the international agreement from Article 162(13) and (14) of the Constitution which provides for the continued operation of the KSC and SPO until the above-mentioned notification by the Council of the EU, the proposed amendments would impede 'uninterrupted operation, in secure, independent, impartial, fair and effective manner, until completion of the respective proceedings arising out of the SITF investigations … [and] would diminish the fundamental rights and freedoms of persons involved in the proceedings … [including victims'] right to independent and effective investigation … [and protected witnesses'] right to physical and psychological integrity'.[710]

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[706] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, paras 53-57. *See also* Avni Puka and Fisnik Korenica, 'The "Struggle" to Dissolve the Kosovo Specialist Chambers in The Hague: Stuck between Constitutional Text and Mission to Pursue Justice' (2021) 2 Law and Practice of International Courts and Tribunals 548.
[707] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, para 56.
[708] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, para 63.
[709] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, paras 63-70.
[710] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, paras 68-69.

5.5.3.2 Authority to Deny the EU Control over Duration of the KSC's and SPO's Mandate

The Chamber in the above 2020 *Referral on Proposed Amendments to the Constitution of Kosovo* also authoritatively clarified an important question regarding the allocation of authority between Kosovo and the EU with respect to the KSC and SPO. The Chamber confirmed that while indeed Kosovo can amend its Constitution including those provisions specific to the KSC and SPO, the international agreement and the constitutional provisions adopting this agreement require – as a procedural and substantive matter to guarantee the independence and proper functioning of the mechanisms – that Kosovo must first consult with EULEX Kosovo before proposing any amendments to legal provisions relevant to the KSC and SPO.[711] This, according to the Chamber, is a permissible restriction on a specific aspect of Kosovo's sovereign authority – namely legislative authority – since Kosovo had, through the international agreement, specifically agreed to this restriction by delegating sovereign powers necessary for the proper functioning of the KSC and SPO.[712]

While this appears to be the correct interpretation of the international agreement, Law N0. 04/L-274 and Article 162 of the Constitution, it provides minimal comfort for the stability of the KSC and SPO. The legal obligation arising from the international agreement is for Kosovo to consult EULEX Kosovo on potential amendments to laws relevant to the KSC and SPO. This does not translate into any obligation to secure the agreement of EULEX Kosovo on these proposed amendments. Therefore, in theory Kosovo could enact any amendment to the Constitution or other relevant law that may have significant consequences for the continued operation of the KSC and SPO or how and where they function. However, if the Chamber's decision in the 2020 *Referral* is anything to go by, it is unlikely that any such proposals would be approved by the Specialist Chamber of the Constitutional Court if they are likely to curtail the autonomy and functioning of the KSC and SPO and the rights of participants therein.

Further, considered in light of international law's position on the relationship between municipal law and international law and specifically Article 27 VCLT 1986 which prohibits a treaty party from 'invok[ing] the provisions of its internal law as justification for its failure to perform the treaty', any amendment of the constitution and other enabling law that directly conflicts with the express provisions of the international agreement would have no effect on the international obligations arising from the international agreement. As such, even if Kosovo

[711] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, paras 71-75. The Ombudsperson of the KSC, the EU High Representative and the Head of EULEX had also made this argument in their submissions to the Chamber. Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00007, Specialist Chamber of the Constitutional Court, Submissions by the Ombudsperson of the Kosovo Specialist Chambers on Referral, 16 October 2020, paras 19-27; Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00013, Specialist Chamber of the Constitutional Court, Written Submission by the High Representative of the Union for Foreign Affairs and Security Policy on the admissibility of the Referral, 30 October 2020, paras 13-17; Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11/F00014, Specialist Chamber of the Constitutional Court, Written Submission by the Head of the European Union Rule of Law Mission in Kosovo (EULEX) on the Admissibility of Referral KSC-CC-2020-11 on a Proposed Amendment to the Constitution of Kosovo by the President of the Assembly of Kosovo, 2 November 2020, paras 7-18.

[712] Referral on Proposed Amendments to the Constitution of Kosovo, KSC-CC-2020-11, Specialist Chamber of the Constitutional Court, Judgment, 26 November 2020, para 74.

were to amend Article 162(13) & (14) of the Constitution (Amendment No. 24) and/or Law No. 04/L-274 on ratification of the international agreement, these amendments would not modify or affect the obligations arising from the international agreement, in particular paragraph 21 of the President's Letter of 14 April 2014 which provides that the work of the KSC and SPO 'shall continue until such time as Kosovo is notified by the Council of the European Union that the investigations have been concluded and that any proceedings by the judicial chambers resulting therefrom have been concluded'.

5.5.3.3 Denunciation of International Agreement before Conclusion of the Mandate of KSC and SPO

Despite the express provisions of the international agreement and the Constitution of Kosovo discussed above, it is possible to envision a situation where either party (most likely Kosovo) would want to denounce the agreement before the conclusion of the KSC's and SPO's mandate. Besides the provisions on conclusion of mandate, the agreement does not, *stricto sensu*, provide for termination or denunciation of the agreement by a party before the conclusion of the mandate. This does not, however, mean that a party is absolutely prohibited from so denouncing. As Article 56(1) VCLT 1986 provides–

> 1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

A party seeking to denounce this agreement would therefore have to establish that 'the parties intended to admit the possibility of denunciation' or that 'a right of denunciation … may be implied by the nature of the treaty'. It would, however, be implausible to argue that in concluding an international agreement to establish a judicial mechanism to ensure accountability for international crimes by investigating and prosecuting such crimes, the parties envisaged the possibility of the treaty's termination before this object is concluded. It would be equally implausible to argue that such a possibility can be implied from the provisions of the agreement and the enabling domestic law.

Assuming for the sake of argument, however, that it would be plausible to base denunciation on Article 56(1) VCLT 1986, then the question would arise as to whether or not such denunciation would affect ongoing obligations or obligations that have already accrued, especially considering that the KSC has already commenced (pre)trial proceedings. Article 70(1) VCLT 1986 would appear to answer this question in the negative as it provides that while a treaty's termination releases the parties from performing any further obligations thereunder, 'any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination' persists. Arguably, therefore, ongoing proceedings before the KSC and any ongoing investigations by the SPO would proceed to conclusion, but the SPO would arguably not be able to initiate new investigations.

5.5.4 Financial Control over the KSC and SPO by EU Institutions

5.5.4.1 Funding of the KSC and SPO

The governing law of the KSC and SPO expressly removes financial obligations in respect of these mechanisms from Kosovo. Article 63(1) of Law 05/L-053 provides that, 'The Specialist Chambers and the Specialist Prosecutor's Office shall have a budget, which shall not come from the budget of Kosovo.' Consequently, and as discussed below, the budget of the KSC and SPO is entirely funded externally, primarily by the EU, and to a minimal extent from voluntary contributions by other states.

For its initial budgetary period retroactively commencing April 2016 till June 2017, the Council of the EU allocated the KSC and SPO € 29,100,000.[713] Subsequently, for the period June 2017–June 2018, the Council of the EU allocated € 41,314,000.[714] During this period, Norway also contributed NOK 80,000,000 (approximately € 7,777,183) while Switzerland committed € 181,200 for 2018–2019 activities.[715] For the period June 2018–June 2020, the Council of the EU allocated € 86,250,000.[716] For the period June 2020–June 2021, the Council of the EU allocated € 45,045,000.[717] The KSC and SPO also received, during this period, € 144,700 from Switzerland for their 2020–2021 activities.[718] For the period June 2021–June 2023, the Council of the EU allocated € 115,793,683.[719] This significant increase in financial allocation reflects the increased financial needs of the KSC and SPO following the commencement of the first criminal proceedings in 2020 (against Salih Mustafa, Hashim Thaçi, Kadri Veseli, Rexhep Selimi, Jakup Krasniqi, Pjetër Shala, Hysni Gucati and Nasim Haradinaj).[720]

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[713] Council Decision (CFSP) 2016/947 of 14 June 2016 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 59 Official Journal of the European Union, L 157/26 (15 June 2016), art 1(1)(a).

[714] Council Decision (CFSP) 2017/973 of 8 June 2017 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 60 Official Journal of the European Union, L 146/141 (9 June 2017), art 1.

[715] Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'First Report' <https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf> accessed 20 June 2021, 47.

[716] Council Decision (CFSP) 2018/856 of 28 June 2018 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 61 Official Journal of the European Union, L 146/5 (11 June 2018), art 1(3). *See also* Kosovo Specialist Chambers & Specialist Prosecutor's Office, '2018 Report' <https://www.scp-ks.org/sites/default/files/public/content/en_annual_report_2018_online.pdf> accessed 20 June 2021, 49; Kosovo Specialist Chambers & Specialist Prosecutor's Office, '2019 Report' <https://www.scp-ks.org/sites/default/files/public/content/ksc_2019-report-eng.pdf> accessed 20 June 2021, 60.

[717] Council Decision (CFSP) 2020/792 of 11 June 2020 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 63 Official Journal of the European Union, L 193/9 (17 June 2020), art 1(2).

[718] Kosovo Specialist Chambers & Specialist Prosecutor's Office, '2020 Report' <https://www.scp-ks.org/sites/default/files/public/content/ksc_online_annual_report2020-eng.pdf> accessed 20 June 2021, 58.

[719] Council Decision (CFSP) 2021/904 of 3 June 2021 Amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, 64 Official Journal of the European Union, L 197/114 (4 June 2021), art 1(2)(a).

[720] Kosovo Specialist Chambers, 'Cases' <https://www.scp-ks.org/en/cases> accessed 20 June 2021.

It is worth mentioning that on 3 August 2015, Kosovo also enacted Law No. 05/L-054 on Legal Protection and Financial Support for Potential Accused Persons in Trials before the Specialist Chambers which seeks to draw from Kosovo's budget in order 'to offer legal protection and financial support of potential accused persons in court proceedings and procedures related to the alleged crimes before the Specialist Chambers'.[721] This support includes court-related travel expenses for immediate family, defence costs and compensation to acquitted persons.[722] Consequently, Kosovo allocated a total of € 1,500,000 in its 2017 budget for this purpose,[723] € 1,500,00 in its 2018 budget,[724] € 1,586,089 in its 2019 budget,[725] € 6,554,323 in its 2020 budget,[726] € 17,072,617 in its 2021 budget,[727] € 6,922,911 in its 2022 budget and estimated projected expenditure for 2023 and 2024 at € 6,922,11 for each year.[728] Considering the fact that the SPO only filed its first indictments before the KSC in 2020,[729] it is unclear what the 2017, 2018 and 2019 budgetary allocations were spent on, if at all. Article 2 of Law No. 05/L -054 provides that, 'The provisions of this Law shall apply to any person who is accused of crimes alleged in proceedings before the Specialist Chambers including legal protection for the accused persons and the financial support of immediate members of their family for travelling related to court proceedings that are held outside of the Republic of Kosovo.' Even though the SPO summoned persons for interviews before June 2020, it appears from the above provision that the law only affords financial support when formal proceedings have been commenced against persons before the KSC.

Notably, however, Law No. 05/L-054 is neither part of the legal architecture of the KSC and SPO nor does it seek to allocate funds from Kosovo's budget to the KSC and SPO. It is also worth noting that Article 34(7) of Law 05/L-053 establishes a Defence Office which, *inter alia,* administers 'a system of legal aid for representation of indigent or partially indigent accused before the [KSC]', ostensibly from the KSC's budget and independent of Law No. 05/L-054.[730] The KSC confirmed that three accused persons have previously benefitted from the Court's legal aid scheme.[731] For confidentiality reasons, the KSC was unable to disclose

[721] Law No. 05/L-054 on Legal Protection and Financial Support for Potential Accused Persons in Trials before the Specialist Chambers (3 August 2015), art 1.
[722] Law No. 05/L-054 on Legal Protection and Financial Support for Potential Accused Persons in Trials before the Specialist Chambers, arts 2–5.
[723] Law No. 05/L-125 on the Budget of the Republic of Kosovo for Year 2017 (23 December 2016), Official Gazette of the Republic of Kosovo, No. 1 (06 January 2017), table 3.1. p. 39.
[724] Law No. 06/L-020 on the Budget of the Republic of Kosovo for Year 2018 (22 December 2017), Official Gazette of the Republic of Kosovo, No. 1 (09 January 2018), table 3.1. p. 39.
[725] Law No. 06/L-133 on the Budget Appropriations for the Budget of the Republic of Kosovo for Year 2019 (3 February 2018), Official Gazette of the Republic of Kosovo, No. 4 (14 February 2019), table 3.1. p. 39.
[726] Law No. 07/L-001 on the Budget Appropriations of the Republic of Kosovo for Year 2020 (15 March 2020), Official Gazette of the Republic of Kosovo, No. 1 (19 March 2020), table 3.1. p. 38.
[727] Law No. 07/L-041 on the Budget Appropriations for the Budget of the Republic of Kosovo for Year 2021 (29 December 2020), Official Gazette of the Republic of Kosovo, No. 1 (06 January 2021), table 3.1. p. 40.
[728] Law No. 08/L-066 on Budget Appropriations for the Budget of the Republic of Kosovo for Year 2022 (17 December 2021), Official Gazette of the Republic of Kosovo, No. 13 (31 December 2021), table 3.1. p. 41.
[729] Kosovo Specialist Chambers, 'Cases' <https://www.scp-ks.org/en/cases> accessed 20 June 2021.
[730] *See also* Rules of Procedure and Evidence Before the Kosovo Specialist Chambers (adopted 17 March 2017, revised 29 May 2017, amended 29 and 30 April 2020), art 23(6).
[731] E-mail from Angela Griep (Head of Public Information and Communication at the KSC) on 26 January 2022 (on file with author).

the specific amounts allocated to the individuals who previously benefitted from the scheme.[732] However, the KSC also confirmed that as of January 2022, no accused person was benefitting from the scheme.[733] Presumably, therefore, all accused persons currently before the KSC are either self-funded or benefit from Law No. 05/L-054.[734] There is indeed no formal relationship between the Defence Office and Law 05/L-054, save for the obligation of a suspect, accused person and Defence Counsel to inform the Defence Office of any assistance received under Law 05/L-054.[735] As provided under Article 63(1) of Law 05/L-053, the KSC and SPO therefore remain funded entirely by external actors, that is, the EU as primary contributor and other contributing states providing some funds on a voluntary basis.[736]

5.5.4.2 Implications of EU Law on Funding and Control of KSC and SPO

As discussed above, the KSC and SPO are primarily funded by the EU. Consequently, this funding from the EU is subject to EU substantive and procedural law relevant to financial management, with the implication that the KSC and SPO are subject to yet another set of EU law that is not anticipated by their governing law and which the Republic of Kosovo has no say in. This fact also means that EU institutions such as the European Commission, European Parliament and the CJEU have a role to play, albeit to different degrees, in the financial control of the KSC/SPO.

As provided in Joint Action 2008/124/CFSP, EULEX Kosovo's budget and expenditure are subject to EU laws relevant to the EU's general budget,[737] and in implementing EULEX Kosovo's budget, the Head of Mission is answerable to and supervised by the European Commission.[738] As discussed above, the KSC's and SPOs' budget – save for contributions by non-EU states – is determined by the Council of the EU and is derived from the Council's budgetary allocation to EULEX Kosovo. As confirmed by the CJEU (both General Court and Court of Justice) in *Elitaliana SpA v EULEX Kosovo,* EULEX Kosovo – under whose general budget the KSC and SPO operate – does not have financial autonomy, but rather exercises financial and budgetary functions delegated by the European Commission and does so under

[732] E-mail from Angela Griep (Head of Public Information and Communication at the KSC) on 26 January 2022 (on file with author).
[733] E-mail from Angela Griep (Head of Public Information and Communication at the KSC) on 26 January 2022 (on file with author).
[734] Despite requests for information from defence teams at the KSC, the author was unable to get information as to whether the accused persons had so far benefitted from Law No. 05/L-054.
[735] Legal Aid Regulations (3 September 2020) regs 6(4)(f) & 25(3).
[736] So far, only Norway and Switzerland have provided some funding to the KSC and SPO, which funding still pales in comparison to EU funding. *See* Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'First Report' https://www.scp-ks.org/sites/default/files/public/content/ksc_spo_first_report_en.pdf (accessed 20 June 2021) 47; Kosovo Specialist Chambers & Specialist Prosecutor's Office, '2018 Report' https://www.scp-ks.org/sites/default/files/public/content/en_annual_report_2018_online.pdf (accessed 20 June 2021) 49; Kosovo Specialist Chambers & Specialist Prosecutor's Office, '2019 Report' https://www.scp-ks.org/sites/default/files/public/content/ksc_2019-report-eng.pdf (accessed 20 June 2021) 60; Kosovo Specialist Chambers & Specialist Prosecutor's Office, '2020 Report' https://www.scp-ks.org/sites/default/files/public/content/ksc_online_annual_report2020-eng.pdf (accessed 20 June 2021) 58.
[737] Joint Action 2008/124/CFSP, art 16(2).
[738] Joint Action 2008/124/CFSP, arts 8(5) & 16(4).

the supervision, authority and control of the European Commission.[739] Consequently, it is the European Commission and not the KSC and SPO themselves that has ultimate control over the latter's financial direction. Further, because the bulk of KSC and SPO budgetary allocation is allocated by the Council of the EU within the EULEX Kosovo budget, both the European Parliament and CJEU have a residual supervisory role to play in relation to this budget.

Going by the decision-making structure provided in the EU's constituent instruments and as confirmed in the CJEU jurisprudence, particularly in *European Parliament v Council of the European Union, Action for Annulment (Decision 2011/640/CFSP – Legal Basis- Common Foreign and Security Policy (CFSP) – Article 37 TEU – International Agreement Relating Exclusively to the CFSP)*[740] and *European Parliament v Council of the European Union (Action For Annulment – Common Foreign and Security Policy (CFSP) – Decision 2014/198/CFSP – Agreement Between the European Union and The United Republic of Tanzania on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-Led Naval Force to The United Republic of Tanzania),*[741] the substantive legal basis for the adoption of a decision by the Council of the EU determines the level of the European Parliament's involvement. If adopted as one relating 'exclusively to the common foreign and security policy' as provided under Article 218(6) TFEU and as confirmed by the CJEU in the above cases, then the European Parliament's consent is not required. Rather, its role is limited to being kept 'immediately and fully informed at all stages of the [treaty-making] process' as required under Article 218(10) TFEU in order to enable the European Parliament to exercise 'democratic scrutiny'[742] or 'democratic control'[743] over the EU's external action.

The EU instruments relevant to the conclusion of the international agreement between the EU and Kosovo – Joint Action 2008/124/CFSP of 4 February 2008, EU High Representative's letter of 17 April 2014 and Council Decision 2014/685/CFSP of 29 September 2014 – relate (exclusively) to the EU's common foreign and security policy for the purpose of determining the role of the European Parliament. Consequently, and going by the analysis in the preceding paragraph, while the European Parliament's consent was not required for the conclusion of this agreement, the Council of the EU was obligated to keep the European Parliament 'fully informed' in order to enable the latter to exercise 'democratic scrutiny and control'.

Finally, the CJEU has an important judicial role to play in EULEX Kosovo's expenditure, and by extension that of the KSC and SPO. The Court of Justice held in *Elitaliana SpA v EULEX Kosovo* that while the CJEU does not generally have jurisdiction over matters concerning EU common foreign and security policy, it nonetheless has jurisdiction to entertain cases concerning the interpretation and application of EU public procurement laws, particularly

[739] Case C-439/13 P (12 November 2015) paras 51–68.
[740] Case C-658/11, ECLI:EU:C:2014:2025 (24 June 2014).
[741] Case C-263/14, ECLI:EU:C:2016:435 (14 June 2016).
[742] Case C-658/11, ECLI:EU:C:2014:2025 (24 June 2014) [79].
[743] Case C-263/14, ECLI:EU:C:2016:435 [71].

EULEX Kosovo's expenditure which is in fact expenditure of a civilian nature charged to the EU's budget.[744] As such, in the event of a dispute, the CJEU has the authority to judicially review KSC and SPO budget and expenditure as this is allocated from the EU budget as part of EULEX Kosovo's budget.

The implications of the above state of affairs are potentially manifold. On the one hand, considering the fact that Law No. 05/L-053 expressly provides that the budget of the KSC and SPO 'shall not come from the budget of Kosovo',[745] it is understandable that the funders should exercise some degree of oversight over their contributions. Seen in this light, subjecting the KSC's and SPO's budget and expenditure to the EU legal order appears appropriate. On the other hand, the fact that the KSC and SPO are subjected to a legal order not envisioned in their governing law, even if only for the specific budgetary purposes, raises concerns as to the extent of the independence of the KSC and SPO.

5.5.5 Residual Constitutional Control and Oversight by Kosovo

Kosovo theoretically retains residual oversight and control over the legal aspects of the KSC and SPO that relate to the compatibility of their actions with the Constitution of Kosovo, including the question of violation of constitutionally-guaranteed rights and fundamental freedoms. The governing legal framework seeks to ensure this residual control primarily through the power to determine questions of constitutional compatibility and violations of individual rights. The KSC is legally part of the judicial system of Kosovo albeit with primacy over matters within its jurisdiction and is attached to each level of Kosovo's judicial system and therefore has four chambers: Basic Court Chamber; Court of Appeals Chamber; Supreme Court Chamber; and Constitutional Court Chamber.[746] The KSC and SPO therefore operate, at least in theory, within the existing judicial structure of Kosovo and with reference to Kosovo's judicial system. In this hierarchy, the Constitutional Court Chamber (Specialist Chamber of the Constitutional Court) 'deal[s] exclusively with any constitutional referrals relating to the Specialist Chambers and Specialist Prosecutor's Office'.[747]

5.5.5.1 Constitutional Control and Supervision by Specialist Chamber of the Constitutional Court over the KSC and SPO

The Constitutional Court of Kosovo derives from Article113 of the Constitution its general authority to decide on matters referred to it. Specific to the KSC and SPO, Article 162(3) of the Constitution (Amendment No. 24) specifically empowers a Specialist Chamber of the Constitutional Court to 'exclusively decide any constitutional referrals under Article 113 of the Constitution relating to the [KSC and SPO] in accordance with a specific law'. The 'specific

[744] Case C-439/13 P (12 November 2015) paras 41–50. Notably, however, the Court declared this case inadmissible and declined to review EULEX Kosovo's expenditure, holding that the case should have been pursued against the European Commission as opposed to EULEX Kosovo which had no legal capacity but was merely exercising financial authority delegated to it by the Commission [paras 51–68].
[745] Law No. 05/L-053, art 63(1).
[746] Law No. 05/L-053, arts 3(1), 24 & 54.
[747] Law No. 05/L-053, arts 3(1).

law' referred to here, Law 05/L-053, provides at Article 49(1) that, 'The Specialist Chamber of the Constitutional Court shall be the final authority for the interpretation of the Constitution as it relates to the subject matter jurisdiction and work of the [KSC and SPO].'[748] A referral under these provisions can be made if it 'relates to or directly impacts the work, decisions, orders or judgments of the [KSC] or the work of the [SPO]'.[749] A number of persons and entities can make these referrals to the Specialist Chamber of the Constitutional Court.

Concerning questions on compatibility with the Constitution of Kosovo, the President, the Assembly and the Government may refer matters to the Specialist Chamber of the Constitutional Court if they concern compatibility with the Constitution of laws, decrees, regulations, declarations, proposed referenda and proposed constitutional amendments in as far as they relate to the KSC and SPO.[750] Before a proposed constitutional amendment affecting the KSC and SPO is passed by the Assembly, the President of the Assembly is obligated to seek the Specialist Chamber of the Constitutional Court's confirmation of its compatibility with constitutionally guaranteed rights and fundamental freedoms.[751] At least ten members of the Assembly can also contest before the Specialist Chamber of the Constitutional Court 'the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed' in as far as they relate to the KSC and SPO.[752]

The Ombudsperson of the Republic of Kosovo and the Ombudsperson of the KSC are both authorised to refer matters to the Specialist Chamber of the Constitutional Court if they concern compatibility with the Constitution of laws, decrees, regulations, declarations, proposed referenda and proposed constitutional amendments in as far as they relate to the KSC and SPO.[753] When a question of the compatibility of a law with the Constitution of Kosovo arises during proceedings at the KSC's Basic Court Chamber, Court of Appeals Chamber and Supreme Court Chamber and the question is fundamental to that Chamber's decision, that Chamber may *suo motu* seek the determination of the Specialist Chamber of the Constitutional Court on that question.[754]

In accordance with Article 113(7) of the Constitution, alleged violations of constitutionally-guaranteed individual human rights and fundamental freedoms by public authorities can be referred by the concerned individuals. Specific to the KSC and SPO and deriving from the general constitutional authority above, Article 49(3) of Law 05/L-053 authorises 'individuals, including the accused and victims … to make referrals to the Specialist

[748] *See also* Law No. 05/L-053, arts 3(1).
[749] Law No. 05/L053, art 49(2).
[750] Constitution of the Republic of Kosovo, art 113(2)-(3); Constitution of the Republic of Kosovo, art 162(3) (Amendment No. 24); Law No. 05/L-053 of 3 August 2015, art 49(2).
[751] Constitution of the Republic of Kosovo, art 113(9); Constitution of the Republic of Kosovo, art 162(3) (Amendment No. 24); Law No. 05/L-053 of 3 August 2015, art 49(2).
[752] Constitution of the Republic of Kosovo, art 113(5); Constitution of the Republic of Kosovo, art 162(3) (Amendment No. 24); Law No. 05/L-053 of 3 August 2015, art 49(2).
[753] Constitution of the Republic of Kosovo, art 113(2); Constitution of the Republic of Kosovo, art 135(4); Constitution of the Republic of Kosovo, art 162(3) & (11) (Amendment No. 24); Law No. 05/L-053 of 3 August 2015, art 49(5).
[754] Constitution of the Republic of Kosovo, art 113(8); Constitution of the Republic of Kosovo, art 162(3) (Amendment No. 24); Law No. 05/L-053 of 3 August 2015, art 49(4).

Chamber of the Constitutional Court in relation to alleged violations by the Specialist Chambers or Specialist Prosecutor's Office of their individual rights and freedoms guaranteed by the Constitution'. Notably, this authority is granted broadly to 'individuals' thereby potentially opening up the possibility to any number of persons as long as their rights are allegedly violated and as long as they have exhausted all other legal remedies. In addition to the referrals above, the Specialist Chamber of the Constitutional Court is empowered to review and determine the compatibility of the Rules of Procedure and Evidence of the KSC with constitutionally guaranteed rights and fundamental freedoms.[755]

As such, the Constitutional Court of Kosovo, of which the Specialist Chamber of the Constitutional Court is part, has the ultimate authority in determining the constitutionality of the actions of the KSC. However, as the discussion that follows will reveal, there is more to the actual application of this authority than the legal provisions above suggest.

5.5.5.2 Composition of the Specialist Chamber of the Constitutional Court as a Double-Edged Sword

At first glance, the legal arrangement discussed above appears to assure Kosovo of a degree of residual judicial oversight over the KSC and SPO, at least in theory. This is particularly important since this mechanism, while based in a third country and staffed exclusively by foreigners, has the authority to undertake criminal enquiries of and prosecution for events that occurred during a fundamental moment in the formation of Kosovo as a state. In other words, the work of the KSC and SPO will inevitably have significant impact on the integrity of Kosovo's statehood.

However, this control also raises the possibility that elements within Kosovo's political leadership may take advantage of this avenue for control to challenge the legal basis for the KSC and SPO and in turn derail its work. This concern has been raised by the President of the KSC who in January 2021 warned the EU of plans by Kosovo officials to challenge the legality of the KSC and SPO – ostensibly before the Constitutional Court – and to attempt to relocate the KSC and SPO from The Hague to Pristina, Kosovo or to interfere with its mandate in any other manner.[756] A possible judicial challenge on the legality of the KSC and SPO would, however, most likely be unsuccessful because the Constitutional Court had in 2015 confirmed the constitutionality of Amendment No. 24 (in its proposed form) before its adoption by the Assembly,[757] and this is the constitutional amendment upon which Law 05/L-053 and the KSC and SPO are based.

The composition of the Specialist Chamber of the Constitutional Court with exclusive competence to hear referrals relating to the KSC and SPO also provides some comfort against

[755] Constitution of the Republic of Kosovo, art 162(6) (Amendment No. 24); Law No. 05/L-053, art 19(5).
[756] Orlando Crowcroft, 'Kosovo Could Try to Move War Crimes Court to Pristina, Judge Warns' *Euronews* 15 February 2021 <https://www.euronews.com/2021/02/15/kosovo-could-try-to-move-war-crimes-court-to-pristina-judge-warns> accessed 16 February 2021.
[757] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015.

whimsical action by Kosovo. At the same time, it also raises questions as to any real residual control that Kosovo may have over the KSC and SPO. As discussed above, the Specialist Chamber of the Constitutional Court is composed of three international judges appointed by the Head of EU Common Security and Defence Policy Mission.[758] No Kosovar national sits on the bench of this chamber, neither does Kosovo have any say in who gets appointed to this chamber. As such, it is unlikely, on the one hand, that the three international judges appointed by EULEX Kosovo will entertain a legally tenuous challenge on the legality of the KSC and SPO.

On the other hand, this composition casts serious doubt on any illusion of residual control that Kosovo through the Constitutional Court may have over the KSC and SPO and whether the KSC and SPO do in practice operate within and with reference to Kosovo's judicial system. These doubts were in fact raised by a group of parliamentarians before the Constitutional Court in April 2015 during proceedings to determine the constitutional compatibility of the then-proposed Amendment No. 24.[759] The parliamentarians challenged the establishment of the KSC and the SPO, arguing that this violated the Constitution by purporting to establish a judicial body parallel to and separate from Kosovo's judicial system.[760]

Without addressing the proposed Specialist Chamber of the Constitutional Court's exclusive composition of three international judges, the Constitutional Court rejected these arguments, holding that the establishment of the Specialist Chamber of the Constitutional Court 'does not diminish the constitutional rights guaranteed by [the Constitution of Kosovo]'[761] since it is established 'within the existing Constitutional Court … [to exercise] a supervisory jurisdiction over the Specialist Chambers within the regular courts and the Specialist Prosecutor's Office'[762] and was intended to domesticate Kosovo's international obligations arising from the international agreement with the EU. As is evident from the discussion in Section 5.3.2.2 above, the soundness of this holding by the Court appears questionable when the practical aspects of the KSC and SPO are considered, for example, the appointment of judges and staff, judicial control and accountability and funding.[763] Because the question of the composition of the Specialist Chamber of the Constitutional Court with exclusive supervisory jurisdiction over the KSC and SPO was not specifically addressed by the Constitutional Court, it unsurprisingly came up again soon after the adoption by the Assembly of Amendment No. 24.

[758] The three current judges on the roster for the Specialist Chamber of the Constitutional Court and the reserve judge on the roster are nationals of Norway, Bulgaria and Italy. Kosovo Specialist Chambers & Specialist Prosecutor's Office, 'Chambers' <https://www.scp-ks.org/en/specialist-chambers/chambers> accessed 13 May 2021.
[759] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015.
[760] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015, paras 24-34.
[761] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015, para 66.
[762] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015, para 65.
[763] See also Avdylkader Mucaj (n 632) 372–373.

The September 2015 constitutional challenge by a group of parliamentarians against Amendment No. 24 (discussed in Section 5.3.2.2) argued, *inter alia*, that the creation of the Specialist Chamber of the Constitutional Court as part of the KSC composed of three international judges contravened the structure and composition of the Constitutional Court of Kosovo as provided in the Constitution, including the authority and role of the President and Assembly in appointing judges of the Constitutional Court.[764] However, the Constitutional Court declined to examine the merits of the application, dismissing it on the basis of lack of competence, as discussed in discussed in Section 5.3.2.2.[765]

Going by the Constitutional Court's decisions of April 2015 and September 2015, it is therefore unlikely that this legal question will be raised again. However, should it ever be, a possible dilemma for this challenge would be the appropriate forum. While the Constitutional Court has the general authority under Article 113 of the Constitution to determine questions of constitutionality referred to it, the exclusive authority to determine such questions if they relate to the KSC and SPO rests with the Specialist Chamber of the Constitutional Court as provided in Article 162(3) of the Constitution (Amendment No. 24). One interpretation could be that the Constitutional Court as a whole has the authority to entertain such a challenge since it relates to the legality of the Specialist Chamber of the Constitutional Court, and not to the work of the KSC and SPO *stricto sensu.* Another interpretation would be that such a challenge is the exclusive preserve of the Specialist Chamber of the Constitutional Court as the challenge has an overall impact on the work of the KSC and SPO. However, this means requesting the Specialist Chamber of the Constitutional Court to decide on the legality of its existence, a likely violation of the natural justice principle of *nemo judex in causa sua.* Whichever the case, and its other benefits notwithstanding, however, it is apparent that the issue of the composition of the Specialist Chamber of the Constitutional Court is problematic in as far as it purports to imply a degree of residual supervisory control by Kosovo over the KSC and SPO and in as far as a bench composed entirely of foreigners has exclusive authority to make determinations on questions of domestic constitutional law.

5.5.6 Making (Some) Sense of Kosovo's Deference to the EU Regarding the KSC and SPO

While a technical reading of the legal framework governing the KSC and SPO emphasises the legal position that the KSC and SPO are part of Kosovo's judicial system, the practical effect of this framework paints a different picture. As has emerged from the discussion above, the allocation of authority between the EU and Kosovo in respect of the KSC and SPO is heavily in favour of the EU, with Kosovo exercising almost no meaningful control over the mechanisms. As the examination of the legal process leading up to the establishment of the KSC and SPO including the conclusion of the international agreement, of the mechanisms' legal framework and of the allocation of authority between the EU and Kosovo has revealed,[766]

[764] Case No. KO107/15, Ref, No. RK 845/15, Constitutional Court of the Republic of Kosovo, Judgment, 21 September 2015, para 35.
[765] Case No. KO107/15, Ref, No. RK 845/15, Constitutional Court of the Republic of Kosovo, Judgment, 21 September 2015, paras 67, 85, 88 & 90.
[766] *See* Section 5.3.

authority over the KSC and SPO, including administrative control, is practically the exclusive preserve of the EU.

While it is not unusual for states to delegate such authority as Kosovo has to inter-governmental organisations, the motivations for doing so and the extent of the delegation often vary. As Hehir has convincingly showed in his research, the creation of the KSC and SPO was not domestically driven, but was rather a result of pressure from external sources, most prominent of these being the EU and the USA.[767] To reconcile the apparent internal opposition to the KSC and SPO from Kosovo's political establishment with the government's deference to the EU on the KSC and SPO, it is important to briefly examine what Kosovo's motivation might have been.

A common thread that runs through Kosovo's engagement with the EU regarding the KSC and SPO, and which might explain the generous deference to the EU in this regard, is Kosovo's ambition to become a member of the EU. For instance, in Kosovo's letter to the EU High Representative for Foreign Affairs and Security Policy dated 14 April 2014 inviting the EU to assist in establishing and operating the KSC and SPO, the President concludes by stating that, 'I thank you for your continued contribution to Kosovo's peace and stability and look forward to continuing our close cooperation to contribute to a multiethnic democratic and prosperous Kosovo, *and to bring Kosovo closer to full integration in the European Union*'.[768] The EU High Representative's response to the above letter was also revealing of this motivation. It stated that, 'In carrying out its mandate, EULEX KOSOVO will contribute to *facilitating Kosovo's progress towards further integration with the EU*.'[769] This overt packaging of the proposed mechanism by the EU as a prerequisite for membership of the EU was supported by the USA.[770] In making the proposal on behalf of the EU and USA and in justifying the external pressure for the establishment of the KSC and SPO, the EU Special Representative explicitly emphasised 'Kosovo's European path',[771] that is, enhancing Kosovo's chances of integrating into the EU, and justified the proposal on the basis of, among others, 'hope for a better, European future'.[772]

The ambition to 'Europeanise' Kosovo has since resulted in the conclusion of a Stabilisation and Association agreement. Acting on the basis of specific power in Article 217 TFEU which empowers the EU to 'conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and

[767] Aidan Hehir, 'Lessons Learned? The Kosovo Specialist Chambers' Lack of Local Legitimacy and Its Implications' (2019) 20 Human Rights Review 267, 268–270; 275–277.
[768] Kosovo President's Letter of 14 April 2014, para 19 (emphasis added).
[769] EU High Representative's Letter of 17 April 2014, para 4 (emphasis added).
[770] Fisnik Korenica, Argjend Zhubi and Dren Doli (n 635) 477.
[771] European Union External Action Service, 'Statement by High Representative/Vice President Federica Mogherini after the Adoption by the Kosovo Assembly of the Law on Specialist Chambers and Specialist Prosecutor's Office' 3 August 2015 <https://eeas.europa.eu/headquarters/headquarters-homepage/3230/node/3230_nl> accessed 5 March 2021.
[772] Samuel Žbogar, Head of the EU Office in Kosovo and EU Special Representative, 'The Truth Beyond any Doubt' 10 April 2014 <http://eeas.europa.eu/archives/delegations/kosovo/documents/statements/140410_the_truth_beyond_any_doubt_en.doc> accessed11 March 2021, para 12.

obligations, common action and special procedure', the EU concluded the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part.[773] As vaguely defined by the CJEU in *Meryem Demirel v Stadt Schwäbisch Gmünd, Reference for a Preliminary Ruling: Verwaltungsgericht Stuttgart – Germany, Association Agreement between EEC and Turkey - Freedom of Movement for Workers,* association agreements are those 'creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system.' [774] It follows, therefore, that the association agreement with Kosovo means that Kosovo acquired (limited) rights and obligations vis-à-vis the EU. The Stabilisation and Association Agreement also makes preambular reference to this ultimate 'Europeanisation' aim[775] and so does the EU's Transitional Justice Policy which expressly provides that, 'The EU considers transitional justice to be a priority for candidate countries and potential candidates … through the respect for fundamental rights and the rule of law, and all countries seeking to accede to the Union must demonstrate a credible commitment to promoting these principles by addressing all relevant aspects where obstacles to achieving justice persist.'[776] The Stabilisation and Association Agreement was subsequently followed in 2017 by the Framework Agreement between the European Union and Kosovo on the general principles for the participation of Kosovo in Union programmes[777] concluded under Article 212 TFEU and which, ostensibly, governs financial, economic and technical cooperation between the EU and Kosovo.

A generous interpretation of the EU's motive would, as Cimiotta argues, be 'creating the factual and legal pre-conditions for Kosovo's future admission into the EU, namely the restoration and reinforcement of stability and rule of law in Kosovo, with possible positive consequences in the whole region'.[778] However, the EU's motives were not entirely as altruistic. As mentioned in Section 5.3.1.3, European Commission bureaucrats were initially not enthusiastic about EU involvement, but eventually had to get in line due to the enthusiasm of EU political organs, specifically the Council of the EU, and also because of pressure from the USA.[779] The EU's motives can also be viewed from the prism of the Union's desire to promote its own regional political and security interests which, as Baylis argues, is consistent with 'a long history of … unidirectional EU power in Kosovo, both in the form of the authority it has exerted in the EULEX mission and in the control it holds over Kosovo's opportunity to

[773] 59 Official Journal of the European Union, L 71/3 (16 March 2016).
[774] Case 12/86 [1987] ECR 3719 (30 September 1987) [9].
[775] Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part, 59 Official Journal of the European Union, L 71/3 (16 March 2016), preamble, paras 3 & 22.
[776] The EU's Policy Framework on Support to Transitional Justice, 13576/15 (16 November 2015) IV(7).
[777] 60 Official Journal of the European Union, L 195/3 (27 July 2017).
[778] Emanuele Cimiotta, 'The Specialist Chambers and the Specialist Prosecutor's Office in Kosovo: The 'Regionalization'of International Criminal Justice in Context' (2016) 14 Journal of International Criminal Justice 53, 69.
[779] Conversation with former high-ranking official of the KSC/SPO, Nuremberg International Conference, Nuremberg 14 May 2022 (notes on file with author).

accede to membership'.[780] This perhaps explains why, despite the overt exhortation of the 'Europeanising' motive of the proposal, the EU and its ally the USA backed their proposal with 'subtle' threats to invoke the powers of the UN Security Council to establish a UN-backed tribunal should Kosovo fail to accept the proposal as made by the EU and the USA,[781] and even implied that they had secured Russia's assurance of support for this course of action at the UN Security Council.[782] The EU's involvement in international criminal accountability in Kosovo can therefore be summarised as leaning on cosmopolitan justifications to mask a thinly-veiled agenda for regional dominance, integration and security.

It appears, therefore, that while Kosovo was never enthusiastic about establishing an international criminal accountability mechanism, it saw in the pressure by the EU and USA an opportunity to further its European integration ambitions and possibly even bolster its quest for global recognition as a state. As such, while Kosovo's political elite and perhaps even the general populace may not necessarily be enthusiastic about the KSC and SPO,[783] these misgivings seemed to pale when considered as against the perceived political, economic and social benefits of EU membership. EU membership would also undoubtedly boost Kosovo's quest for global recognition as a state. Thus, Visoka argues, 'Kosovo's pragmatic politicians feared that opposing the Specialist Court would risk exposing the country to international isolation and impede efforts to extend recognition of Kosovo's sovereignty … Despite dissatisfaction and disagreements, it is expected that, in the end, Kosovo's cooperation with international justice will restore the confidence of international partners and is likely to boost support for completing diplomatic recognition and securing membership of key international and regional organisations.'[784] This would explain Kosovo's invitation to the EU – or acquiescence to EU and USA pressure – to establish and operate the KSC and SPO which at their establishment were, as they are now, deeply unpopular with Kosovo's political establishment.

In a sense, therefore, the role played by Kosovo and its political elites in establishing the KSC and SPO can appropriately be considered as that of instrumental norm adopters, to adopt the classification advanced by Subotić.[785] Herein, political elites strategically adopt international norms and processes not necessarily because they believe in them and their

[780] *See for example* Elena A. Baylis, 'Regionalized Hybrid Courts' in Kirsten Ainley and Mark Kersten (eds), *Hybrid Justice: Innovation and Impact in the Prosecution of Atrocity Crimes* (Oxford University Press forthcoming) 16.
[781] Robert Muharremi, 'The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers' (2018) 18 International Criminal Law Review 623, 624; Mathias Holvoet, 'The Continuing Relevance of the Hybrid or Internationalized Justice Model: The Example of the Kosovo Specialist Chambers' (2017) 28 Criminal Law Forum 35, 41–42; Gëzim Visoka, *Assessing the Potential Impact of the Kosovo Specialist Court* (PAX 2017) 17–20; Beth Van Schaack, 'The Building Blocks of Hybrid Justice' (2016) 44 Denver Journal of International Law and Policy 101, 133–135.
[782] Amb. Stephen J. Rapp (Former USA Ambassador-at-Large for Global Criminal Justice), International Nuremberg Principles Academy International Conference 14 May 2022 (notes on file with author).
[783] See Aidan Hehir (n 767); Aidan Hehir, 'The Assumptions Underlying the Kosovo Specialist Chambers and Their Implications' (2020) 20 International Criminal Law Review 17.
[784] Gëzim Visoka (n 781) 24.
[785] Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell University Press 2009) 35. Oumar Ba has also observed and extensively interrogated similar instrumental norm 'adoption' in his study on so-called weaker states and the International Criminal Court. *See* Oumar Ba (n 173).

supposed lofty ideals, but rather because they want to 'position themselves as internationalist and reformist forces in society'[786] and because they believe that these processes are 'legitimate and necessary if they are to be taken seriously by international actors on whom they depend [and who supposedly hold the key to] international club membership'.[787] Therefore, while Kosovo and its political elite acquiesced to the establishment of the KSC and SPO due to a mix of international pressure and political opportunism, the political elite has remained 'either actively hostile towards [the KSC and SPO] or at best ambivalent'.[788]

5.6 Chapter Conclusion

5.6.1 Mode of Conferral of Competence on the EU In Respect of the KSC and SPO and Practical Implications thereof

The analysis in this chapter has revealed one possibility through which RIGOs can exercise elements of sovereign authority in order to promote accountability for international crimes at the regional level. The approach, evidenced in the EU's engagement with the KSC and SPO, is where the RIGO exercises its powers outside its ordinary jurisdictional reach, that is, in respect of international crimes allegedly committed in a non-member state. The discussion in sections 5.2 and 5.3 established the legal basis for the EU's involvement in the establishment and operation of the KSC and SPO. Following on that discussion, the thesis concludes that the involvement of the EU in the establishment and operation of the KSC and SPO can be explained as a substantive conferral of authority on an *ad hoc* basis.[789] Kosovo is not a member of the EU, and as such the EU does not have any pre-existing and permanent legal authority to intervene in Kosovo on its own initiative.[790] Kosovo has therefore exercised its sovereign prerogative and invited the EU to assist in the establishment and operation of the KSC and SPO. This Kosovo does through formal invitations, that is, the general invitation through the Declaration of Independence of 17 February 2008 welcoming EULEX Kosovo's presence, and the specific invitation through the President's letter of 14 April 2014 to the EU to assist in the establishment and operation of a criminal accountability mechanism. The invitation sought to expressly confer specific and temporary authority on the EU with respect to the KSC and SPO.

As discussed in section 5.2, the EU's constituent instruments expressly and impliedly empower it with the general competence to engage in external action in the relevant areas, being the rule of law and international peace and security. Consequently, this means that the EU is competent to accept Kosovo's invitation which seeks to confer specific and limited authority on the EU. The EU accepts Kosovo's invitation, acting on the basis of specific and implied competence in its constituent instruments (the TEU and TFEU) and through legal instruments based on these treaties and enabling it to accept and engage in external action in

[786] Jelena Subotić (n 785) 35.
[787] Jelena Subotić (n 785) 35.
[788] Aidan Hehir (n 767) 277.
[789] For a discussion of the modes of competence conferral, *see* Dan Sarooshi (n 312) 19–27.
[790] In any case, even if Kosovo were a member state of the EU, the EU would still be unable to intervene on its own initiative in Kosovo in this respect since the EU does not have pre-existing and permanent legal authority for such interventionist action.

the specific area, that is, Joint Action 2008/124/CFSP of 4 February 2008, EU High Representative's letter of 17 April 2014 and Council Decision 2014/685/CFSP of 29 September 2014.

However, the powers conferred on the EU by the international agreement with Kosovo are neither of a permanent nor general nature. First, they are specific to the KSC and SPO and they are temporally limited in that they exist only as long as the KSC and SPO, which are temporary mechanisms, exist. Second, the parameters (scope and extent) of these powers are delimited by the international agreement between the EU and Kosovo, Law No. 04/L-274, Constitutional Amendment No. 24 and Law 05/L-053. Therefore, the substantive powers conferred on the EU in respect of the KSC and SPO are of an *ad hoc* nature. That said, however, the practical exercise of the EU's implied and conferred authority in respect of the KSC and SPO is neither straight-forward nor devoid of ambiguities and challenges, as the discussion in section 5.5 has revealed concerning the balance of authority between the EU and Kosovo in respect of the KSC and SPO.

5.6.2 Imbalance of Authority between the EU and Kosovo

Authority related to the KSC and SPO can be divided into two broad categories – criminal accountability and constitutional control – which are then allocated to and between each of the two authorities, the EU and Kosovo. Under the legal framework of the KSC and SPO, the EU has the sole responsibility of administering aspects of these mechanisms that are specific to the dedicated function of ensuring accountability for international crimes, that is, the KSC's and SPO's criminal accountability functions *stricto sensu*. These include: the investigation of alleged crimes, first carried out by SITF under EULEX Kosovo's control and now by the SPO which is staffed and operated by the EU; prosecution of alleged perpetrators which is conducted by the SPO; and adjudication which is done by the KSC, itself also staffed and operated by the EU. In theory, Kosovo retains residual constitutional control over the KSC and SPO through the Specialist Chamber of the Constitutional Court and through its sovereign power to amend its laws and to conclude or denounce treaties.

Nevertheless, the discussion in this chapter has revealed that despite (or perhaps because of) the applicable legal framework, the KSC and SPO appear to be designed to operate, and they do in practice operate, parallel to and independent of Kosovo's judicial system despite all the rhetoric about being part of the domestic legal system. As Baylis has observed, the KSC 'is highly independent of Kosovo's judiciary and in many ways is functionally an EU court'[791] and a manifestation 'of unidirectional EU power in Kosovo'.[792] By practically operating outside Kosovo's judicial structure, the KSC is then *de facto* an 'extraordinary' court as opposed to a 'specialised' court, a position that is difficult to reconcile with Article 103(7) of the Constitution of Kosovo which provides that '[s]pecialized courts may be established by law when necessary, but no extraordinary court may ever be created' and Article 162(1) of the Constitution of Kosovo (Amendment No. 24) which empowers Kosovo to establish the KSC

[791] Elena A. Baylis (n 780) 14.
[792] Elena A. Baylis (n 780) 16.

and SPO 'within the justice system of Kosovo'. The Constitutional Court of Kosovo has interpreted the term 'specialized court' as foreseen under Article 103(7) of the Constitution of Kosovo to mean 'a court with a specifically defined scope of jurisdiction, and which *remains within the existing framework of the judicial system of the Republic of Kosovo* and operates in compliance with its principles'[793] and the term 'extraordinary court' to mean a court 'placed outside the structure of the existing court system and [which] would operate without reference to the existing systems'.[794] For all intents and purposes, the KSC is therefore an 'extraordinary court'.[795]

This power imbalance between the EU and Kosovo regarding the KSC and SPO may not necessarily hinder proceedings before the KSC. It may even be the reason why the Court has managed so far to indict, arrest and detain eight persons in The Hague despite resistance from Kosovo's political establishment, a feat it has managed largely due to the policing role of EULEX Kosovo and the EU's control over the KSC and SPO. Further, it does not necessarily imply the erosion of the independence of the KSC and SPO in performing their specific functions of accountability for international crimes. The independence of the KSC and of the SPO is legally guaranteed by the legal framework, and it can be argued that the EU's control over the KSC and SPO assures that this independence (from interference by Kosovo) is maintained.

However, this imbalance where the EU has near-absolute control of the KSC and SPO has and is likely to continue to cause tension between Kosovo and the KSC and SPO, with significant implications for the proper functioning of these mechanisms and for accountability for international crimes in Kosovo, and possible consequences for perceptions of overall legitimacy. For instance, any government cooperation required to secure evidence and ensure security of witnesses may prove difficult to obtain. While EU presence in Kosovo through EULEX Kosovo may, to some extent, mitigate these difficulties, the abilities of a hostile government in Kosovo cannot be underestimated. Further, the hostility of a government and population that do not 'see themselves' in and as part of a mechanism supposedly operating in their name may become evident in how the government and the Kosovo public receive and perceive the Court's decisions. sIf one recalls that the EU's Transitional Justice Policy emphasises, as essential to the success of transitional justice initiatives, context-specificity and national and local ownership of transitional justice processes defined by a participatory, consultative and inclusive design and implementation approach,[796] it is odd that this

[793] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015, para 43 (emphasis added).
[794] Case No. KO26/15, Ref, No. AGJ 788/15, Constitutional Court of the Republic of Kosovo, Judgment, 15 April 2015, para 43.
[795] As the discussion above has established, the KSC and SPO are part of Kosovo's judicial system in theory only. As such, it is perhaps a misnomer to refer to the KSC as a 'specialist chamber' as this gives the false impression that its various chambers are chambers within Kosovo's judicial structure. On the contrary, it is an autonomous court for all intents and purposes. Indeed, as Korenica, Zhubi and Doli have argued, '[A]s opposed to the formal name of "Specialist Chambers", the term "Special(ist) Court" more substantively reflects the self-contained nature of this institution.' *See* Fisnik Korenica, Argjend Zhubi and Dren Doli (n 635) 277–278. Nonetheless, this thesis adopts the formal designation of Specialist Chambers for reasons of consistency.
[796] EU's Policy Framework on Support to Transitional Justice, 13576/15 (16 November 2015), IV (1–2).

exhortatory emphasis has amounted to little more than lip service in the EU-Kosovo relationship with respect to the KSC and SPO where the EU wields near-exclusive control.

As the discussion in this chapter has also revealed, however, there is very little, if any, legal room for Kosovo authorities to fundamentally influence the functioning of the KSC and SPO or to make them practically operate within Kosovo's judicial system. In any case, the thesis does not necessarily argue that this would be a desirable course of action. There is perhaps wisdom in the words of Hehir who argues that, 'The KSC is, of course, a reality; as such, rather than just lament its origins, there is a pressing need to bolster its legitimacy to prevent its proceedings impacting negatively on peace and stability in Kosovo.'[797] This pragmatic conclusion does not, of course, cure the imbalance of authority between the EU and Kosovo with regards to the KSC and SPO, neither does it address the legal uncertainties raised herein. However, it allows for contestation within the realms of legal possibility while providing room for accountability for international crimes to be pursued.

[797] Aidan Hehir (n 767) 284.

CHAPTER SIX

THE AFRICAN UNION AND THE (PROPOSED) HYBRID COURT FOR SOUTH SUDAN

6.1 Introduction

This chapter, the second of two 'practical' chapters of the thesis, proceeds from the theoretical argument made in Chapter II that international criminal justice as a cosmopolitan project demands that a tenable conception of state sovereignty guarantees humanity's fundamental values, specifically human dignity. Since cosmopolitanism emphasises the equality and unity of the human family, guaranteeing the dignity and humanity of the human family is not therefore a parochial endeavour, but rather a common interest of humanity. Accountability for international crimes is one way through which human dignity can be validated where such dignity has been grossly and systematically assaulted. Therefore, while accountability for international crimes is primarily the responsibility of individual sovereign states, this responsibility is ultimately residually one of humanity as a whole, exercisable through collective action. As such, and as argued in Chapter II, states as collective representations of humanity have an obligation to assist in ensuring accountability for international crimes where an individual state is either genuinely unable or unwilling by itself to do so. In conceptualising sovereign authority and collective action by states, Chapters III and IV have interrogated the exercise of elements of sovereign authority by RIGOs and located in general terms the legal basis of such authority in international law. Applying the theoretical foundation and the conceptual framework laid down in Chapters II and III and IV respectively, therefore, this Chapter interrogates the practical role of RIGOs in the pursuit of international criminal accountability as a cosmopolitan project to validate the cosmopolitan values of human dignity and shared humanity. Specifically, the Chapter uses the case study of the African Union's role in the establishment and operation of the proposed Hybrid Court for South Sudan (Hybrid Court) to test and apply the cosmopolitan arguments that the thesis advances. In so doing, the Chapter grapples with the legal complexities of the AU, a regional inter-governmental organisation, exercising elements of sovereign authority ostensibly on behalf of its member states to facilitate the process of ensuring accountability for international crimes in South Sudan, a member state. The chapter analyses the exercise of this authority at various stages of the process, being, the initial stage of investigating crimes allegedly committed during the South Sudan civil war from December 2013, the ongoing process to establish the Hybrid Court and the anticipated role during the operation stage. It also engages with the dynamics of allocation of authority between the AU and South Sudan in relation to the administration of the Hybrid Court. This chapter benefitted significantly from discussions held in Juba, South Sudan from 06–08 October 2021 during the Multi-Stakeholder Convening on Transitional Justice in South Sudan convened by Trust Africa and the African Union Commission and which I attended on-site, and in Nairobi, Kenya from 13–15 December 2021 during the Conference on Sustaining Momentum for Transitional Justice in South Sudan convened by the United Nations

Commission on Human Rights in South Sudan, United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Mission in South Sudan (UNMISS) and which I attended virtually.

6.2 The African Union and Intervention

6.2.1 International Legal Personality of the African Union

As discussed in Chapter IV, inter-governmental organisations are considered to have international legal personality under general international law, and this personality endows them with the capacity to engage on the international plane. The AU's constituent instrument, the Constitutive Act, does not expressly provide for the legal personality of the AU, neither does any other AU instrument. Member states appear to have assumed the legal personality of the organisation that they were establishing. As Abbas has argued, '[T]he legal personality of the [African Union] would therefore have to remain dependent on that conferred under customary international law.'[798] The African Court on Human and Peoples' Rights in its 2012 judgment in *Femi Falana v The African Union* agreed with this view, relied on ICJ jurisprudence (discussed in detail in Chapter IV) and held that because of its nature as an international organisation and despite the Constitutive Act's silence on the question, 'the African Union has a legal personality separate from the legal personality of its Member States'.[799] Following from the detailed discussion in Chapter IV, the thesis agrees with this conclusion regarding the AU's legal personality.

6.2.2 The African Union's Relevant Normative Framework

In order to analyse and properly appreciate the legal basis for the AU's intervention in South Sudan, particularly as regards accountability for international crimes, it is appropriate to first provide a general overview of the AU's relevant normative framework. The AU's primary legal authority is embodied in its constituent instrument, the Constitutive Act of the African Union of 2000 (Constitutive Act),[800] a 'continental-level social contract and a constitutional instrument'[801] underpinning the AU's norm-generating ambitions.[802] As Amao has observed, 'A majority of the objectives of the AU are directly or indirectly linked with integration and collectivism'[803] while its principles underscore a uniquely continental approach to the development of AU law and consequently international norms and standards.[804]

[798] Ademola Abass, *Complete International Law: Texts, Cases, and Materials* (n 456) 205.
[799] Application No 001/2011 (Judgment of 26 June 2012) para 68.
[800] Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3.
[801] Olufemi Amao (n 29) 1.
[802] Olufemi Amao (n 29) 1.
[803] Olufemi Amao (n 29) 32.
[804] Olufemi Amao (n 29) 32.

The Constitutive Act provides some of the AU's objectives and principles[805] that are relevant to international criminal accountability. Specifically, Article 3 of the Constitutive Act provides the AU's objectives as including the promotion of peace, security, stability, human and peoples' rights and cooperation, and the promotion and defence of African common positions. In pursuing these objectives, the AU is guided by the governing principles enshrined in Article 4 of the Constitutive Act which include: common continental defence policy; the Union's right of intervention in the event of specific international crimes in a member state; members' right to request intervention to secure peace and security; self-reliance; respect for human rights and the rule of law; sanctity of human life and rejection of impunity. These objectives and principles are also reflected in the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002 (PSC Protocol)[806] which recognises the AU as the body with 'the primary responsibility for promoting peace, security and stability in Africa',[807] establishes the AU Peace and Security Council (AU-PSC) 'as a standing decision-making organ for the prevention, management and resolution of conflicts',[808] and lays down practical means for operationalising the AU's intervention powers as provided in the Constitutive Act. These objectives and principles also reflect the commitment made by AU member states in Article 23 of the African Charter on Human and Peoples' Rights to recognise 'the right to national and international peace and security … [and] strengthen[] peace, solidarity and friendly relations'.

The AU's understanding of and approach to peace and security reflected in its objectives and principles as discussed above is further elaborated in the Common African Defence and Security Policy (CADSP), one of the AU's first soft-law instruments adopted in February 2004.[809] The CADSP lays emphasis on 'human security' which it defines as 'based not only on political values but on social and economic imperatives … human rights … [and] safeguard[ing] security of individuals, families, communities, and the state/national life, in the economic, political and social dimensions'.[810] By emphasising human security, the AU's approach as enshrined in the Constitutive Act and PSC Protocol and as elaborated in the CADSP is therefore 'a holistic approach to the identification and elaboration of the concept of security'.[811] This understanding recognises the inextricable link and interdependence between physical security, socio-economic security, human rights, human development and peace, and also ensures, as Abass and Baderin have observed, that human rights and human dignity are

[805] For a discussion of the AU's principles and purposes *see* Stéphane Doumbé-Billé, 'The African Union: Principles and Purposes' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (Martinus Nijhoff Publishers 2012).
[806] Protocol Relating to the Establishment of the Peace and Security Council 2002, arts 3 & 4.
[807] Protocol Relating to the Establishment of the Peace and Security Council 2002, art 16(1).
[808] Protocol Relating to the Establishment of the Peace and Security Council 2002, art 2. *See* Roland Adjovi, 'The Peace and Security Council' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (Martinus Nijhoff Publishers 2012).
[809] For a discussion of the CDSP, *see* Omar A. Touray, 'The Common African Defence and Security Policy' 104 African Affairs 636.
[810] Common African Defence and Security Policy 2004, para 6.
[811] Olufemi Amao (n 29) 87.

placed squarely at the centre of the AU's considerations regarding peace and security on the continent.[812]

Aside from traditional state-centric conceptions of security, the above understanding epitomises the reconceptualised understanding of sovereignty as advanced in Chapter III, that is, as deriving from peoples rather than the political entity of the state, and consequently that any expression of such sovereignty must advance the interests of the peoples. Further, the above understanding of security is an expression of a cosmopolitan understanding of human values as argued in Chapter II. In other words, the framing of these objectives and principles is people-centric rather than state-centric, particularly by the emphasis laid on unity, solidarity and interests of the continent and its peoples rather than of states. As such, and as Musila argues, 'As the main regional intergovernmental body – especially one that commits itself to the fight against impunity – the idea that the AU necessarily has a role to play in international criminal justice is not difficult to fathom.'[813]

6.2.3 The African Union's Power of Intervention

In order to give full effect to the objectives and principles discussed above, the Constitutive Act empowers the AU to intervene in member states in certain circumstances. Intervention is envisioned either upon invitation or request by a member state or by the AU on its own motion.

6.2.3.1 Intervention by Invitation or Request: Article 4(j) of the Constitutive Act

In the event of breach of the peace and security, Article 4(j) of the Constitutive Act recognises 'the right of Member States to request intervention from the Union in order to restore peace and security'.[814] Besides this treaty recognition of the right, the competence of a sovereign state to invite intervention or assistance from other states or inter-governmental organisations is a logical consequence and exercise of sovereignty. Therefore, in as far as the intervention is envisioned in respect of the territory of the requesting state, this is not a right granted to AU member states by the Constitutive Act. Rather, its codification in Article 4(j) is formal treaty recognition of a sovereign prerogative that these states already possess by virtue of their status as sovereign states. Article 4(j) is thus merely declarative of this sovereign authority rather than constitutive. A state's invitation in respect of its own territory is therefore both procedural and substantive in the sense that it enables the AU to intervene in that member state, and to exercise elements of sovereign authority that would ordinarily only be exercisable by that state.

However, and as Omorogbe has observed, Article 4(j) does not insist that the request must come from the state on whose territory intervention is envisioned.[815] Rather, the provision is open-ended in respect of the target state, thereby recognising that such request can also be

[812] Ademola Abass and Mashood A. Baderin (n 252) 29.
[813] Godfrey M. Musila (n 40) 304.
[814] *See also* African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009, art 8(2).
[815] Eki Yemisi Omorogbe, 'The African Union, Responsibility to Protect and the Libyan Crisis' (2012) 59 Netherlands International Law Review 141, 150.

made by any AU member state in respect of a situation in another member state.[816] If exercised in this manner, this would not be an exercise of the requesting state's sovereign authority since no state's sovereign authority extends to another state's territory. However, this would be an exercise of a right conferred by member states collectively on one another by virtue of being parties to the Constitutive Act. By agreeing to Article 4(j), each party to the Constitutive Act consented to the possibility of another member state requesting the AU to intervene on their territory without their consent. Once so requested, the AU would have discretion to intervene on its member states' collective behalf in exercise of substantive powers already expressly conferred upon it in the Constitutive Act. In other words, Article 4(j) used in this manner is merely a procedural trigger for the AU as it enables member states to request intervention in relation to another member state's territory. In this instance, the consent or invitation of the member state whose territory is concerned is not required for purposes of the AU's intervention since by ratifying or acceding to the Constitutive Act and becoming a member state of the AU, that state consented to the AU's possible intervention pursuant to an Article 4(j) request.

6.2.3.2 Proprio Motu *Intervention by the AU: Article 4(h) of the Constitutive Act*

Another particularly striking governing principle of the AU enshrined in Article 4(h) of the Constitutive Act, and reiterated as a guiding principle of the AU-PSC in Article 4(j) of the PSC Protocol, is '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'.[817] The origin of this unprecedented provision has been traced to the first articulation of the so-called responsibility to protect by the International Panel of Eminent Personalities constituted by the Organisation of African Unity, the AU's predecessor, following the 1994 Genocide against the Tutsi in Rwanda.[818] The Panel recommended that, 'Since Africa recognises its own responsibility to protect the lives of its citizens, we call on: a) the OAU to establish appropriate structures to enable it to respond effectively to enforce the peace in conflict situations.'[819] It then found expression in Article 4(h) of the Constitutive Act as a right of the AU to intervene in member states.[820] As Kabumba has noted, the provision was, therefore, 'a deeply-considered response to a number of critical failures of the UN Charter framework for collective security, particularly as experienced in Africa'[821] and most prominently in Rwanda.

The provision expressly limits the AU's *proprio motu* intervention powers to the international crimes of genocide, war crimes and crimes against humanity, a limitation

[816] Eki Yemisi Omorogbe (n 815) 150.
[817] *See also* African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) 2009, art 8(1).
[818] Olufemi Amao (n 29) 95.
[819] Report of the Organisation of African Unity International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, 'Rwanda, the Preventable Genocide' (2000), cap 24 recommendation 22.
[820] *See* Abdulqawi A. Yusuf, 'The Right of Forcible Intervention in Certain Conflicts' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (Martinus Nijhoff Publishers 2012).
[821] Busingye Kabumba (n 110) 187.

'predicated on the understanding that these acts are now generally recognized as violations of international law'.[822] The provision does not, however, provide a definition of the listed crimes. The PSC Protocol is equally unhelpful in this regard, simply providing that these crimes are to be understood 'as defined in relevant international conventions and instruments'.[823] Nevertheless, the thesis does not consider the lack of definition of war crimes, genocide and crimes against humanity in the AU instruments as problematic and concurs with the drafter's 'presum[ption] that there was no need to do so, these crimes being already defined in the [international law instruments].'[824] As discussed in the Introductory Chapter, what constitutes these crimes is relatively well-settled.

Relatedly, the Constitutive Act does not provide a procedure for determining whether these crimes have been or are being committed. Similarly, Article 7(1)(e) of the PSC Protocol which empowers the AU-PSC to recommend to the AU Assembly of Heads of State and Government (AU Assembly) to authorise intervention pursuant to Article 4(h) of the Constitutive Act does not provide a procedure for determining the commission of these crimes. Further, in addition to the AU-PSC, the African Commission on Human and Peoples' Rights (ACHPR) is empowered to make a determination of serious or massive human rights violations and notify the AU Assembly. Article 58(1) of the African Charter provides that, 'When it appears after deliberations of the [ACHPR] that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.' Like the legal provisions relevant to the AU-PSC, the African Charter does not prescribe a procedure for determining the commission of these serious violations. Logically, the AU-PSC and the ACHPR would have to make this determination before making the relevant recommendation or notification to the AU Assembly. However, nothing in the legal framework suggests that the AU-PSC's or ACHPR's determination is binding on the AU Assembly. The implication arising from Article 4(h) of the Constitutive Act, Article 7(1)(e) of the PSC Protocol and Article 58(1) of the African Charter is that the AU Assembly has the ultimate responsibility for determining the commission of the relevant international crimes as a precondition for exercising its right to intervene.

While some consider Article 4(h) as enshrining the principle of humanitarian intervention,[825] the thesis argues that this provision neither enshrines so-called principle of humanitarian intervention, nor is it a blanket endorsement of humanitarian intervention. The thesis concurs with Kuwali's interpretation that, 'The AU right to intervene cannot be viewed as a euphemism for humanitarian intervention but as a normative commitment of AU States to

[822] Tiyanjana Maluwa, 'Fast-Tracking African Unity or Making Haste Slowly? A Note on the Amendments to the Constitutive Act of the African Union' (2004) 51 Netherlands International Law Review 195, 217; See also Dire Tladi and John Dugard, 'The African Union's Right to Intervene and the Right to Life: Tension or Concordance?' in Frans Viljoen and others (eds), *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns* (Pretoria University Law Press 2022).
[823] PSC Protocol, art 7(e).
[824] Ntombizozuko Dyani-Mhango, 'Reflections on the African Union's Right to Intervene' (2012) 38 Brooklyn Journal of International Law 1, 13.
[825] Godfrey M. Musila (n 40) 304, 313.

prevent mass atrocity crimes on the continent.'[826] Firstly, by establishing and consenting to membership of the AU, states have consented to be bound by the provisions of the Constitutive Act. As such, Article 4(h) intervention is based on the consent of the concerned state by virtue of being a party to the Constitutive Act.[827] Secondly, as discussed in Section 6.2.4 below, Article 4(h) does not envision the use of force as its primary means of intervention, but rather envisions an open-ended range of non-forcible and forcible measures. Article 4(h) can therefore more appropriately be described as 'dr[awing] closely upon the Responsibility to Protect (R2P) doctrine'[828] by 'crystalli[sing] into treaty form a diffuse set of legal ideas and concepts that are similar to, and form the basis for, the principle of the responsibility to protect'.[829] Article 4(h) therefore formulates a limited intervention principle that is not a unilateral entitlement, but is rather a residual power bestowed multilaterally by member states upon the AU Assembly as a collective representation of its member states taking this decision based on consensus or two-thirds majority,[830] and in respect of specific international crimes. The intervention envisioned is therefore to be undertaken in strict accordance with the legal procedures under the AU's continental collective security architecture.

It is noteworthy that the AU's deliberate decision to 'establish[…] as a regional "hard law" norm a principle which until that point had, in the international system, only been a political commitment at least, or a "soft law" obligation, at most'[831] means that the Constitutive Act is the first and so far only treaty to expressly confer such power upon an intergovernmental organisation. This is indeed an unprecedented collective cession of sovereign power by states to a RIGO that Amao aptly describes as 'one of the strongest indications of the emerging *acquis* in the continent that underpins the non-indifference approach in the [AU's] new legal order'.[832] By virtue of being parties to the Constitutive Act (a multilateral treaty), member states of the AU have therefore given the AU Assembly the authority to intervene without further consent of the concerned member state provided that the intervention is undertaken in accordance with the Constitutive Act.

6.2.4 International Criminal Accountability Mechanisms as AU Intervention Measures

Despite being framed as a 'right of the Union' and not necessarily as an obligation or duty of the AU to intervene,[833] and despite the AU's legal framework not expressly listing international criminal accountability mechanisms as an intervention measure, Abass has convincingly argued that the AU's intervention powers under the Constitutive Act imply an obligation on

[826] Dan Kuwali (n 252) 58.
[827] See also Ademola Abass and Mashood A. Baderin (n 252) 19–20; Dan Kuwali (n 252) 52 & 57.
[828] Busingye Kabumba (n 110) 177–181; See also Dan Kuwali (n 252) 46.
[829] Tiyanjana Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law through African Regional Multilateral Treaties' (2020) 41 Michigan Journal of International Law 327, 378–379.
[830] *See* AU Constitutive Act, art 7(1).
[831] Busingye Kabumba (n 110) 181.
[832] Olufemi Amao (n 29) 91; See also Tiyanjana Maluwa, 'The OAU/African Union and International Law: Mapping New Boundaries or Revising Old Terrain?' (2004) 98 Proceedings of the Annual Meeting of the American Society of International Law 232, 235–237.
[833] See Ntombizozuko Dyani-Mhango (n 824) 12–13; Ademola Abass and Mashood A. Baderin (n 252) 15–16.

the AU to ensure redress for these crimes.[834] Otherwise, it would be counterintuitive for the Constitutive Act to condemn these crimes and empower the AU to intervene without envisioning an obligation to provide redress.[835]

It is notable that except for the limitation of intervention under Article 4(h) to the specific international crimes of genocide, war crimes and crimes against humanity, this provision is open-ended in that it neither prescribes nor proscribes any specific method of intervention by the AU. Article 4(j) on intervention upon request by a member state is similarly silent on intervention method or measure. Unlike Article 4(h), Article 4(j) also envisions intervention more broadly 'in order to restore peace and security'. It appears, therefore, that the scope of the legal provisions for the AU's intervention is imprecise,[836] and deliberately so. The intervention measures that the AU can adopt are not expressly restricted. The AU Assembly and AU-PSC are empowered to determine an appropriate method or measure of intervention.[837] As Omorogbe has argued, these could be 'military or other measures',[838] that is, measures involving the use of force or measures not involving the use of force. In this regard, the thesis disagrees with Abdulqawi's conclusion that the AU's legal framework excludes international criminal prosecution as an intervention measure envisioned under Article 4(h) of the Constitutive Act,[839] or indeed under any other provision of the Constitutive Act.

A similar contention has previously arisen concerning the UN Security Council's authority of intervention in the restoration and maintenance of peace and security under Chapter VII of the UN Charter. Chapter VII does not expressly mention international criminal accountability mechanisms as anticipated measures. Faced with a challenge to the legal legitimacy of the International Criminal Tribunal for the former Yugoslavia (ICTY) based, *inter alia*, on the above ground, the ICTY held in *Duško Tadić v Prosecutor* that Chapter VII, and in particular Article 41 of the UN Charter, merely provides a non-exhaustive illustrative list of examples of 'measures not involving the use of force' and as such, this provision gives the Security Council discretion to evaluate and determine what other measures would be appropriate and suitable in contributing to the restoration and maintenance of peace and security in the concerned state.[840] The ICTY then concluded that international criminal mechanisms, though not expressly mentioned in the UN Charter's illustrative list, are such 'measures not involving the use of force' within the meaning of Article 41 of the UN Charter and that, 'The Security Council has [lawfully] resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own

[834] Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (2013) 24 European Journal of International Law 933, 938.
[835] Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (n 834) 938.
[836] Godfrey M. Musila (n 40) 313.
[837] Constitutive Act, art 4(h); PSC Protocol, art 7.
[838] Eki Yemisi Omorogbe (n 122) 300.
[839] Abdulqawi A. Yusuf (n 820) 342.
[840] *Prosecutor v Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-94-1-AR72 (02 October 1995) paras 31–40. See also *Effect of Awards of Compensation Made by the U.N Administrative Tribunal,* Advisory Opinion, I.C.J. Reports 1954, p. 47, 61.

principal function of maintenance of peace and security.'[841] Similarly, the Special Court for Sierra Leone (SCSL), faced with a similar challenge in *Prosecutor v Charles Ghankay Taylor*, held that, '[I]t was clear that the power of the Security Council to enter into an agreement for the establishment of the [Special Court for Sierra Leone] was derived from … Article 1 of the Charter [of the United Nations] and the specific powers of the Security Council in Article 39 and 41. These powers are wide enough to empower the Security Council to initiate … the establishment of the Special Court by Agreement with Sierra Leone.'[842]

Consequently, the thesis concludes that the AU, in exercising its responsibility for continental peace and security as mandated by the Constitutive Act and the PSC-Protocol, is empowered to establish, either on its own motion or by agreement with a member state, international criminal accountability mechanisms as non-forcible measures aimed at contributing to the restoration or maintenance of peace and security. This conclusion applies whether the intervention is undertaken pursuant to Article 4(h) or Article 4(j) of the Constitutive Act or based on an invitation not expressly made pursuant to the provisions of the Constitutive Act. The AU has in fact similarly adopted this interpretation with specific reference to accountability for international crimes. The AU Assembly interpreted the Constitutive Act as bestowing upon it the competence to ensure criminal accountability for the international crimes listed in Article 4(h), using whatever mechanism the AU deems appropriate. This interpretation was first adopted by the AU Assembly in its 2006 decision mandating Senegal to prosecute the former President of Chad, Hissein Habré, on the AU's behalf,[843] following a report by the Committee of Eminent African Jurists[844] established by the AU in 2006 to advise on Senegal's request for the AU's guidance and direction on Habrè's fate.[845] The Committee interpreted provisions of the Constitutive Act as forming the legal basis for the AU Assembly's competence to establish an *ad hoc* international criminal accountability mechanism.[846] Specifically, the Committee relied on the AU's objective to protect human and peoples' rights under Article 3(h) of the Constitutive Act, the AU's right of intervention under Article 4(h), the AU's principle of 'respect for the sanctity of human life [and] condemnation and rejection of impunity' under Article 4(o) and the AU Assembly's power under Article 9(1)(d) to establish AU organs.

Emboldened by its role in the successful prosecution of Habrè by the Extraordinary African Chambers (within the Courts of Senegal) for the Prosecution of International Crimes

[841] *Prosecutor v Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-94-1-AR72 (02 October 1995) para 38.
[842] *Prosecutor v Charles Ghankay Taylor,* Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I (31 May 2004) paras 37, 34–42.
[843] Decision on the Hissène Habré Case and the African Union Doc. Assembly/AU/3 (VII), Assembly/AU/Dec.127(VII), Assembly of the African Union 7th Ordinary Session,1–2 July 2006.
[844] Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (2006).
[845] Decision on the Hissène Habré Case and the African Union (Doc.Assembly/AU/8 (VI) Add.9), Assembly/AU/Dec.103 (VI), Assembly of the African Union 6th Ordinary Session, 23–24 January 2006.
[846] Report of the Committee of Eminent African Jurists on the Case of Hissène Habré (2006), paras 22–25 & 31–33.

Committed in Chad 1982–1990 leading to Habrè's final conviction in April 2017,[847] and piggy-backing on 'the concretisation and expansion of international criminal justice, … the AU [is] increasingly becoming [an] important role player[]'[848] in international criminal accountability, at least in rhetoric. However, with the exception of the individual case of Hissein Habré highlighted above, it is unclear whether the AU would be eager to mandate international criminal accountability in a member state either by invoking its Article 4(h) powers or as a response to an intervention request by a member state under Article 4(j) in respect of another member state, especially where such intervention might entail prosecution of incumbent high-ranking government officials. It has been observed that the reluctance so far to invoke Article 4(h) in this manner probably stems from an apprehension by some member states that this would set a precedent where all member states are potentially exposed to such intervention.[849]

6.3 Evolution of the African Union's Involvement in International Criminal Accountability in South Sudan

6.3.1 Investigation by the African Union Commission of Inquiry on South Sudan

On 17 December 2013, two days after violence broke out in South Sudan, the AU through the Chairperson of the African Union Commission (AU Commission) expressed its 'readiness to assist in finding a solution to the … situation within the context of relevant AU's instruments'.[850] Shortly thereafter on 24 December 2013, the AU-PSC called for 'a meeting of the Council at the level of Heads of State and Government, bearing in mind the urgency of the situation and the need for an enhanced African engagement and leadership in the search for a lasting solution'.[851] This was recognition of the fact that concrete legal action under the auspices of the AU could more effectively be undertaken by and based on the decision of the Heads of State and Government. Simultaneously, the AU Commission Chairperson immediately embarked on compiling a background report for the AU-PSC. The report, submitted to the AU-PSC on 30 December 2013, revealed that in less than fifteen days after the conflict broke out, many civilians had been killed, thousands displaced, egregious human rights violations committed, and UN peacekeepers attacked.[852] The meeting requested above occurred six days later on 30 December 2013 when the AU-PSC met at the level of Heads of

[847] *Le Procureur Général c. Hissein Habré,* Arrêt, Chambre Africaine Extraordinaire d'Assises d'Appel (21 avril 2017).
[848] Godfrey M. Musila (n 40) 302.
[849] Yasmin Sooka (Chairperson, UN Commission on Human Rights in South Sudan), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[850] AU Press Release, 'The African Union Deeply Concerned About the Situation in South Sudan' (17 December 2013) https://www.peaceau.org/en/article/the-african-union-deeply-concerned-about-the-ongoing-developments-in-south-sudan accessed 01 June 2021.
[851] AU Peace and Security Council Press Statement PSC/PR/BR.(CDX), 410th Meeting, 24 December 2013, para 10.
[852] Report of the Chairperson of the Commission on the Situation in South Sudan, PSC/AHG/3(CDXI), 411th Meeting at the Level of Heads of State and Government, 30 December 2013, paras 11, 16, 19, 20 & 23.

State and Government, considered the AU Commission Chairperson's report and adopted a decision on the situation in South Sudan.[853]

The first indication that even while working towards a peaceful resolution of the conflict, the AU was already anticipating accountability for crimes that were being committed in the conflict emerged on 24 December 2013 when the AU-PSC warned conflict parties of 'dire consequences of their actions'.[854] The AU-PSC meeting at the level of Heads of State and Government PSC on 30 December 2013 was more direct, stating that, 'Council **warns** all those involved in violations of human rights and international humanitarian law and other criminal acts that they will be held accountable for their actions.'[855] It was also at this 30 December 2013 meeting that the AU Heads of State and Government decided to establish a commission of inquiry into violations committed during the war. The relevant paragraph of the decision states that the Council–[856]

> Requests the Chairperson of the [African Union] Commission, in consultation with the Chairperson of the African Commission on Human and Peoples' Rights (ACHPR) and other relevant AU structures, to urgently establish a Commission to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability, reconciliation and healing among all South Sudanese communities. Council requests that the above-mentioned Commission submit its report to Council within a maximum period of three months.

From the decision, it is evident that the inquiry's mandate would be quite broad, covering all possible abuses committed during the war, and with the intention of establishing a foundation for accountability for those abuses.[857] In a statement issued on 16 January 2014, a few days after the decision to establish a commission of inquiry, the AU-PSC expressly indicated that it would 'hold to account those that would be found responsible [by the commission of inquiry] for violations of human rights',[858] thereby expressly establishing a link between the inquiry and future accountability processes.

The AU Commission Chairperson interpreted this directive from the AU-PSC as requiring her to establish a mechanism '[b]uilding on African experience and acting within the framework of AU instruments'.[859] Notably, before establishing the commission of inquiry, the

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[853] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDXI)-Rev.1, 411th Meeting at the Level of Heads of State and Government, 30 December 2013.
[854] AU Peace and Security Council Press Statement PSC/PR/BR.(CDX), 410th Meeting, 24 December 2013, para 5.
[855] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDXI)-Rev.1, 411th Meeting at the Level of Heads of State and Government, 30 December 2013, para 7(iii).
[856] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDXI)-Rev.1, 411th Meeting at the Level of Heads of State and Government, 30 December 2013, para 8.
[857] *See also* AU Peace and Security Council Communiqué PSC/AHG/COMM/1.(CDXVI), 416th Meeting at the Level of Heads of State and Government, 29 January 2014, para 5.
[858] AU Peace and Security Council Press Statement PSC/PR/BR.2(CDXIII), 413th Meeting, 16 January 2014, para 9.
[859] AU Press Release, 'The AU Takes Steps Towards the Establishment of a Commission of Inquiry into Human Rights Violations in South Sudan' (18 January 2014) http://www.peaceau.org/uploads/press-statement-south-sudan-auc-chairperson-s-statement-18-january-2014.pdf accessed 01 June 2021. *See also* Report of the Chairperson of the Commission on the Situation in South Sudan, PSC/AHG/3(CDXVI), 416th Meeting at the Level of Heads of State and Government, 29 January 2014, para 14.

AU Commission Chairperson consulted South Sudan's conflict parties, including President Salva Kiir's government side and the armed opposition of Dr Riek Machar, and both sides supported the establishment of the commission.[860] Of course, the AU did not legally require the agreement of the government of South Sudan or indeed of the armed opposition in order to establish the commission of inquiry since, as discussed above, the AU derives this power of unilateral intervention in a member state from the Constitutive Act. Nonetheless, the political goodwill of the conflict parties was vital in ensuring access by the commission to the conflict zone and also ensuring a degree of local ownership of the process.

On 07 March 2014, the AU Commission Chairperson established the African Union Commission of Inquiry on South Sudan (AUCISS), comprising five members: Olusegun Obasanjo (former President of Nigeria and former Chairperson of the AU) as Chairperson; Sophia A.B. Akuffo (President and Judge of the African Court on Human and Peoples' Rights and Judge of the Supreme Court of Ghana); Mahmood Mamdani (Professor at Makerere University); Bineta Diop (AU Chairperson's Special Envoy for Women, Peace and Security); and Pacifique Manirakiza (Commissioner of the African Commission on Human and Peoples' Rights and Professor at the University of Ottawa School of Law).[861] The notice of appointment expounded on the AUCISS' mandate, building on the general mandate as stated in the AU-PSC decision of 30 December 2013 discussed above. According to the notice of appointment issued by the AU Commission Chairperson, AUCISS' terms of reference would be to, *inter alia*,–[862]

- Investigate human rights violations and other abuses during the conflict by all parties from 15 December 2013;
- Establish facts and circumstances that may have led to and that amount to such violations and of any crimes that may have been perpetrated;
- Compile information based on these investigations and in so doing assist in identifying perpetrators of such violations and abuses with a view to ensuring accountability for those responsible …
- [M]ake recommendations based on the investigation on … accountability mechanisms for gross violations of human rights and other egregious abuses to ensure that those responsible for such violations are held to account.

AUCISS interpreted this accountability mandate 'to investigate the human rights violations and other abuses committed during the armed conflict in South Sudan and make recommendations on the best ways and means to ensure accountability'[863] as including an

[860] Report of the Chairperson of the Commission on the Situation in South Sudan, PSC/AHG/3(CDXVI), 416th Meeting at the Level of Heads of State and Government, 29 January 2014, para 14; AU Press Release No. 039/2014, 'South Sudan Commission of Inquiry Established and Members Appointed' (07 March 2014) https://www.peaceau.org/uploads/pr-039-south-sudan-commission-of-inquiry-established-and-members-appointed-addis-ababa-et-7-march-2014.pdf accessed 01 June 2021.

[861] AU Press Release No. 039/2014, 'South Sudan Commission of Inquiry Established and Members Appointed' (07 March 2014) https://www.peaceau.org/uploads/pr-039-south-sudan-commission-of-inquiry-established-and-members-appointed-addis-ababa-et-7-march-2014.pdf accessed 01 June 2021.

[862] AU Press Release No. 039/2014, 'South Sudan Commission of Inquiry Established and Members Appointed' (07 March 2014) https://www.peaceau.org/uploads/pr-039-south-sudan-commission-of-inquiry-established-and-members-appointed-addis-ababa-et-7-march-2014.pdf accessed 01 June 2021.

[863] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDXI)-Rev.1, 411th Meeting at the Level of Heads of State and Government, 30 December 2013, para 8; AU Press Release No. 039/2014, 'South Sudan Commission of Inquiry Established and Members Appointed' (07 March 2014)

inquiry into violations of international humanitarian law (IHL) during the relevant period.[864] This interpretation is relatively uncontroversial since abuses committed in the context of an armed conflict can reasonably be assumed to be violations of human rights and IHL. An inquiry into abuses in such contexts which focuses only on human rights abuses would be incomplete. In this regard, the applicable law informing AUCISS' understanding of human rights and IHL were 'the Bill of Rights contained in South Sudan's Transitional Constitution … key norms in major international human rights instruments, including key African Union treaties such as the African Charter on Human and Peoples' Rights … customary international law and the key instruments ratified by South Sudan in 2012: Geneva Conventions of 1949 and the two Additional Protocols of 1977'.[865] In line with its mandate as defined in the relevant AU-PSC instruments, AUCISS understood 'accountability' to entail criminal accountability, reparations, administrative sanctions and truth-telling.[866] In particular, the AUCISS investigation therefore sought to obtain evidence of violations of human rights and IHL including those amounting to international crimes, identify victims and alleged perpetrators[867] and propose accountability measures for these crimes.[868]

6.3.2 Findings and Recommendations of AUCISS on Accountability

After a three-month extension of its mandate on 17 June 2014, AUCISS finalised its investigations and submitted its final report to the AU Commission Chairperson on 15 October 2014.[869] From its in-depth investigation of crimes allegedly committed during the conflict, AUCISS concluded that there are reasonable grounds to believe that all parties to the conflict (government forces and their allies, and opposition forces and their allies) had, in a widespread or systematic manner, committed serious and gross violations of international humanitarian law and international human rights law amounting to the international crimes of war crimes and crimes against humanity, and primarily targeted at civilian populations not participating in the conflict, but also directed at combatants who were *hors de combat* at the time and at peacekeepers.[870] These violations included extrajudicial killings and murders, exterminations, abductions, detentions, enforced disappearances, rape and other sexual and gender-based crimes, torture and other cruel, inhuman or degrading treatment, persecution, forced

https://www.peaceau.org/uploads/pr-039-south-sudan-commission-of-inquiry-established-and-members-appointed-addis-ababa-et-7-march-2014.pdf accessed 01 June 2021.

[864] Final Report of the African Union Commission of Inquiry on South Sudan (15 October 2014) (AUCISS Report), paras 10–11.

[865] AUCISS Report, para 11.

[866] AUCISS Report, para 369.

[867] AUCISS Report, para 356.

[868] AUCISS Report, para 370.

[869] AU Press Release, 'The African Union Releases the Report of the AU Commission of Inquiry on South Sudan' (27 October 2015) paras 8–9 https://archives.au.int/bitstream/handle/123456789/6371/2015_SS_PS8E.pdf?sequence=1&isAllowed=y accessed 01 June 2021.

[870] AUCISS Report, cap III, paras 380–827 & 1122–1137.

displacement and removal of populations, recruitment and use of children under the age of 15 years in conflict, servitude, pillaging, looting and destruction of property.[871]

For these crimes, AUCISS recommended that 'those bearing the highest responsibility for their commission ought to be held responsible under international criminal law frameworks'[872] while '[t]he domestic criminal law framework can be used to try mid to lower level perpetrators'.[873] For this purpose, and recognising the very weak capacity of the South Sudanese judicial system at the time, AUCISS specifically recommended 'an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account … [which] mechanism should include South Sudanese judges and lawyers'.[874] While AUCISS identified some of the people that it considers as possibly bearing the greatest responsibility for these international crimes, it understandably submitted these names as a confidential list to the AU-PSC.[875]

Notably, even though the AUCISS report was presented to the AU Commission Chairperson on 15 October 2014,[876] it was not presented to the AU-PSC until 29 January 2015.[877] Even then, the AU-PSC did not consider the report, but instead in June 2015 the AU-PSC at the Level of Heads of State and Government resolved to convene the AU-PSC at the ministerial level by mid-July 2015 to consider the AUCISS report.[878] This meeting, convened on 24 July 2015, affirmed 'the commitment of the AU to combat impunity, in line with Article 4(o) of the AU Constitutive Act and the relevant provisions of the [PSC Protocol]'[879] and established an *ad hoc* sub-committee to extensively consider the report and recommend a way

[871] AUCISS Report, cap III, paras 380–827 & 1122–1137. Notably, another AU organ, the African Committee of Experts on the Rights and Welfare of the Child, also conducted an advocacy mission to South Sudan in 2014, with the permission of South Sudan which is not a state party to the African Charter on the Rights and Welfare of the Child. This mission, though limited in mandate, scope and reach, made similar findings to AUCISS. *See* African Committee of Experts on the Rights and Welfare of the Child, 'Report on the Advocacy Mission to Assess the Situation of Children in South Sudan' (August 2014) https://www.refworld.org/docid/545b4e384.html accessed 01 June 2021.
[872] AUCISS Report, paras 787 & 1142–1143.
[873] AUCISS Report, para 787.
[874] AUCISS Report, para 1148.
[875] AUCISS Report, para 827.
[876] AU Press Release, 'The African Union Releases the Report of the AU Commission of Inquiry on South Sudan' (27 October 2015) paras 8–9 https://archives.au.int/bitstream/handle/123456789/6371/2015_SS_PS8E.pdf?sequence=1&isAllowed=y accessed 01 June 2021.
[877] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDLXXXIV), 484th Meeting at the Level of Heads of State and Government, 29 January 2015, para 9; Report of the Chairperson of the Commission on the Situation in South Sudan, PSC/AHG/2(DXV), 515th Meeting at the Level of Heads of State and Government, 13 June 2015, para 17.
[878] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXV), 515th Meeting at the Level of Heads of State and Government, 13 June 2015, para 12.
[879] AU Peace and Security Council Communiqué PSC/MIN/COMM.(DXXVI), 526th Meeting at the Level of Ministers, 24 July 2015, para 10.

forward to be adopted by the AU-PSC at the Level of Heads of State and Government in August 2015.[880]

6.4 International Agreement between the African Union and South Sudan on the Establishment of the Hybrid Court for South Sudan

Having discussed the AU's general competence in relation to intervention and accountability for international crimes in Section 6.2 and the AU's investigation of international crimes allegedly committed in South Sudan during the conflict that broke out in December 2013 in Section 6.3, this section examines the process currently underway to establish the Hybrid Court for South Sudan. This examination is intended to establish the legal basis for the establishment of the Hybrid Court.

While the AUCISS inquiry was underway and even after AUCISS submitted its report to the AU-PSC, a parallel process which would have significant implications for accountability for international crimes allegedly committed during the South Sudan conflict was underway. Peace negotiations aimed at resolving the conflict were being spearheaded by the Intergovernmental Authority on Development (IGAD), a regional economic community (REC) recognised by the AU and comprising of member states of the Horn of Africa region. Pursuant to the Constitutive Act and the PSC Protocol as discussed in Section 6.2, the AU enjoys primacy of responsibility for continental peace, security and stability. However, this legal framework also recognises the comparative advantage of RECs including their proximity and contextual understanding, and in the spirit of subsidiarity includes these organisations as part of the AU's peace and security architecture, a partnership whose practical implementation is governed by the 2008 Memorandum of Understanding on Cooperation in the Area of Peace and Security between the African Union, the Regional Economic Communities and the Coordinating Mechanisms of Regional Standby Brigades of Eastern Africa and Northern Africa.

IGAD has a long history with the peace process in South Sudan, having negotiated and shepherded the peace process which led to the end of the three-decade Sudan civil war and the eventual secession of Southern Sudan from Sudan and the creation of the new state of South Sudan.[881] As such, IGAD continued to serve as a guarantor of the transition of South Sudan to viable statehood. Recognising IGAD's comparative advantage regarding South Sudan, the AU deferred to IGAD's lead, while of course maintaining its primacy over peace and security as a guarantor and overseer of the process. On 19 December 2013, almost immediately after the

[880] AU Peace and Security Council Communiqué PSC/MIN/COMM.(DXXVI), 526th Meeting at the Level of Ministers, 24 July 2015, para 15.

[881] See Francis Mading Deng, 'Sudan's Turbulent Road to Nationhood' in Ricardo René Larémont (ed), *Borders, Nationalism, and the African State* (Lynne Reinner 2005); Sara Basha, 'The Comprehensive Peace Agreement - A Synopsis' in Brian Raftopoulos and Karin Alexander (eds), *Peace in the balance: The crisis in Sudan* (Institute for Justice and Reconciliation 2006); Bona Malwal, *Sudan and South Sudan: From One to Two* (Palgrave Macmillan 2015); Hilde F. Johnson, *South Sudan: The Untold Story from Independence to Civil War* (IB Tauris 2016); Owiso Owiso and others, 'Intractable Conflicts in Africa: The International Response to the Darfur and South Sudan Crises' (2017) 1 Global Campus Human Rights Journal 287.

conflict erupted, IGAD dispatched a ministerial delegation to Juba accompanied by high-level AU and UN officials to commence the process of negotiating an end to the conflict.[882] The AU promptly endorsed IGAD's efforts[883] and served throughout the peace negotiation process as guarantor of the process, exercising a supervisory role as well as providing technical assistance and political goodwill.

6.4.1 Sudan's Invitation to the AU to Establish the Hybrid Court: Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan

The IGAD-led peace process discussed above resulted in the signing in August 2015 of the Agreement on the Resolution of the Conflict in the Republic of South Sudan (Agreement).[884] When the fragile 'peace' secured by the Agreement failed to hold and after South Sudan descended into yet another wave of violence from July 2016, IGAD and the AU managed to secure a recommitment by the parties to the peace agreement on 12 September 2018, now dubbed the Revitalised Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-Agreement), signed by the Government of South Sudan and South Sudanese non-state actors (the armed opposition, other political parties and other South Sudanese stakeholders) and by guarantors including the AU.[885]

Chapter V of the R-Agreement on transitional justice, accountability, reconciliation and healing provides for the establishment of a criminal accountability mechanism. Specifically, Article 5.3.1.1 provides that–

> There shall be established an independent hybrid judicial court, the Hybrid Court for South Sudan (HCSS). The Court shall be established by the African Union Commission to investigate and where necessary prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, committed from 15th December 2013 through the end of the Transitional Period.[886]

The R-Agreement appears to have adopted the recommendation of AUCISS which recommended 'an Africa-led, Africa-owned, Africa-resourced legal mechanism under the

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[882] Communique of the Foreign Ministers of Inter-Governmental Authority on Development (21 December 2013) https://igad.int/attachments/727_jubacommunique%20Doc..pdf accessed 10 June 2021; Communiqué of the 23rd Extra-Ordinary Session of the IGAD Assembly of Heads of State and Government on the Situation in South Sudan (27 December 2013) https://igad.int/attachments/725_23rd_Extra_Summit.pdf accessed 10 June 2021; Report of the Chairperson of the Commission on the Situation in South Sudan, PSC/AHG/3(CDXI), 411th Meeting at the Level of Heads of State and Government, 30 December 2013, para 6.

[883] AU Peace and Security Council Press Statement PSC/PR/BR.(CDIX), 409th Meeting, 18 December 2013, paras 8–10; African Union Press Release, 'The African Union Welcomes the IGAD Ministerial Mission to South Sudan' (19 December 2013) http://www.peaceau.org/en/article/the-african-union-welcomes-the-igad-ministerial-mission-to-south-sudan accessed 01 June 2021; AU Peace and Security Council Press Statement PSC/PR/BR.(CDX), 410th Meeting, 24 December 2013, para 8; AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDXI)-Rev.1, 411th Meeting at the Level of Heads of State and Government, 30 December 2013, paras 6–7.

[884] The Agreement was signed by opposition forces on 17 August 2015 and by President Kiir on 24 August 2015. *See* AU Peace and Security Council Press Statement PSC/BR/2.(DXXXVII), 537th Meeting, 24 August 2015, paras 5–6.

[885] The guarantors of the R-Agreement are not parties to the R-Agreement. They can appropriately be considered as mere witnesses or political/moral guarantors. Essentially, the R-Agreement remains an agreement between the Government of South Sudan, rebel groups and other domestic opposition forces.

[886] R-Agreement, art 5.3.1.1.

aegis of the African Union supported by the international community, particularly the United Nations to bring those with the greatest responsibility at the highest level to account … [which] mechanism should include South Sudanese judges and lawyers'.[887] While indeed the Agreement was signed in August 2015 before the AUCISS report was publicly released, it is nonetheless evident that the Agreement (and R-Agreement) adopted the criminal accountability recommendation of AUCISS. As discussed in Section 6.3.1, the AUCISS report was submitted to the AU-PSC in January 2015. Because of the direct involvement of the AU in the IGAD peace process – as guarantor of the process – and the close collaboration between AU-PSC and IGAD peace negotiators, the conflict parties and peace negotiators had access to the AUCISS report as soon as it was submitted to AU-PSC in January 2015. The parties therefore decided that the AUCISS report would be an integral part of the peace negotiations going forward.[888] The R-Agreement in fact acknowledges the AUCISS report by expressly providing that, ''In carrying out its investigation, the [Hybrid Court] may use the report of the African Union Commission of Inquiry (COI) on South Sudan.'[889]

As required under Chapter VIII of the R-Agreement, the agreement was subsequently ratified by the South Sudan (transitional) parliament in 2018 and incorporated into the Transitional Constitution of the Republic of South Sudan.[890] The ratification of the R-Agreement by South Sudan's is significant for the instrument's legal status. Signed peace agreements are generally of an 'inherently extra-legal character'.[891] However, the ratification by parliament and incorporation into South Sudan's constitutional framework eliminates any doubt as to its legal status by removing the agreement from the realm of the extra-legal and placing it squarely within the realm of the legal. It is henceforth a legal instrument under the laws of South Sudan.

Being an instrument between the government and domestic actors, the R-Agreement as subsequently ratified is a domestic legal instrument which, while binding within the domestic legal sphere, does not in that form have any binding effect on the international plane.[892] Article 5.3.1.1 of the R-Agreement as ratified therefore effectively served as an invitation by South Sudan to the AU to establish the Hybrid Court. In other words, South Sudan exercised its sovereign prerogative by use of a domestic legal instrument to invite the AU to assist in the

[887] AUCISS Report, para 1148.
[888] Hon. Angelina Teny (Minister of Defence and Veterans' Affairs, South Sudan), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[889] R-Agreement, art 5.3.6.1.
[890] Although the legislation ratifying the R-Agreement was not publicly available to the author, its existence was confirmed to the author by officials of the South Sudan government including legislators and by officials of the Reconstituted Joint Monitoring and Evaluation Commission (R-JMEC) constituted under the R-Agreement to monitor implementation of the R-Agreement, during the Multi-Stakeholder Convening on Transitional Justice in South Sudan convened by Trust Africa and the AU Commission in Juba from 06–08 October 2021.
[891] Phoebe Okowa (n 643) 339.
[892] See Phoebe Okowa (n 643) 338–347. See also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, International Court of Justice, Merits Judgment, 19 December 2005, I.C.J. Reports 2005, p. 168 [98–104].

establishment of the Hybrid Court. At this point and before its acceptance by the AU, this invitation did not create binding legal obligations for the AU.

6.4.2 Acceptance by the AU of South Sudan's Invitation to Establish the Hybrid Court: AU Decision-Making Process

Even though Article 5.3.1.1 of the R-Agreement envisions the AU Commission as the entity invited to establish the Hybrid Court, the AU Commission does not by itself have the power to accept South Sudan's invitation. This power rests with the AU Heads of State and Government, which power they can exercise while sitting as the AU Assembly or as the AU-PSC. It is therefore important to briefly discuss the AU's decision-making structure so as to appreciate the roles subsequently played by the AU-PSC and the AU Commission regarding South Sudan's invitation.

The decision-making structure of the AU is a complex affair involving a number of AU organs and is governed generally by the Constitutive Act and other instruments adopted pursuant to the Constitutive Act. For purposes of this thesis, it suffices to interrogate not the general decision-making structure, but that structure in as far as it relates to the AU's intervention on matters that threaten peace and security such as international crimes. At the apex of this structure is the AU's supreme organ, the AU Assembly established under Article 5 of the Constitutive Act and tasked under Article 9 with, among others, determining the AU's common policies, taking decisions on recommendations by other organs, monitoring and ensuring compliance with AU decisions, providing directives on the management of situations that breach or threaten the peace, and establishing AU organs.

However, the most important AU organ on matters of peace and security is the AU-PSC established under Article 2 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 2002 (PSC Protocol) 'as a standing decision-making organ for the prevention, management and resolution of conflicts'. The AU-PSC convenes at the level of Permanent Representatives, Ministers or Heads of State and Government.[893] Not originally included as an organ of the AU in the Constitutive Act, the AU Assembly invoked its powers under Article 5(2) of the Constitutive Act to establish the AU-PSC as an AU organ integral to the implementation of the AU's peace and security mandate and the Common African Defence and Security Policy,[894] hence the PSC Protocol.

The AU-PSC is tasked with primary responsibility for the promotion of the AU's peace and security objectives and principles as enshrined in Articles 3 and 4 of the Constitutive Act, discussed in Section 6.2. Specifically, the AU-PSC is expected to, among others, 'anticipate and prevent conflicts … prevent and promote peace-building and post-conflict reconstruction … develop a common defence policy for the Union … [and] promote ... the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international

[893] PSC Protocol, art 8(2).
[894] For a concise discussion of the AU CADSP, *see* Omar A. Touray (n 809).

humanitarian law'.[895] In so doing, the AU-PSC is guided by the AU's, UN Charter's and the Universal Declaration of Human Rights' principles, including pacific settlement, early response, the rule of law, human rights and freedoms, international humanitarian law, sanctity of human life, the AU's intervention right and member states' right to request AU intervention.[896]

The AU-PSC's powers most relevant to this thesis include anticipating and preventing disputes/conflicts/policies that may result in genocide and crimes against humanity, peace-making, peace-building, peace support, recommending to the AU Assembly when intervention is necessary under Article 4(h) in the event of war crimes, genocide and crimes against humanity, approving specific intervention modalities when the AU Assembly authorises intervention under Article 4(j), and implementing the AU's common defence policy.[897] Equally important is the mandate of the AU-PSC under its peace-building role to consolidate peace agreements negotiated by conflict parties.[898] These the AU-PSC performs in its capacity 'as [the] standing decision-making organ [of the AU] for the prevention, management and resolution of conflicts',[899] and as provided in Articles 7(2) and (3) of the PSC Protocol, AU member states agree that the AU-PSC acts on their collective behalf and therefore accept its decisions as binding on them.

The AU-PSC has wide discretion on when and how it can intervene. An understanding of this discretion in respect of the choice of intervention modality will become particularly important when the chapter discusses the role of the Chairperson of the AU Commission in the ongoing process to establish the Hybrid Court. Article 9 of PSC Protocol empowers the AU-PSC to intervene to stop a potential conflict, during a conflict and to stop escalation after a settlement, and may do so as a Council or through its chairperson, the AU Commission Chairperson, the AU Panel of the Wise or through RECs. Besides implementing AU-PSC decisions and as confirmed by Article 10 of the PSC Protocol, the AUC Chairperson can also on their own initiative deploy their good offices in conflict prevention, management and resolution but under the general authority of the PSC. Other than these roles, however, the AU Commission primarily serves as the AU's secretariat and administrative organ[900] without independent decision-making capacity with regard to more interventionist measures.

6.4.3 Acceptance by the AU of South Sudan's Invitation to Establish the Hybrid Court: African Union Peace and Security Council Decision of 26 September 2015

The AU-PSC eventually adopted the AUCISS report on 26 September 2015 and emphasised the need for 'a holistic approach addressing, in a mutually-supportive way, the inter- related issues of accountability, reconciliation, healing and institutional reforms, based on ownership

[895] AU-PSC Protocol, art 3.
[896] AU-PSC Protocol, art 4.
[897] AU-PSC Protocol, art 7.
[898] AU-PSC Protocol, art 14(3)(a).
[899] AU-PSC Protocol, art 2(1).
[900] Constitutive Act, art 20(1).

by the South Sudanese stakeholders and robust African and international support'.[901] In this regard, the AU-PSC considered 'that the tragedy that took place in South Sudan is a scar on the conscience of Africa',[902] and as such there was a continental responsibility to remedy this failure including by ensuring accountability for the atrocities committed during the conflict. The AU-PSC consequently decided that its response in and engagement with South Sudan would henceforth be informed by the AUCISS report.[903] Specifically, the AU-PSC agreed to–[904]

> [T]he establishment by the AU Commission of an independent hybrid judicial court, the Hybrid Court of South Sudan (HCSS), in accordance with Chapter V (3) of the Agreement reached by the South Sudanese parties, as an African-led and Africa-owned legal mechanism, "to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the transitional period".

The AU-PSC then entrusted the AU Commission Chairperson 'to take all necessary steps towards the establishment of the [Hybrid Court], including providing broad guidelines relating to the location of the [Hybrid Court], its infrastructure, funding and enforcement mechanisms, the applicable jurisprudence, the number and composition of judges, privileges and immunities of Court personnel and any other related matters'.[905] By this decision, the AU therefore expressly and unequivocally accepted the invitation by South Sudan under Article 5.3.1.1 of the R-Agreement (as ratified) to establish the Hybrid Court.

Consequently, the R-Agreement as ratified by South Sudan's (transitional) parliament and the 26 September 2015 decision of the AU-PSC at the Level of Heads of State [AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government] accepting the invitation together form the international agreement which provides the legal basis for the establishment of the proposed Hybrid Court to investigate and prosecute international crimes committed during the South Sudan conflict.

6.5 The Hybrid Court for South Sudan

6.5.1 Material Jurisdiction and Applicable Law

The R-Agreement empowers the Hybrid Court to investigate and prosecute 'violations of international law and/or applicable South Sudanese law'.[906] Specifically, the Hybrid Court will have jurisdiction over the following crimes:[907] genocide, crimes against humanity, war crimes

[901] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 17.
[902] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 20.
[903] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 21.
[904] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[905] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[906] R-Agreement, art 5.3.1.1.
[907] R-Agreement, art 5.3.2.1.

and '[o]ther serious crimes under international law and relevant laws of the Republic of South Sudan including gender-based crimes and sexual violence'.[908] The Draft Statute of the Hybrid Court for South Sudan expounds on the last category of crimes by defining 'other serious violations' as 'violations of the laws and customs applicable in armed conflicts not of an international character'.[909]

Reference to laws and customs of war in the legal instruments of international criminal accountability mechanisms is generally considered as reference to applicable customary international law.[910] As such, the material jurisdiction of the Hybrid Court as formulated in the R-Agreement and the Draft Statute implies that in exercising this jurisdiction, the Hybrid Court would rely on customary international humanitarian law as a source of law. Because international criminal tribunals, albeit not without controversy, have since identified applicable norms that have attained customary international law status, clarified their content and developed a relatively solid body of jurisprudence in this regard,[911] the Hybrid Court's position is arguably less controversial.

6.5.2 Temporal Jurisdiction

The Hybrid Court's temporal mandate covers the period from 15 December 2013 when the conflict broke out till the end of the transitional period.[912] As provided in the R-Agreement, the transitional period commenced eight months after the R-Agreement was signed on 12 September 2018 and should last for 36 months.[913] By extending the Court's jurisdiction to cover over 3½ years after the signing of the R-Agreement, the parties recognised that some crimes committed during the period of active conflict such as enforced disappearance have a continuing effect beyond the date of the R-Agreement's signature. This was also presciently important because though active hostilities ceased soon after the R-Agreement was signed, sporadic violations are still being reported across the country, particularly in rural areas.[914] Since these violations have a direct connection to the conflict subject of the R-Agreement, it follows that the Hybrid Court should have jurisdiction over them.

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[908] R-Agreement 5.3.2.1.4.
[909] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 5. The 2017 Draft is currently undergoing further revision by the AU Commission in consultation with South Sudan, albeit the process is slow and fraught with difficulties as confirmed by representatives of the Office of the Legal Counsel of the African Union during the Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 convened by the UN Commission on Human Rights in South Sudan, Office of the High Commissioner for Human Rights and UN Mission in South Sudan (notes on file with author).
[910] Dapo Akande, 'Sources of International Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press) 49–51.
[911] Amit Kumar (n 648) 2–5.
[912] R-Agreement, art 5.3.1.1; Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 1(1).
[913] R-Agreement, art 1.1.2.
[914] *See* Report of the Commission on Human Rights in South Sudan, A/HRC/34/63 (06 March 2017); Report of the Commission on Human Rights in South Sudan, A/HRC/37/71 (13 March 2018); Report of the Commission on Human Rights in South Sudan, A/HRC/40/69 (12 March 2019); Report of the Commission on Human Rights in South Sudan, A/HRC/43/56 (31 January 2020); Report of the Commission on Human Rights in South Sudan, A/HRC/46/53 (04 February 2021).

However, the fact that the lower ceiling of the Court's temporal jurisdiction is set at 15 December 2013 may be limiting. As observed elsewhere, while the violence that broke out on 15 December 2013 was possibly spontaneous, general discontent within South Sudan had been brewing for a while and inter-communal violence had been experienced in a few states, prominently in Jonglei state.[915] Particularly egregious violations that may have been committed during this period and which have a logical connection to subsequent violations during the conflict will therefore be beyond the Hybrid Court's jurisdiction.

6.5.3 Territorial and Personal Jurisdiction

The R-Agreement does not expressly define the territorial jurisdiction of the Hybrid Court. However, the draft Statute limits this jurisdiction to violations 'committed in the territory of South Sudan',[916] logically because South Sudan can transfer to the AU elements of its sovereign authority only to the extent that it has such authority itself. In other words, since a state's sovereign authority is tied to its territory, the state cannot delegate or transfer any more authority than it itself possesses. While this may mean that some crimes committed against refugees displaced because of the conflict fall outside the Court's jurisdiction, this circumscription of territorial jurisdiction however guards against legal complications associated with extra-territorial application of criminal jurisdiction. In any case, a creative interpretation of the Hybrid Court's territorial and material jurisdictions can address the question of some crimes committed outside South Sudan's territory if they have a logical connection to crimes committed within South Sudan or have a link to the territory of South Sudan. These include crimes which commenced in South Sudan and were then completed elsewhere; crimes whose very nature and elements require cross-border effect, such as deportation; and crimes that are part of a continuing violation, as is the case with enforced disappearance.

Such interpretation of jurisdiction has recently been adopted, albeit not without controversy, by the International Criminal Court (ICC) in the situation in Myanmar where populations were allegedly deported from Myanmar, a state not party to the Rome Statute, to Bangladesh, a state party to the Rome Statute. The ICC held that it has jurisdiction over the crime of deportation, relying on various approaches to territorial jurisdiction including the ubiquity principle which considers whether the crime wholly or partially occurred on the concerned state's territory, and the constitutive elements approach which considers that at least one element of the crime was committed on the territory of the concerned state.[917] Adopting this reasoning, and despite its territorial jurisdiction being restricted by the R-Agreement and the Draft Statute to the territory of South Sudan, the Hybrid Court would have jurisdiction over

[915] Owiso Owiso, 'The Proposed Hybrid Court for South Sudan: Moving South Sudan and the African Union to Action against Impunity' (2018) 18 African Journal on Conflict Resolution 87, 91–95.
[916] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art, art 1(1).
[917] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar,* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*,* International Criminal Court, Pre-Trial Chamber III, ICC-01/19-27 (14 November 2019), paras 42–62.

a limited category of crimes affecting refugee populations in neighbouring states, specifically the crime of deportation as a crime against humanity.

The Hybrid Court's territorial jurisdiction is also reinforced by its broad personal jurisdiction. According to the R-Agreement, the Court has jurisdiction over 'individuals bearing responsibility for violations of international law and/or applicable South Sudanese law'.[918] The Draft Statute similarly refers to 'persons responsible for serious violations of international law and or the laws of South Sudan committed in the territory of South Sudan'.[919] Additionally, the Hybrid Court's legal instruments expressly exclude reliance on any form of pardons, amnesties or immunities, including those based on official position or capacity, to divest the Court of jurisdiction.[920] The Hybrid Court's personal jurisdiction does not therefore discriminate based on nationality of alleged perpetrators or their official capacity, instead insisting on jurisdiction over all persons responsible for violations on the territory of South Sudan during the relevant period.

The broad nature of the Hybrid Court's personal jurisdiction, read together with its material and territorial jurisdiction and the non-immunity provisions of its legal instruments, is particularly important when the role of intervening foreign armed forces and armed groups is considered. For instance, the Uganda People's Defence Forces (Ugandan military) is accused of using cluster bombs during its short-lived intervention in early 2014 (ostensibly in support of Kiir's government), resulting in severe injuries to civilians.[921] The Justice and Equality Movement (JEM), a rebel group operating in Sudan's Western regions, and which intervened in the South Sudan conflict on the government's side, is also alleged to have committed atrocities.[922] The Hybrid Court therefore has jurisdiction over crimes allegedly committed by these intervening foreign armed forces and armed groups in much the same way as it has jurisdiction over the primary South Sudanese conflict parties.

6.6 Allocation of Authority between the African Union and South Sudan over the Hybrid Court

6.6.1 Establishment of the Hybrid Court

The R-Agreement envisions a prominent and primary role for the AU in the establishment of the Hybrid Court. The A-Agreement provides that, 'The Court shall be established by the African Union Commission.'[923] As discussed in Section 6.4.3, subsequent to the signing of the R-Agreement, the AU-PSC at the Level of Heads of States and Government agreed to 'the

[918] R-Agreement, art 5.3.1.1.
[919] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art, art 1(1).
[920] Agreement, art 5.3.5.4 & 5.3.5.5; Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), arts 8(2–3) & 13.
[921] AUCISS Report, paras 532 & 758. Notably, however, the AUCISS classified the South Sudan conflict as a non-international armed conflict despite the short-lived involvement of Uganda. *See* AUCISS Report, paras 377, 788 & 1126.
[922] AUCISS Report, paras 610 & 758.
[923] R-Agreement, art 5.3.1.1.

establishment by the AU Commission of an independent hybrid judicial court, the Hybrid Court of South Sudan (HCSS), in accordance with Chapter V (3) of the Agreement reached by the South Sudanese parties, as an African-led and Africa-owned legal mechanism'[924] and authorised 'the Chairperson of the Commission to take all necessary steps towards the establishment of the [Hybrid Court]'.[925] However, while the R-Agreement expressly bestows upon the AU the power to establish the Hybrid Court, it curiously also requires that 'the [South Sudan government] shall initiate legislation for the establishment of … the Hybrid Court'.[926] At the same time, the R-Agreement's implementation matrix also provides that the bodies responsible for initiating the legislation are the government, including the Ministry of Justice, and the AU Commission.[927]

While these provisions may, at first blush, appear to be contradictory regarding the entity responsible for establishing the Hybrid Court, the thesis considers these provisions as reinforcing and procedurally facilitating the AU's primary responsibility to establish the Hybrid Court, the legal authority to do so having already been conferred by the international agreement between South Sudan and the AU. The anticipated national legislation reinforces the AU's primary role by emphasising that this should be undertaken in consultation and with the cooperation of South Sudan. This cooperation is envisioned, in particular, in the form of the executive's role in initiating national legislation and parliament's role in enacting said legislation. This is in recognition of the fact that while the AU is responsible for establishing the Hybrid Court and may even prepare the draft legislation, it is only South Sudan through its relevant institutions, particularly its cabinet and parliament, that can enact domestic legislation. This is particularly legally relevant if it is recalled that the intervention by the AU envisioned by the R-Agreement is an intervention upon invitation and request by South Sudan, and not a *proprio motu* intervention by the AU under Article 4(h) of the Constitutive Act or an intervention upon request by another member state under Article 4(j). In this case, South Sudan is exercising its sovereign prerogative to invite the AU to establish the Hybrid Court, and as such may be required to enact enabling legislation, though the legal legitimacy of the resulting mechanism may not necessarily hinge upon such enactment as this derives from the international agreement.

6.6.1.1 Who is Responsible for What?

To clarify this seeming ambiguity and cement its primary role, and following authorisation by the AU-PSC,[928] the AU Commission produced a draft statute of the Hybrid Court in 2015,[929] updated the draft in 2017 and submitted it to the South Sudan cabinet (Council of Ministers)

[924] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[925] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[926] R-Agreement, art 5.1.1.2.
[927] R-Agreement, annexure D, cap. V, No.1.
[928] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[929] Report of the Commission on Human Rights in South Sudan, A/HRC/37/71 (13 March 2018), para 115.

for consideration.[930] It was reported in January 2021 that the cabinet had approved the draft legislation (presumably the draft statute) as prepared by the AU Commission, which report was confirmed by government officials who also indicated that the statute will soon head to parliament for debate and adoption.[931] Despite publicly welcoming the announcement by the government of South Sudan,[932] the AU Commission insists that as of December 2021, it had not received any official confirmation from the government that it was moving forward with the process as reported.[933]

While indeed multiple factors and multiple stakeholders may share responsibility for the very slow progress of operationalisation of the R-Agreement's provisions on the Hybrid Court, some observers have argued that the lack of buy-in and political commitment by the government of South Sudan primarily explains this phenomenon.[934] However, from the reactions of the AU Commission and the government of South Sudan, it is apparent not only that both parties are at odds on their responsibilities regarding the operationalisation of the Hybrid Court and the requisite cooperation between them, but also that there is lack of direct and clear communication between them.[935]

The contention appears to revolve around a Memorandum of Understanding (MoU) that had been submitted to the transitional government by the AU Commission in 2015 alongside a draft statute of the Hybrid Court.[936] The Ministry of Justice considers that the MoU was not only overtaken by the events which led to the R-Agreement, but that it was also insufficient to guide cooperation between the AU Commission and South Sudan because it did not provide the broad guidelines anticipated in the R-Agreement.[937] The Ministry of Justice further insists that the AU shoulders the blame for the current inertia because it is yet to provide the broad guidelines to the government to enable South Sudan to move forward with the process of

[930] Conversation with R-JMEC representative, Juba Convening, Juba 07 October 2021 (notes on file with author)
[931] Statement by Mary Ayen, Member of the South Sudan Council of States, Juba Convening, Juba 07 October 2021 (notes on file with author).
[932] Statement by H.E. Mr Moussa Faki Mahamat, Chairperson of the African Union Commission, on African Union Hybrid Court of South Sudan (20 January 2021) https://au.int/es/node/39911 accessed 01 June 2021.
[933] Amb. Dr. Namira Negm, Legal Counsel of the African Union, UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[934] Dr Solomon Dersso (outgoing Chairperson of the African Commission on Human and Peoples' Rights), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[935] This is the author's impression from conversations with and the submissions made by representatives of the South Sudan government and the AU Commission during the Multi-Stakeholder Convening on Transitional Justice in South Sudan convened by Trust Africa and the AU Commission in Juba from 06–08 October 2021 and during the Conference on Sustaining Momentum for Transitional Justice in South Sudan convened by the UN Commission on Human Rights in South Sudan, UN Office of the High Commissioner for Human Rights (OHCHR) and the UN Mission in South Sudan (UNMISS) in Nairobi from 13–15 December 2021. Notes on file with author.
[936] *See* Report of the Commission on Human Rights in South Sudan, A/HRC/34/63 (06 March 2017), para 64.
[937] Under-Secretary of the South Sudan Ministry of Justice, UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).

establishing the Hybrid Court, despite the government signalling its readiness.[938] The government considers its hands to be tied because of lack of these broad guidelines which it argues are essential. On its part, the AU Commission has expressed concern that the process for the establishment of the Hybrid Court is so far largely a project of the AU Office of Legal Counsel, with the South Sudan government yet to fully come on board.[939] The AU Commission insists that it has proposed amendments to the 2015 draft MoU and had submitted these to the South Sudan government, but the government is stalling in signing the amended MoU.[940] Further, the AU Commission believes that the legal legitimacy of the Hybrid Court would depend on the MoU and as such, any forward movement is paralysed by the government's failure to sign the proposed amendments.[941]

However, the thesis disagrees with this argument by the AU Commission. As discussed in Section 6.4 and the following paragraphs, the legal legitimacy of the Hybrid Court does not depend on the conclusion of an MoU, but is rather anchored in the international agreement between South Sudan and the AU. The R-Agreement does not condition the establishment of the Hybrid Court on any further legal consent by South Sudan beyond the consent evidenced by the invitation in the signed and ratified R-Agreement. Alternatively, and as discussed in Sections 6.2.3 and 6.2.4, the AU nevertheless has the legal authority deriving from Article 4(h) of the Constitutive Act to establish the Hybrid Court even in the absence of the international agreement referred to above. The MoU would only serve as an instrument to facilitate smooth cooperation between South Sudan and the AU, and not as the legal foundation upon which the Hybrid Court is based. As such, while the MoU would be instrumental in laying down parameters for cooperation between South Sudan and the AU, the conclusion of the MoU is not a precondition for the establishment of the Hybrid Court.

6.6.1.2 Should the AU Establish the Hybrid Court without South Sudan's Cooperation?

Some, including the UN Commission on Human Rights in South Sudan, have argued that should South Sudan's cooperation not be forthcoming in the establishment of the Hybrid Court, the AU should invoke Article 4(h) of the Constitutive Act and establish the Court without South

[938] Under-Secretary of the South Sudan Ministry of Justice, UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[939] Amb. Dr. Namira Negm (Legal Counsel of the African Union), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[940] Amb. Dr. Namira Negm (Legal Counsel of the African Union), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[941] John Ikubaje (Senior Political Officer, AU Department of Political Affairs), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).

Sudan's 'approval'.[942] Indeed, and as argued in Sections 6.2.3 and 6.2.4, Articles 4(h) and 4(j) of the Constitutive Act empower the AU Assembly to undertake such intervention, that is, establish a criminal accountability mechanism in respect of South Sudan without any consent additional to the one already given by virtue of South Sudan's accession to the Constitutive Act, if the intervention is undertaken pursuant to these provisions. Further, as noted in Section 6.6.1.1 above, the AU does not require any additional consent even if it were to establish the Hybrid Court within the framework envisioned in the R-Agreement. There is indeed merit in emphasising the AU's legal authority to establish the Hybrid Court regardless of South Sudan's cooperation. Unfettered deference to South Sudan has thus far resulted in undue delay in the establishment of the Hybrid Court, and this inertia may persist particularly since the parties implicated in atrocities committed during the war continue to have a strong hold on instruments of state power.

However, the thesis argues that this option should be explored only as an absolute last resort. As the experience of the Special Tribunal for Lebanon shows, failure to secure cooperation of the concerned state – in the case of Lebanon, the refusal of Lebanon's parliament to ratify the applicable law – could have significant implications for legal and social legitimacy of the mechanism and for cooperation required to effectively pursue prosecutions. On the contrary, in situations where government cooperation in the establishment phase has been secured, such as in Sierra Leone and Cambodia, these mechanisms have operated with a reasonable level of social legitimacy and have achieved relative success. As Okowa has argued, a collaborative relationship between the government of the concerned state and the international organisation in question in the creation of such criminal accountability mechanisms establishes 'a special bond between the Court and the people of [the concerned state]'.[943] The R-Agreement's implementation matrix does indeed emphasise a collaborative relationship between the AU Commission and the government in establishing the Hybrid Court upon the enactment of the enabling legislation.[944] Therefore, it is reasonable to argue that while the AU's power to establish the Hybrid Court without South Sudan's cooperation should be prominently emphasised in the hope of encouraging expeditious and smooth cooperation from South Sudan, this power should not be hastily deployed. As convincingly argued by one South Sudanese stakeholder, 'We have the capacity, we know our history, we know our needs; all we need is assistance in implementing the transitional justice mechanisms in the R-Agreement.'[945]

[942] Report of the Commission on Human Rights in South Sudan, A/HRC/34/63 (06 March 2017), para 95; Report of the Commission on Human Rights in South Sudan, A/HRC/43/56 (31 January 2020), para 84, Annex II para 91.
[943] Phoebe Okowa (n 643) 337.
[944] R-Agreement, annexure D, cap. V, No.8.
[945] Statement by a member of the Transitional Justice Working Group South Sudan, Juba Convening, Juba 07 October 2021 (notes on file with author). Similar sentiments expressed by participants at the Conference on Sustaining Momentum for Transitional Justice in South Sudan convened by the UN Commission on Human Rights in South Sudan, Office of the High Commissioner for Human Rights and UN Mission in South Sudan in Nairobi from 13–15 December 2021 (notes on file with author).

6.6.2 Location of the Hybrid Court

The AU has the responsibility of determining the location of the Hybrid Court. The R-Agreement provides that 'the [AU Commission] shall provide broad guidelines relating to including the location of the [Hybrid Court]'[946] and that, 'The Chairperson of the [AU Commission] shall decide the seat of the [Hybrid Court].'[947] Considering the current restive state of South Sudan, coupled with the fact that the conflict parties now wield the instruments of state power, locating the Hybrid Court outside South Sudan would assure the Court of the requisite security and operational independence that it requires to operate. However, in considering a location outside South Sudan, the AU Commission should settle for a location that is within reasonable proximity to South Sudan, not least for practical reasons, but also to bridge the physical and social distance between the Court and the people of South Sudan, an issue that has dogged many an international criminal accountability mechanism.[948] A location that is within reach of the people primarily served by the Hybrid Court would be instrumental in 'creat[ing] a special bond between the Court and the people of [South Sudan]'.[949]

As of October 2021, the AU Commission had convened at least two multi-stakeholder meetings to discuss not just the Draft Statute, but also a possible location for the Court. One of these consultations was held in Tanzania and included participation by officials from the Arusha branch of the International Residual Mechanism for Criminal Tribunals (IRMCT), [950] perhaps signalling that Arusha could be a possible location for the Hybrid Court. The participation of IRMCT officials is significant not only for possible judicial dialogue and capacity-building, but also because of the possibility of the Hybrid Court inheriting the state-of-the-art infrastructure and facility of the defunct ICTR (now IRMCT),[951] thereby ensuring that the Hybrid Court has proper operational facilities. Additionally, Arusha is a secure location within reasonable geographical distance of South Sudan. Nonetheless, even if a decision is taken to locate the Hybrid Court outside South Sudan, it should be understood that this is a Court whose mandate is specific to South Sudan and as such, efforts should be made to relocate the Court to South Sudan as the residual location as and when circumstances permit. At the very least, the Court should be required to conduct some trials or parts thereof on location in South Sudan as and when circumstances permit. This assurance ought to be reflected in the Court's Statute, an issue on which the current draft is silent.[952]

[946] R-Agreement, art 5.3.1.2.
[947] R-Agreement, art 5.3.1.3.
[948] See Vincent Nmehielle (n 143); Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (n 173); Phil Clark (n 173).
[949] Phoebe Okowa (n 643) 337.
[950] Conversation with representative of R-JMEC, Juba Convening, Juba 07 October 2021 (notes on file with author)
[951] Owiso Owiso (n 915) 109.
[952] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author).

6.6.3 Appointment of Judges, Prosecutor(s) and other Staff

In keeping with the Hybrid Court's declared identity as 'an African-led and Africa-owned legal mechanism',[953] the R-Agreement anticipates that the staffing of the Court – judges, prosecutors, registrar, investigators and defence staff – shall be drawn entirely from African states.[954] Specifically, a majority of the Hybrid Court's judges are to hail from other African states, with the rest hailing from South Sudan.[955] The Court's registrar, prosecutors and defence counsels will hail from other African states other than South Sudan,[956] while their support staff can be nationals of South Sudan or of other African states.[957] As argued elsewhere, in addition to their legal expertise and experience, 'South Sudanese judges bring deep understanding of the specific cultural and historical context, [while] the [judges from other African states] bring a general understanding of the African context'.[958] The relevant contextual understanding brought to the Court by the two groups of judges is vital in enabling the Court to have a solid appreciation of context while upholding international criminal law standards. It is also instrumental in ensuring the imperatives of impartiality, objectivity and local ownership.

However, the R-Agreement rather controversially purports to exclude South Sudanese nationals from serving as prosecutors and defence counsels.[959] Further, the 2017 draft Statute of the Hybrid Court excludes South Sudanese nationals from serving as trial and appeal attorneys.[960] While this requirement is arguably understandable from an independence and impartiality point of view when applied to the Prosecutor and Deputy Prosecutor, it is not quite the case for trial and appeal attorneys. On the contrary, it potentially robs the Hybrid Court of the expertise and contextual understanding required to effectively prosecute international crimes committed in South Sudan. Further, it squanders the opportunity to contribute towards building and strengthening capacity in South Sudan.[961]

As regards defence counsels, this provision potentially conflicts with an accused person's right to freely choose their defence counsel, a fair trial right guaranteed by international human

[953] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a). *See also* AUCISS which describes the anticipated mechanism as 'an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community'. AUCISS Report, para 1148; AU Transitional Justice Policy, paras 24–27.
[954] R-Agreement, art 5.3.3.
[955] R-Agreement, arts 5.3.3.2 & 5.3.3.5.
[956] R-Agreement, arts 5.3.3.3 & 5.3.3.4.
[957] R-Agreement, art 5.3.3.6.
[958] Owiso Owiso (n 915) 100.
[959] R-Agreement, art 5.3.3.3.
[960] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 18(5).
[961] According to the AU Transitional Justice Policy, building national and local capacity should be a priority consideration in the implementation of transitional justice processes as this has a direct bearing on 'the attainment of sustainable peace, justice and accountability'. AU Transitional Justice Policy, para 41.

rights instruments[962] and acknowledged in various international criminal law instruments.[963] Ideally, the Hybrid Court would be better served by the prosecutorial team comprising of majority nationals of other African states and a minority of South Sudanese prosecutors. As relates to defence counsels, the thesis finds no compelling justification why an accused person's choice of defence counsel should be limited in such a manner as to exclude South Sudanese nationals from serving as defence counsels. Perhaps recognising this potential legal quandary, the 2017 draft Statute of the Hybrid Court restricts this limitation to the Principal Defender who 'shall be a national of an African Union Member State other than South Sudan'[964] while the other staff of the Defence Office shall be 'African, including South Sudanese'.[965] Further, the 2017 draft Statute of the Hybrid Court expressly recognises the right of accused persons to be represented by counsel of their own choice.[966]

The appointing authority of Judges, Prosecutor, Deputy Prosecutor, Principal Defender and the Registrar is the Chairperson of the AU Commission.[967] No indication is provided in the R-Agreement on the procedure to be adopted by the AU Commission Chairperson in the selection and appointment of these court officials. The 2017 draft Statute of the Hybrid Court clarifies that these appointments shall be made by the AU Commission Chairperson 'upon recommendation by the Advisory Council on Selection of Principals for the Hybrid Court'.[968] However, the draft Statute provides no indication as to the composition of this Advisory Council or how and by whom it is to be established.

6.6.4 Duration and Termination of the Hybrid Court's Mandate

The two instruments constituting the international agreement between South Sudan and the AU (R-Agreement and the 26 September 2015 decision of the AU-PSC at the Level of Heads of State and Government, Communiqué PSC/AHG/COMM.1(DXXVII)) and which form the legal basis for the Hybrid Court do not expressly provide for the duration of the Hybrid Court's mandate or termination of this mandate. The 2017 draft Statute of the Hybrid Court is equally silent on this issue. It is therefore reasonable to expect, on the one hand, that the Hybrid Court's

[962] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, art 14(3)(b) & (d); African Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217, art 7(1)(e); American Convention on Human Rights, 22 November 1969, 1144 UNTS 123, art 8(2)(d); European Convention for the Protection of Human Rights and Fundamental Freedoms, 04 November 1950, 213 UNTS 221, art 6(3)(c)

[963] Rome Statute of the International Criminal Court, arts 55(2)(c) and 67(1)(d); Statute of the International Criminal Tribunal for the former Yugoslavia, arts 18(3) and 21(4)(b) & (d); Statute of the International Criminal Tribunal for Rwanda, arts 17(3) and 20(4)(b) & (d); Statute of the Special Court for Sierra Leone, at 17(4)(b) & (d); Statute of the Special Tribunal for Lebanon, arts 15(a), 16(4)(b) & (d) and 22(2)(b) & (d); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), arts 24 and 35(b) & (d); Law No.05/L-053 on (Kosovo) Specialist Chambers and Specialist Prosecutor's Office, arts 21(4)(c) & (e), 38(3)(c) and 41(4)(b); Malabo Protocol art 22 [inserting Article 46A(b) & (d) of the Statute of the African Court of Justice and Human and Peoples' Rights].

[964] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 19(1).

[965] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 19(4).

[966] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 25(4)(b) & (d).

[967] R-Agreement, art 5.3.3.5.

[968] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 15(3), 18(2) & (3), 19(1), 20(2),

mandate continues as long as it is discharging its mandate 'to investigate and where necessary prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, committed from 15th December 2013 through the end of the Transitional Period'.[969] On the other hand, however, this does not necessarily mean that this mandate cannot be revised or terminated before its conclusion. Being a mechanism established by treaty, it follows that the rules governing treaty termination or revision apply. As such, the thesis' interpretation is that the Hybrid Court's mandate can, at least in theory, be revised or terminated by South Sudan by amending the R-Agreement including to denounce its international agreement with the AU.

6.6.4.1 Revision or Termination of Mandate by Amendment to the R-Agreement

The R-Agreement provides a detailed procedure for its amendment. Article 8.4 of the Agreement provides as follows–

> This Revitalised Agreement may be amended by the Parties, with at least two-thirds of the members of the Council of Ministers of the RTGoNU, and, at least two-thirds of the voting members of the Revitalised Joint Monitoring and Evaluation Commission consenting to the amendments, followed by ratification by the Transitional National Legislature, according to the constitutional amendment procedure set out in the TRCSS, 2011 (as amended).'

De jure, therefore, any provision of the R-Agreement can be amended, including Chapter V which provides for the establishment of the Hybrid Court. However, the practical implementation of the amendment procedure above is unlikely to be easy considering the voting requirements.

Firstly, the Council of Ministers (cabinet) is composed of thirty-five (35) members drawn from parties to the South Sudan conflict and other political actors.[970] Convincing at least two-thirds of members (23) drawn from different political persuasions with different interests to vote for amendments that delete or impair the provisions on the Hybrid Court is unlikely to be easy. Secondly, the forty-three (43) voting members of the Reconstituted Joint Monitoring and Evaluation Commission (R-JMEC), the body established to monitor compliance with and implementation of the R-Agreement, are drawn from a variety of stakeholders, being 10 representatives of the parties to the R-Agreement, 13 representatives of other South Sudanese stakeholders, 13 representatives of regional guarantors (Ethiopia, Kenya, Djibouti, Sudan, Uganda, Somalia, AU Commission, AU High-Level *Ad hoc* Committee, IGAD Secretariat), and seven representatives of International Partners and Friends of South Sudan.[971] It is unlikely that it would be easy to convince at least two-thirds (29) members of this very diverse group to consent to amendments that delete or impair the provisions on the Hybrid Court.[972] Finally, such an amendment would still have to be ratified by South Sudan's parliament.

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[969] R-Agreement, art 5.3.1.1.
[970] R-Agreement, art 1.10.7.
[971] R-Agreement, cap VII.
[972] From my conversations with persons engaged in the transitional justice process in South Sudan (Juba Convening, Juba 07–08 October 2021, notes on file with author), concerns were nevertheless raised over R-JMEC's commitment to the establishment of the Hybrid Court. Some felt that R-JMEC was prioritising other

Therefore, while it is legally possible for South Sudan to revise the Hybrid Court's mandate or end the mandate entirely by denouncing the international agreement with the AU on the establishment of the Hybrid Court through an amendment of the relevant provisions of the R-Agreement, this appears very unlikely because of the rigid amendment procedure discussed above.

6.6.4.2 Effect of Denunciation of International Agreement before Conclusion of the Mandate of the Hybrid Court

Should the unlikely scenario detailed above nevertheless occur leading to the denunciation by South Sudan of the international agreement with the AU (by virtue of an amendment to Chapter V of the R-Agreement) before the conclusion of the Hybrid Court's mandate, this thesis argues that the Hybrid Court can nonetheless continue to operate. Depending on the timing of the denunciation, the (continued) operation of the Hybrid Court could still be legally assured in any one of three ways discussed below: a) as a continuing obligation; b) by recourse to Article 4(h) of the Constitutive Act; and c) by recourse to Article 4(j) of the Constitutive Act.

a) Continuing Obligations Arising from the International Agreement

Should the above scenario unfold after the Hybrid Court has been established but before conclusion of its mandate, two responses are possible. First, it would be possible for the Hybrid Court to argue along the lines of Article 70(1)(b) VCLT 1986 that the denunciation by South Sudan of the international agreement with the AU does not affect 'any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination'. In other words, obligations regarding the Hybrid Court already arose from the international agreement between South Sudan and the AU and these obligations continue until the Court completes its mandate which, as provided in the R-Agreement, is 'to investigate and where necessary prosecute individuals bearing responsibility for violations of international law and/or applicable South Sudanese law, committed from 15th December 2013 through the end of the Transitional Period'.[973] The already-established Hybrid Court would be such 'legal situation' within the meaning of Article 70(1) VCLT 1986 hence the obligation of the AU and South Sudan to facilitate the discharge of the Court's mandate would persist even after such denunciation and until the Court's mandate is completed.

b) Operation Pursuant to Article 4(h) of the Constitutive Act

It would also be possible for the AU to *proprio motu* invoke Article 4(h) of the Constitutive Act and mandate the continued operation of the Hybrid Court. In this case, even though initially established pursuant to the international agreement between South Sudan and the AU, the legal basis of the Court's continued mandate would be Article 4(h) of the Constitutive Act, as discussed in detail in Sections 6.2.3 and 6.2.4. If the above scenario unfolds before the Hybrid

peacebuilding processes under the R-Agreement and deprioritising the Hybrid Court, and were of the opinion that the AU should rein in R-JMEC in this regard.

[973] R-Agreement, art 5.3.1.1.

Court is established pursuant to the R-Agreement, then the AU can intervene by invoking Article 4(h) as the legal basis for establishing the Hybrid Court. In this case, the Hybrid Court would not be a mechanism established pursuant to the R-Agreement, but a mechanism established solely on the basis of the AU's intervention powers under Article 4(h) of the Constitutive Act.

c) Operation Pursuant to Article 4(j) of the Constitutive Act

It is also possible, if the *proprio motu* intervention by the AU Assembly is not forthcoming, for a member state to request intervention by the AU. Article 4(j) of the AU Constitutive Act, discussed in Sections 6.2.3 and 6.2.4, recognises 'the right of Member States to request intervention from the Union in order to restore peace and security'. The commission or threat of commission of international crimes on the territory of South Sudan is not only a matter of concern to South Sudan, but also a continental concern, a position supported by the cosmopolitan underpinnings of this research. The prevention of and redress for international crimes fall quite squarely within the AU's expressed objectives of continental peace, security and stability, solidarity and cooperation and promotion and protection of human and peoples' rights. As such, should the above scenario where South Sudan denounces the international agreement with the AU regarding the Hybrid Court unfold, any member of the AU would have the right under Article 4(j) of the Constitutive Act to request the AU to intervene and establish or mandate the continued operation of the Hybrid Court.

6.6.5 Financial Control of the Hybrid Court

The R-Agreement requires the AU Commission to 'provide broad guidelines relating to … funding mechanisms'.[974] Precise provisions on funding are to be detailed in the anticipated implementing legislation.[975] Beyond these provisions, the R-Agreement does not, however, indicate which party, the AU or South Sudan, is responsible for funding the institution and the formula for such funding. However, the implication is that since the AU is responsible for the establishment of the Hybrid Court as discussed in Sections 6.4 and 6.6.1, it follows therefore that it bears responsibility for determining the Court's funding structure.

Proceeding on the assumption that the AU is the primary entity responsible for determining the Hybrid Court's funding structure, the thesis argues that to guarantee sustained funding for the Court, its funding should primarily derive from AU member states, either as compulsory assessed contribution of member states specific to the Hybrid Court or derived from the general annual budget of the AU as approved by the AU Assembly. Alternatively, and to avoid an additional budgetary expenditure which may further burden member states, the Hybrid Court's funding could also be drawn from the Peace Fund established under Article 21(1) of the PSC Protocol 'to provide the necessary financial resources for peace support

[974] R-Agreement, art 5.3.1.2. *See also* AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[975] R-Agreement, art 5.1.2.

missions and other operational activities related to peace and security' and which is financed by, inter alia, 'appropriations from the regular budget of the Union'.[976] As has been argued in Sections 6.2 and 6.4, the legal competence of the AU to accept South Sudan's invitation to establish the Hybrid Court stems largely from the peace and security provisions of the AU's legal instruments. As such, the Hybrid Court qualifies as 'other operational activities related to peace and security' within the meaning of Article 21(1) of the PSC Protocol. Further, since the Peace Fund is already in existence and is funded from the AU's regular budget, using it to finance the operations of the Hybrid Court would neither occasion additional budgetary expenditure nor require additional budgetary approval. As argued elsewhere,[977] primary funding of the Hybrid Court by the AU would also ensure that the Hybrid Court lives up to its declared identity as 'an African-led and Africa-owned legal mechanism'.[978]

Additionally, to cement South Sudanese ownership of the transitional justice process, South Sudan should be required to contribute to the funding of the Hybrid Court. As the AU Transitional Justice Policy acknowledges, tapping into and mobilising national resources for the implementation of transitional justice processes is a vital step towards ensuring national ownership of the process.[979] However, the South Sudan government has already expressed concern that it may not be able, by itself, to sustain the financial burden of the transitional justice mechanisms anticipated in the R-Agreement.[980] The AU has also noted that its fundraising initiatives for the Hybrid Court are currently being hampered by the fact that AU member states and other potential donors are reluctant to make financial commitments without an indication of progress towards the establishment of the Hybrid Court.[981] Since the R-Agreement has not tied the Hybrid Court to a specific funding model, the drafting of the Court's statute (and the MoU discussed in Section 6.6.1.1) provides the AU with the opportunity to define a sustainable funding model which will also ensure the Court's sustainability and independence.[982]

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[976] PSC Protocol, art 21(2).
[977] Owiso Owiso (n 915) 108.
[978] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a). *See also* AUCISS which describes the anticipated mechanism as 'an Africa-led, Africa-owned, Africa-resourced legal mechanism under the aegis of the African Union supported by the international community'. AUCISS Report, para 1148; AU Transitional Justice Policy, paras 24–27.
[979] AU Transitional Justice Policy, para 32(ii).
[980] Hon. Angelina Teny (Minister of Defence and Veterans' Affairs, South Sudan), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[981] Amb. Dr. Namira Negm (Legal Counsel of the African Union), UN Commission on Human Rights in South Sudan – Office of the High Commissioner for Human Rights – UN Mission in South Sudan Conference on Sustaining Momentum for Transitional Justice in South Sudan, Nairobi 13 December 2021 (notes on file with author).
[982] The relevance of such a court's funding structure to its proper functioning, independence and impartiality is explored in Chapter VII (Concluding Chapter). Notably, the 10 August 2017 version of the Draft Statute of the Hybrid Court for South Sudan (on file with author) does not provide a funding structure. However, this draft is still undergoing revision in light of the R-Agreement of 2018. The author was unable to secure a copy of the 2015 version of the MoU between the AU Commission and South Sudan, which is also currently undergoing revision.

6.6.6 Oversight of the Hybrid Court by AU Organs

Being a mechanism (to be) established primarily by the AU, it follows that some AU organs would have some influence over the administrative aspects of the Hybrid Court. In particular, the roles of the AU Assembly and the Pan-African Parliament are notable.

6.6.6.1 Oversight by the African Union Assembly of Heads of State and Government

As the supreme organ of the AU with the power to intervene in member states including through the establishment of mechanisms such as the Hybrid Court, as discussed in Section 6.2, the AU Assembly will consequently wield significant oversight power over the Hybrid Court. Some of these avenues for oversight include the AU Assembly's function of adopting the AU's budget[983] and its power to impose sanctions on member states. As discussed in Section 6.6.5, the Hybrid Court will primarily be funded by the AU. As such, the Hybrid Court will be administratively subject to the AU's budgetary processes which are controlled by the AU Assembly. In accordance with Article 23 of the Constitutive Act, the AU Assembly may also impose economic and political sanctions on a member state that does not comply with its policies and decisions. Legally, therefore, the AU Assembly has the coercive threat of sanctions at its disposal to incentivise South Sudan to cooperate with the Hybrid Court. This power is important in guaranteeing, at least in theory, that elements with the South Sudan government do not frustrate the operation of the Hybrid Court. Much of the AU Assembly's coercive oversight and supervisory functions over the Hybrid Court will, however, most likely be undertaken directly by the AU-PSC to which the AU Assembly has delegated the exercise of its peace and security functions as discussed in Sections 6.2.2 and 6.4.2, of course while recognising the residual authority of the AU Assembly.

6.6.6.2 Oversight by the Pan-African Parliament

The Pan-African Parliament (PAP) was established as an advisory and consultative forum[984] whose powers include promoting AU objectives such as human rights, peace, security, accountability, solidarity and cooperation;[985] examining and making recommendations on matters including human rights, democracy, good governance and the rule of law; and discussing the AU's budget and making recommendations thereon.[986] Notably, PAP in its current design is not a legislative body, but rather an advisory and consultative organ.[987] Nonetheless, PAP has the power to request from the AU-PSC reports related to the

[983] Constitutive Act, art 9(1)(f).
[984] Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, 2001 (PAP Protocol), art 2(3)(i); See also Sani L. Mohamed, 'The Pan-African Parliament' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework – A Manual on the Pan-African Organization* (Martinus Nijhoff Publishers 2012).
[985] PAP Protocol art 3.
[986] PAP Protocol, art 11.
[987] This role is expected to evolve into a legislative role, and an instrument to this effect (Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament) was adopted in 2014 but is yet to attain the requisite number of ratifications to enter into effect.

maintenance of peace and security, and AU-PSC is obligated to provide such reports.[988] However, what PAP can do with or about these reports appears to be limited to making non-binding recommendations.[989] With its current powers, it is therefore possible that PAP may play a non-intrusive 'supervisory' role over the AU's engagement with the Hybrid Court, which role would be limited to requesting and receiving reports from the AU-PSC on the Court's functioning, debating these reports and making recommendations.

However, should the 2014 Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (2014 PAP Protocol) which seeks to amend and increase the powers of PAP enter into effect during the lifespan of the Hybrid Court, PAP would, legally speaking, have additional powers – beyond considering reports and making recommendations – that would have an impact on the Court. In particular, the 2014 PAP Protocol expressly empowers PAP to conduct fact-finding, inquiry or observer missions.[990] PAP could very well exercise these powers to conduct more intrusive interrogation of South Sudan's implementation of Chapter V of the R-Agreement on transitional justice which includes the Hybrid Court.

It is worth noting that despite its current legal framework not enshrining the specific power to undertake fact-finding missions, PAP has in fact interpreted its power to '[p]erform such other functions as it deems appropriate to achieve [its] objectives'[991] as empowering it to undertake fact-finding missions. Consequently, PAP conducted fact-finding missions in Darfur in 2006 including to evaluate the AU mission in Sudan. That said, however, what PAP does with the result of such fact-finding, inquiry or observer missions appears again to be limited to making recommendations to relevant AU organs.[992] It is possible, then, that PAP may exercise its fact-finding power to influence not only the operation of the Hybrid Court but also South Sudan's relationship with the Court.

6.6.7 The Hybrid Court and its Relationship with Domestic Institutions

6.6.7.1 Administrative Role for South Sudan?

As evident from the discussion in the preceding sections, the R-Agreement and the draft Statute envision a primary and prominent role for the AU in the non-judicial administrative aspects of the Hybrid Court, including establishment, location and appointment of personnel. The R-Agreement does not specifically spell out any particularly active role for South Sudan in the administration of the Hybrid Court. This is, of course, aside from the general obligation to 'cooperate with the [Hybrid Court]'.[993] Since the AU has the responsibility of establishing the Hybrid Court,[994] the implication is that the operation of the Hybrid Court will be the

[988] PSC Protocol, art 18(2).
[989] PAP Protocol, art 11(1).
[990] 2014 PAP Protocol, art 8(3).
[991] PAP Protocol, art 11(9).
[992] 2014 PAP Protocol, art 8(2).
[993] R-Agreement, art 5.1.4.
[994] R-Agreement, art 5.3.1.

responsibility of the AU, with South Sudan providing the necessary cooperation. There appears, therefore, to be no supervisory or oversight role envisioned for South Sudan regarding the operation of the Hybrid Court. On the one hand, this ensures the judicial independence of the Hybrid Court necessary for it to objectively undertake its judicial functions. On the other hand, being a mechanism established by treaty, it is arguable that some nominal role for South Sudan particularly regarding the non-judicial or administrative aspects of the Hybrid Court is important if the institution is to maintain its dual character as a South Sudanese and AU mechanism in which South Sudan has ownership. In particular, and borrowing from a similar arrangement between the UN and Sierra Leone with respect to the SCSL,[995] a role could be identified for South Sudan whereby it is required to assist in providing the Court's material infrastructure such as utilities and other general services. Such role would emphasise the South Sudanese character of the mechanism without amounting to the kind of significant supervisory or oversight or administrative authority over the Hybrid Court which may be exploited by South Sudan to frustrate the Court's operations.

6.6.7.2 Relationship with South Sudan's Judiciary

Even though it is to be established by the AU in collaboration with South Sudan as discussed above, the Hybrid Court is not a domestic court of South Sudan. It is 'independent and distinct from the national judiciary … [and has] primacy over any national courts'.[996] As such, the Hybrid Court has the power to mandate national courts to defer to its authority and primacy and transfer to the Hybrid Court any investigations, prosecutions, records and persons subject of proceedings before national courts.[997] That said, however, the draft Statute foresees a collaborative and complementary relationship between the Hybrid Court and South Sudan's domestic judiciary in discharging their judicial functions.

The draft Statute provides that, 'The Hybrid Court and the national courts of South Sudan shall have concurrent jurisdiction.'[998] The draft Statute empowers the Hybrid Court to refer some cases to the domestic judicial system, while maintaining residual authority and a supervisory role over these referred cases in order to ensure that the domestic judiciary upholds international fair trial standards when handling these cases.[999] Additionally, the Hybrid Court can refer matters to the Commission for Truth, Reconciliation and Healing (CTRH) where it determines, based on considerations of interests of justice and gravity, that such matters are more appropriate for the CTRH.[1000] Such transfer of cases to the domestic judiciary is not unique to the Hybrid Court, and it is an approach that has been successfully implemented by other courts and tribunals. For instance, the International Criminal Tribunal for Rwanda (ICTR)

[995] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art 5.
[996] R-Agreement, art 5.3.2.2; Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 11(2).
[997] R-Agreement, art 5.3.2.2; Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 11(2).
[998] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 13.
[999] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 10(1–3).
[1000] Draft Statute of the Hybrid Court for South Sudan (version 10 August 2017, on file with author), art 10(4).

transferred three cases to Rwanda[1001] while the International Criminal Tribunal for the former Yugoslavia (ICTY) transferred cases involving ten persons to Bosnia and Herzegovina,[1002] one case involving two persons to Croatia,[1003] and one case involving one person to Serbia.[1004] Prosecution of all cases transferred to Rwanda, Bosnia and Herzegovina and Croatia were successfully undertaken by the national courts with the residual oversight of the ICTR and ICTY.[1005]

This relationship is vital for several reasons. Firstly, being a large-scale conflict where international crimes are reported to have been committed in a widespread and systematic manner, it is unlikely and unrealistic to expect that the Hybrid Court will by itself investigate and prosecute all crimes and all persons that would ordinarily be within its jurisdiction. Selectivity is an inherent feature of international criminal law, and the Hybrid Court, like all international criminal courts and tribunals before it, will likely focus on those who bear the greatest responsibility. The bulk of the crimes and perpetrators will therefore have to be the responsibility of the domestic judicial system.

Secondly, this relationship is important in order to help (re)build the capacity of South Sudan's domestic judicial system, particularly considering the enormous responsibility that it has in dispensing justice to a new nation emerging from a devastating conflict. The AUCISS itself noted that South Sudan's domestic criminal justice system had very limited capacity, and

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[1001] *Jean Uwinkindi v The Prosecutor,* Decision on Uwinkindi's Appeal against the Referral of His Case to Rwanda and Related Motions, International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-01-75-AR*11*bis (16 December 2011); *The Prosecutor v Ladislas Ntaganzwa,* Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, International Criminal Tribunal for Rwanda, Referral Chamber, Case No. ICTR-96-9-R11*bis* (08 May 2012); *Bernard Munyagishari v The Prosecutor*, Decision on Bernard Munyagishari's Third and Fourth Motions for Admission of Additional Evidence and on the Appeals against the Decision on Referral under Rule 11*bis*, International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-05-89-AR11*bis* (03 May 2013).

[1002] *The Prosecutor v Mitar Rašević and Savo Todović,* Decision on Referral of Case under Rule 11*bis* with Confidential Annexes I and II, International Criminal Tribunal for the former Yugoslavia, Referral Bench, Case No. IT-97-25/1-PT (08 July 2005); *The Prosecutor v Mitar Rašević and Savo Todović,* Decision on Savo Todović's Appeals against Decisions on Referral under Rule 11*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-97-25/1-AR11*bis*.1 & IT-97-25/1-AR11*bis*.2 (04 September 2006); *The Prosecutor v Radovan Stanković,* Decision on Rule 11*bis* Referral, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-96-23/2-AR11*bis*.1 (01 September 2005); *Prosecutor v Gojko Janković,* Decision on Rule 11*bis* Referral, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-96-23/2-AR11*bis*.2 (15 November 2005); *Prosecutor v Paško Ljubičić,* Decision on Appeal against Decision on Referral under Rule 11*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-00-41-AR11*bis*.1 (04 July 2006); *Prosecutor v Željko Mejakić, Momčilo Gruban, Dušan Fuštar and Duško Knežević,* Decision on Joint Defence Appeal against Decision on Referral under Rule 11*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-02-65-AR11*bis*.1 (07 July 2006); *The Prosecutor v Milorad Trbić,* Decision on Referral of Case under Rule 11*bis* with Confidential Annex, International Criminal Tribunal for the former Yugoslavia, Referral Bench, Case No. IT-05-88/1-PT (27 April 2007).

[1003] *The Prosecutor v Rahim Ademi and Mirko Norac,* Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, International Criminal Tribunal for the former Yugoslavia, Referral Bench, Case No: IT-04-78-PT (14 September 2005).

[1004] *Prosecutor v Vladimir Kovačević,* Decision on Appeal against Decision on Referral under Rule 11*bis*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-01-42/2-AR11*bis*.1 (28 March 2007).

[1005] The case transferred to Serbia was not prosecuted since the accused person was declared unfit to stand trial due to mental illness.

also observed a general lack of public confidence in the judicial system's ability to ensure accountability for the crimes identified by AUCISS.[1006] AUCISS nonetheless acknowledged that while those bearing greatest responsibility for crimes should be held accountable internationally, the domestic judiciary could and should be strengthened and utilised to hold accountable the many mid and lower level perpetrators.[1007] Mandating close collaboration between the Hybrid Court and South Sudan's judicial system, while emphasising the Hybrid Court's primacy, will therefore hopefully contribute to strengthening the domestic judiciary's capacity by setting standards to be emulated and facilitating diffusion of international normative standards into the domestic system through its jurisprudence.

6.6.8 Explaining the AU's Authority over South Sudan Regarding the Hybrid Court

Evident from the discussion above is that the allocation of authority between the AU and South Sudan in respect of the Hybrid Court heavily favours the AU. South Sudan's role is rather marginal, primarily restricted to cooperation with what is practically an AU judicial mechanism. The explanation for this state of affairs lies primarily in the AU's endeavour to assert its declared status as the inter-governmental organisation with primary responsibility for continental affairs, and to insist on the equal validity on the international plane of its responses. In other words, the AU's involvement with the Hybrid Court is an expression of the reconceptualised cosmopolitan approach to accountability for international crimes discussed in Chapter II.

6.6.8.1 Validity of the AU's Continental Approaches: From State Security to Human Security

When considered from a historical perspective, the inauguration of the AU in 2002 marked the culmination of a shift in primary focus from its predecessor the OAU's emphasis on eradicating colonial domination and upholding and defending the sovereignty, territorial integrity and independence of its members.[1008] As a result of the OAU's primary focus on these otherwise noble objectives, the promotion of the rights and fundamental freedoms of African peoples had consequently been relegated from prominence, thereby resulting in inaction by the OAU in the face of egregious violations across the continent.[1009] This was exacerbated by the general failure of the global collective security architecture under the UN Charter framework to also respond promptly and effectively to atrocity crimes on the continent,[1010] a failure exemplified most tragically by the Security Council's failure to expeditiously respond before and during the Genocide against the Tutsi in Rwanda in 1994 and the conflict in Sierra Leone (1991–2002), and its begrudgingly slow and contradictory response to the conflict in Liberia (1999–

[1006] AUCISS Report, para 1148. *See also* AU Transitional Justice Policy 2019, para 78.
[1007] AUCISS Report, para 787.
[1008] Charter of the Organisation of African Unity, 25 May 1963, 479 UNTS 39, art 1.
[1009] See Tiyanjana Maluwa, 'The Transition from the Organisation of African Unity to the African Union' in Abdulqawi A. Yusuf and Fatsah Ouguergouz (eds), *The African Union: Legal and Institutional Framework - A Manual on the Pan-African Organization* (Martinus Nijhoff Publishers 2012); Kithure Kindiki, 'The Normative and Institutional Framework of the African Union Relating to the Protection of Human Rights and the Maintenance of International Peace and Security: A Critical Appraisal' (2003) 3 African Human Rights Law Journal 97.
[1010] Dan Kuwali (n 252) 45.

2003). Global apathy and continental inaction increasingly became untenable in the face of untold human suffering. This experience informed Africa's desire to assert its influence and primacy over responses to continental crises.

From the 1980s, African states gradually sought to review the OAU's relationship with its member states and with African peoples. African states began to appreciate and recognise that sovereignty, independence, peace and security and human dignity are not mutually exclusive, but are mutually reinforcing concepts. This culminated in a major normative development with the adoption of the African Charter on Human and Peoples' Rights in 1981,[1011] whose drafting and negotiation process in the 1970s also signalled Africa's early ambitions for accountability for gross rights violations.[1012] However, the comprehensive shift in focus was heralded by the inauguration of the AU in 2002 to replace the OAU. The new body's objectives and principles, discussed in Section 6.2, while appreciating the centrality of the state and its attendant concepts of sovereignty and territorial integrity and independence, sought to reconcile hitherto misconceived state-centric conceptions of sovereignty with and situate them in their proper human-centred context. These objectives and principles signal the continent's desire 'to move from a culture of paralysis to a culture of protection … [and] of prevention and compliance'.[1013]

With this new legal framework, the AU sought 'to look within itself to find home-gown solutions to the many challenges confronting Africa … such as conflicts, human rights violations, democracy and governance deficit'.[1014] In so doing, the AU hoped to achieve several aims: assume 'responsibility' for expeditiously and effectively responding to atrocities committed on the continent in the face of a failure by the global collective security architecture; turn the page on decades of relative inaction by the continental collective as regards atrocities committed on the continent; empower the continental body with the requisite legal framework and capacity for intervention; emphasise the validity of its responses to continental challenges, a validity that had hitherto been undermined or ignored by other global actors; and stamp its authority as an important norm-shaper and equal contributor to the development of international law.[1015]

[1011] For a discussion of the evolution of the normative framework of the OAU/AU from state-centric conception of sovereignty to a human-centric conception, see Ben Kioko (n 252); Ademola Abass and Mashood A. Baderin (n 252).
[1012] Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges' (n 834) 936–937.
[1013] Dan Kuwali (n 252) 58; See also Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (n 40) 456–458.
[1014] Ben Kioko (n 252) 300.
[1015] For a general discussion of OAU/AU contribution to the development of international law, see Tiyanjana Maluwa, 'Reassessing Aspects of the Contribution of African States to the Development of International Law through African Regional Multilateral Treaties' (n 829); Chris Maina Peter, 'Africa: Influencing Aspects of Theory and Practice in International Law' in Frans Viljoen and others (eds), *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns* (Pretoria University Law Press 2022).

6.6.8.2 The Hybrid Court as an African Union Cosmopolitan Project

Regarding the AU's involvement in the peace process and transitional justice in South Sudan generally, and with the Hybrid Court in particular, the AU has, from the very onset of the conflict, acknowledged the multiple dimensions of the South Sudan conflict and consistently declared its awareness of the dual impact of the situation on continental peace and security, and on human dignity and human and peoples' rights. It has also consistently emphasised the primacy of continental solutions and the commitments enshrined in its legal instruments.

The AU-PSC in a press statement issued on 18 December 2013, barely three days after the conflict erupted, acknowledged the long-term implications of the conflict for regional peace, security and stability[1016] and called for peaceful and prompt resolution of the conflict, while emphasising human rights and the rule of law commitments enshrined in various AU legal instruments.[1017] This emphasis was reiterated a few days later on 30 December 2013 by the AU-PSC meeting at the Level of Heads of State and Government which also noted the conflict's significant implications for peace, security and stability of the region.[1018]

In establishing AUCISS, the AU Commission Chairperson also emphasised that the process was 'an African-led process … build[ing] on African experience and act[ing] within the framework of relevant AU instruments'.[1019] This position was reiterated by the AU-PSC in its 24 July 2015 communiqué which received the AUCISS report and stated that the AU's interpretation of the report would be aimed at a holistic approach which 'promote[s[an African solution … as opposed to a "one-size-fits-all" remedy packaged as universal'[1020] and which is anchored on contextual understanding and accountability for perpetrators irrespective of their status.[1021] This commitment was further restated by the AU-PSC in its 26 September 2015 decision which adopted the AUCISS report and '[r]eaffirm[ed] the AU's commitment to a comprehensive approach to the issues of peace, justice and reconciliation in Africa, rooted in contexts specific to each country'.[1022] The AU-PSC was emphatic that 'the achievement of lasting peace and reconciliation in South Sudan requires a holistic approach addressing, in a mutually-supportive way, the inter- related issues of accountability, reconciliation, healing and

[1016] AU Peace and Security Council Press Statement PSC/PR/BR.(CDIX), 409th Meeting, 18 December 2013, para 3.
[1017] AU Peace and Security Council Press Statement PSC/PR/BR.(CDIX), 409th Meeting, 18 December 2013, para 5.
[1018] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(CDXI)-Rev.1, 411th Meeting at the Level of Heads of State and Government, 30 December 2013, paras 3 and 7(ii). *See also* AU Peace and Security Council Communiqué PSC/AHG/COMM/1.(CDXVI), 416th Meeting at the Level of Heads of State and Government, 29 January 2014, para 4.
[1019] Report of the Chairperson of the Commission on the Situation in South Sudan, PSC/AHG/3(CDXVI), 416th Meeting at the Level of Heads of State and Government, 29 January 2014, para 14; *See also*AU Press Release, 'The AU Takes Steps Towards the Establishment of a Commission of Inquiry into Human Rights Violations in South Sudan' (18 January 2014).
[1020] AU Peace and Security Council Communiqué PSC/MIN/COMM.(DXXVI), 526th Meeting at the Level of Ministers, 24 July 2015, para 11.
[1021] AU Peace and Security Council Communiqué PSC/MIN/COMM.(DXXVI), 526th Meeting at the Level of Ministers, 24 July 2015, para 11.
[1022] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 15.

institutional reforms, based on ownership by the South Sudanese stakeholders and robust African and international support … [and] the need to promote an African solution to the challenges at hand … to further an approach rooted in the understanding of the South Sudanese context, including the historical, political, moral and economic causes that led to the eruption of a violent conflict in December 2013'.[1023] In this regard, the AU considered 'that the tragedy that took place in South Sudan is a scar on the conscience of Africa',[1024] and as such there was a continental responsibility to remedy this failure including by ensuring accountability for the atrocities committed during the conflict. With specific reference to accountability for international crimes, the AU-PSC emphasised that the Hybrid Court it had decided to establish would be 'an African-led and Africa-owned legal mechanism'.[1025]

What emerges from the analysis above of the AU's normative framework and emerging interventionist practice exemplified by the primary role envisioned for the Union with regards to the Hybrid Court is a reconceptualised cosmopolitan approach to sovereignty, peace and security and human dignity.[1026] As Abdulqawi puts it, AU member states have, by bestowing the AU with powers of intervention, chosen to 'limit their sovereignty by treaty … [and] have decided that sovereignty would no longer trump human rights should the latter be abused by the governments whose basic obligation it is to protect them'.[1027] Similarly, Kuwali considers this as confirmation by the AU of 'a shift from sovereignty as a right to sovereignty as a responsibility'[1028] which while affirming state sovereignty and its constituent elements of territorial integrity and independence, also recognises and emphasises states' primary and common responsibility to protect their citizens from atrocity crimes.[1029] This approach acknowledges the centrality of human dignity in its understanding of sovereignty, and pays due regard to the equal validity of continental processes of validating these values of humanity.

This approach is evident in the AU's perception of the promotion and maintenance of peace and security and human and peoples' rights in Africa as its primary purpose, and in its recognition of 'the inextricable link between an effective collective security system and the observance of human rights of their people in the quest for peace and security in the continent',[1030] a recognition informed not least by the continent's colonial and post-colonial experience of atrocity crimes. It is also evident in the assertive primary role envisioned for the AU in the establishment of the Hybrid Court. Indeed, as Makaza has strongly argued, due to the historical and persisting inequalities and subordinations of international criminal justice, and the particular circumstances of the continent, 'African states have the responsibility to spearhead the shaping of [international criminal law] reform in order to improve its

[1023] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 17.
[1024] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 20.
[1025] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).
[1026] *See* Chapter II.
[1027] Abdulqawi A. Yusuf (n 820) 352.
[1028] Dan Kuwali (n 252) 47.
[1029] Dan Kuwali (n 252) 48–50 & 58.
[1030] Ademola Abass and Mashood A. Baderin (n 252) 24.

effectiveness and relevance within the continent'.[1031] Makaza further argues that by 'embracing a more pluralistic approach to ICL … African states [are] pav[ing] their own path to international criminal justice in a way that resonates with, and addresses, their grievances'.[1032]

However, while significant in signalling the AU's affirmation of human dignity and rejection of impunity, the implementation of this normative framework and the AU's assertive pronouncement of the validity of its responses remain largely untested with regards to accountability for international crimes, save for the case of Hissein Habré mentioned in Section 6.2.4. As Kuwali notes, '[T]here is still a gap between this normative commitment and the actual [AU] practice.'[1033] The proposed Hybrid Court therefore presents an opportunity for the AU to demonstrate that the values codified in its normative framework are not mere theoretical postulations, but do indeed have practical utility and potency, and that the AU can validate these values. In its unique position as an international criminal accountability mechanism to be established under the auspices of the AU, and through its contribution to international criminal law jurisprudence, the Hybrid Court will also cement the AU's capacity and position as an important actor in the development and implementation of international law.

6.7 Chapter Conclusion

6.7.1 Mode of Conferral of Competence on the AU in Respect of the Hybrid Court and Practical Implications thereof

The discussion in this Chapter has determined that the AU's legal framework expressly and impliedly bestows upon the AU the general competence to engage, in member states, in action related to peace and security, anti-impunity and protection and promotion of human and peoples' rights, of which the thesis argues that international criminal accountability is part. The discussion in this Chapter has also revealed one possible legal explanation for the AU's proposed role in the establishment and operation of the Hybrid Court, and two possible legal justifications should the AU opt to establish the Hybrid Court outside the framework anticipated by South Sudan. In other words, the Chapter has identified three possibilities through which the AU, a RIGO, can exercise elements of sovereign authority to ensure accountability for international crimes in South Sudan. Importantly, in this case, the RIGO exercises its powers within its geographical reach or jurisdiction, that is, in respect of international crimes allegedly committed in a member state. Depending on the process by which the Hybrid Court eventually gets established, the thesis concludes that the involvement of the AU in the establishment and operation of the Hybrid Court will be explained either i) as a process of substantive conferral of powers by South Sudan to the AU on an *ad hoc* basis, in which case the AU has competence to accept such conferral, or ii) as an exercise by the AU of powers already substantively conferred upon it by its constituent instrument,[1034] that is, pre-existing and permanent authority. If intervention by the AU in the form of the Hybrid Court is

[1031] Dorothy Makaza (n 173) 329.
[1032] Dorothy Makaza (n 173) 335.
[1033] Dan Kuwali (n 252) 48.
[1034] For a discussion of the modes of competence conferral, *see* Dan Sarooshi (n 312) 19–27.

undertaken under the invitation or request framework of the international agreement between South Sudan and the AU, then, as summarised below, this international agreement constitutes the legal basis for the AU's exercise of the substantively conferred authority. If intervention by the AU in the form of the Hybrid Court is undertaken outside the framework of the international agreement, then as summarised below, the AU would be exercising powers substantively conferred under the Constitutive Act.

6.7.1.1 Exercise of Inherent Sovereign Authority by South Sudan to Confer Elements of Sovereign Authority on the AU on an Ad Hoc *Basis*

As argued in Section 6.4.1, South Sudan's decision to request the AU to establish the Hybrid Court, evidenced in Chapter V of the R-Agreement as ratified by its parliament, is an expression of a sovereign power inherent to South Sudan as a sovereign state. No recourse to any specific treaty provision is necessary to determine the source of this authority. However, this power is also reflected in Article 4(j) of the Constitutive Act which recognises South Sudan's right, as a member state of the AU, to invite the AU to intervene in South Sudan. As such, while the R-Agreement does not expressly identify and rely on this particular provision of the Constitutive Act, and it need not to, the act of invitation to the AU is indeed an invitation undertaken in exercise of this inherent sovereign power. In other words, by so inviting the AU to establish the Hybrid Court, South Sudan has exercised its sovereign prerogative to substantively confer specific and limited elements of sovereign authority on the AU.

Since South Sudan's invitation to the AU proposed an *ad hoc* conferral of authority, the invitation did not impose any legal obligations on the AU until it was accepted by the AU. As discussed in Sections 6.4.2 and 6.4.3, the invitation was formally accepted by a decision of the competent organs of the AU.[1035] The AU's ability to conclude an international agreement to this effect with South Sudan derives from the general powers specifically conferred by and implied from its legal instruments (the Constitutive Act and the PSC Protocol) enabling it to accept and engage in action in the specific area, as discussed in Section 6.2. Further, this discussion of the relevant powers of the AU reveals that the AU does indeed possess the express and implied competence to undertake international criminal accountability through appropriate judicial mechanisms, an authority expressly conferred by and implied from the Constitutive Act and the PSC Protocol.

Based on this competence, the AU is therefore legally capable of accepting South Sudan's invitation to establish the Hybrid Court. By accepting South Sudan's invitation, the AU acknowledged South Sudan's sovereign ability to substantively confer authority on the AU to establish the Hybrid Court, and its own legal ability to accept such conferral and to perform the conferred functions. Upon such acceptance, international obligations then arose for the AU and South Sudan. The R-Agreement as ratified by South Sudan's parliament, and its acceptance by the AU-PSC at the Level of Heads of State and Government on 26 September 2015 through decision Communiqué PSC/AHG/COMM.1(DXXVII) therefore constitute an international

[1035] AU Peace and Security Council Communiqué PSC/AHG/COMM.1(DXXVII), 547th Meeting at the Level of Heads of State and Government, 26 September 2015, para 22(ii)(a).

agreement between South Sudan and the AU regarding the Hybrid Court, which agreement forms the legal basis for the AU's establishment and operation of the Hybrid Court if undertaken as anticipated in the R-Agreement. The powers conferred on the AU by South Sudan in this manner are neither of a permanent nor general nature. They are specific to the Hybrid Court and are temporally limited to the duration of the existence of the Hybrid Court which is a temporary mechanism. The parameters of these powers are also limited, that is, their nature and scope are delimited by the international agreement between South Sudan and the AU.

6.7.1.2 Exercise by the AU of Elements of Sovereign Authority Collectively Conferred by its Member States: Article 4(h) of the Constitutive Act

As argued in Sections 6.2.3.2, 6.2.4 and 6.6.1.2, the AU can, should South Sudan's cooperation not be forthcoming as envisioned in the international agreement between South Sudan and the AU, invoke powers already previously conferred upon it by its member states under Article 4(h) of the Constitutive Act to intervene in South Sudan by means of the Hybrid Court as an intervention measure. As argued in those sections, this is a right bestowed upon the AU by its member states to enable the AU to act as the collective representation of its member states. By so conferring this power on the AU, each of its member states consented to possible AU intervention at the time of becoming a party to the Constitutive Act. Should the AU invoke Article 4(h) to establish the Hybrid Court, South Sudan's specific invitation regarding the Hybrid Court or its consent to the intervention would not therefore be legally required since by acceding to the Constitutive Act and becoming a member state of the AU on 27 July 2011, South Sudan consented to the AU's possible intervention under Article 4(h).

The substantive conferral of intervention powers on the AU by its member states under Article 4(h) is of a permanent nature in that these powers persist as long as the AU exists or until expressly removed by the member states through an amendment to the Constitutive Act. The AU would therefore be invoking its permanent Article 4(h) powers to establish the Hybrid Court as a non-permanent mechanism with a limited temporal mandate.

6.7.1.3 Exercise by the AU of Elements of Sovereign Authority Collectively Conferred by its Member States: Article 4(j) of the Constitutive Act

As discussed in Sections 6.2.3.1, 6.2.4 and 6.6.1.2, Article 4(j) of the Constitutive Act also expressly recognises states' right to request intervention by the AU. As the thesis has argued, this right is a sovereign right inherent to states by virtue of being states in as far as the request relates to intervention on the territory of the requesting state. However, as further argued by the thesis in the above-mentioned sections, this right to request the AU's intervention is not restricted to intervention in the requesting state's territory, but can also be made by a member state in respect of the territory of another member state. In this instance, this would not be an exercise of the requesting state's sovereign authority since no state's sovereign authority extends to another's state's territory. However, this would be an exercise of a right expressly

conferred by member states collectively on one another by virtue of being parties to the Constitutive Act.

By agreeing to Article 4(j), each party to the Constitutive Act consented to the possibility of another member state requesting the AU to intervene in their territory without their further consent. Once so requested, the AU would have discretion to intervene on its member states' collective behalf in exercise of powers already expressly conferred upon it in the Constitutive Act and PSC Protocol as discussed in Section 6.2. In other words, the request by a member state other than South Sudan for an intervention by the AU in South Sudan does not itself confer substantive powers of intervention on the AU, but is rather a request to the AU to exercise powers that it already possesses, these powers having already been conferred by member states collectively in the form of the Constitutive Act. Should the AU move to establish the Hybrid Court following a request by another member state under Article 4(j), South Sudan's specific invitation regarding the Hybrid Court or its further consent to the intervention would not therefore be necessary since by acceding to the Constitutive Act and becoming a member state of the AU on 27 July 2011, South Sudan consented to the AU's possible intervention pursuant to an Article 4(j) request.

The general competence of the AU to engage in issues related to peace and security including through the establishment of international criminal accountability mechanisms is, as discussed in Section 6.2, of a permanent nature in that these powers persist as long as the AU exists or until expressly removed by the member states through an amendment to the Constitutive Act. In response to a procedural request made under Article 4(j), the AU would therefore be invoking its pre-existing powers to establish the Hybrid Court as a non-permanent mechanism with a limited temporal mandate.

6.7.2 Authority of the AU vis-à-vis South Sudan

Whichever one of the above three approaches eventually prevails in the establishment of the Hybrid Court, the practical exercise of the AU's conferred and implied powers in respect of the Hybrid Court will neither be straight-forward nor devoid of challenges, as the discussion in Section 6.6 has anticipated with respect to the allocation and balance of authority between the AU and South Sudan. Authority related to the Hybrid Court can be divided into two broad categories – judicial and administrative.

6.7.2.1 Authority Relating to Judicial Aspects of the Hybrid Court

Firstly, the primacy of the Hybrid Court vis-à-vis the domestic South Sudan judicial system is rather conclusive, and no questions of jurisdictional conflicts are likely to arise in this regard, as discussed in Section 6.6.7.2. The arrangement in this regard is likely to promote a healthy complementary relationship. Secondly, the AU has significant responsibility for the initial constitutive aspects of the Hybrid Court, including the initial investigation of alleged crimes carried out by AUCISS, and the appointment of judges, prosecutors and other court personnel. However, once the Hybrid Court is constituted, the AU's powers do not extend to the Court's

actual judiciary functions, that is, the Court's criminal accountability functions *stricto sensu*. The Court is expected to perform its judicial functions independently and impartially. The thesis concludes that the balance of authority in this respect, bar a few aspects highlighted in Section 6.6, is generally uncontroversial, and will hopefully contribute towards ensuring that the principles of judicial independence and impartiality are upheld.

6.7.2.2 Authority Relating to Administrative Aspects of the Hybrid Court

The administrative aspects of the Hybrid Court, however, invite some discussion especially as relates to the allocation, if at all, of roles between the AU and South Sudan. The AU enjoys primary responsibility for establishment, location, funding and oversight. There appears to be no defined role for South Sudan on these aspects. In theory, South Sudan retains residual sovereign authority over the Hybrid Court if established as anticipated in the R-Agreement, specifically through its sovereign power to amend its laws and to conclude and terminate or denounce treaties. However, practically assessed and as discussed in Section 6.6.4, this authority is practically well-nigh impossible to exercise. Therefore, South Sudan appears not to retain any practical residual control over the Hybrid Court, and its anticipated role in the administration of the Court is also unclear, if not non-existent.

As evident from the discussion in the Chapter, this power imbalance between the AU and South Sudan regarding the Hybrid Court may not necessarily hinder proceedings before the Court. It could very well be, as partially argued in Section 6.6, that this arrangement may actually guarantee the Court's efficient functioning as an independent and impartial court. However, this imbalance where the AU has near-absolute control of the Hybrid Court may also result in the alienation of South Sudan as a state and of the South Sudanese people from a mechanism that is supposed to serve them. As argued throughout the Chapter, local ownership of the Court can and should be reconciled with the AU's valid desire to affirm the Court's identity as an *ad hoc* continental mechanism and to guarantee its efficient and independent functioning. Since the Hybrid Court has yet to be established, there is still legal room to cure the apparent imbalance of authority between the AU and South Sudan in such manner as to ensure that the Court's dual identity as a South Sudanese and African mechanism is maintained while also guaranteeing the efficient and independent functioning of the Court.

CHAPTER SEVEN

THE CASE FOR ACTIVE INVOLVEMENT OF REGIONAL INTER-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL CRIMNAL ACCOUNTABILITY

7.1 Introduction

The thesis sought to answer the following questions: i) whether RIGOs can engage in international criminal accountability, specifically by establishing criminal accountability mechanisms; ii) whether there is a basis in international law for such engagement by RIGOs; and iii) how such involvement can practically be undertaken. The aim, therefore, was manifold: determine the theoretical and conceptual basis for RIGOs' exercise of elements of sovereign authority, particularly in the establishment of international criminal accountability mechanisms; determine the legal basis upon which RIGOs (can) establish mechanisms for accountability for international crimes, and consequently how this influences the legal legitimacy of the mechanisms so established; identify possible approaches for the establishment of international criminal accountability mechanisms by RIGOs; and suggest possible design models that would bolster these mechanism's efficiency and overall legitimacy. This chapter therefore concludes the thesis by summarising the main findings and arguments made in the preceding chapters and by making a normative case for a proactive role for RIGOs in accountability for international crimes. In making such a case, the chapter argues that the involvement of RIGOs would mitigate some of the challenges currently facing international criminal justice such as inability or unwillingness by locus states and a faltering global-level approach, and that RIGOs have the benefit of learning from and building upon the nascent experiences, best practices and challenges identified in the EU's engagement with the Kosovo Specialist Chambers and the AU's proposed engagement with the proposed Hybrid Court for South Sudan.

Section 7.2 summarises the value-based cosmopolitan basis for the involvement of RIGOs in international criminal accountability. Section 7.3 summarises the discussion as to whether such active engagement would find a basis in international law, particularly when the general legal authority of RIGOs is considered. In this regard, the thesis argues that RIGOs can indeed proactively engage in international criminal accountability, relying on two primary arguments: that international law does not preclude RIGOs from exercising elements of sovereign authority necessary for the establishment and administration of international criminal accountability mechanisms; and that, as the experience of the EU and AU have demonstrated, RIGOs have the legal and practical capacity to undertake such engagement. This section also summarises the discussion on the acquisition by RIGOs of the specific legal authority to establish mechanisms for adjudicating international crimes by highlighting the doctrine of conferred powers and the doctrine of implied powers, and highlights the theory of constitutionalism to explain how this legal authority ought to be exercised. The section further

provides a step-by-step practical guide for determining the legal basis to ground international criminal accountability intervention by a RIGO in a state. Section 7.4 summarises the two approaches identified by the thesis for RIGOs' (possible) involvement in the establishment of international criminal accountability mechanisms (that is, the exercise of pre-existing and permanent authority, and *ad hoc* conferral of substantive authority). Section 7.5 highlights certain considerations necessary to guarantee these mechanism's cosmopolitan identity and appeal to their multiple domestic and regional audiences, specifically through their applicable law, jurisdiction, personnel, funding, location and duration of their mandate. Sections 7.6 and 7.7 conclude with suggestions for further research.

7.2 Theoretical and Conceptual Justifications for RIGOs' Involvement in International Criminal Accountability

7.2.1 Cosmopolitan Values and Cosmopolitan Action

The thesis has theoretically grounded the necessity of and rationale for international criminal adjudication generally, and by RIGOs in particular, in the legitimate premium that humanity places on the cosmopolitan value of human dignity and on the consequent need to protect and promote this value and to validate it where it has been systematically assaulted. Adjudication of international crimes, which by definition systematically assault human dignity, is therefore justified on the basis that this adjudication seeks to validate a fundamental value of humanity that has been assaulted.

The thesis has argued for a reconceptualised understanding of cosmopolitanism which acknowledges the common teleology of and draws a line under the basic, fundamental and common value of human dignity while recognising the diversity in modes of articulation, protection, promotion and validation of this value. The thesis has also argued for an understanding of sovereignty that is based on shared values, that is, sovereignty as primarily a function of humanity's fundamental values. With this reconceptualised understanding, the thesis therefore conceives sovereignty not as in conflict with accountability, but as fundamentally anchored in accountability. Sovereignty and accountability for systematic assaults on human dignity are considered by the thesis as two sides of the same coin.

The thesis further considers international law as undergirded by the principle of humanity which places human dignity, a common interest of humanity, at its centre. At the heart of this understanding is a central argument made in the thesis, particularly in Chapter II, that international criminal justice is a cosmopolitan project which seeks to validate humanity's value of human dignity, and as such, (state) sovereignty is inextricably linked to guaranteeing the protection and enforcement of human dignity. In other words, human dignity is a fundamental, universally common and shared value of humanity for whose protection and validation a sufficiently strong common interest exists within the international community.

Because of the common interest in protecting and validating human dignity, the thesis has argued that collective action can be justified where an individual state is genuinely unable

or unwilling to ensure accountability for international crimes. The thesis has therefore advanced RIGOs as potential collective avenues for such intervention and as examplars of this reconceptualised cosmopolitanism and reconceptualised sovereignty. RIGOs are considered by the thesis as institutional frameworks that are appropriately positioned to ensure the protection, promotion and validation of the cosmopolitan value of human dignity through accountability for international crimes. This is partly because RIGOs are, generally speaking, established along close geographical, social, cultural and political ties – by states with more in common than differences – and can therefore effectively galvanise and spearhead collective action by their member states. In rejecting absolutist conceptions of sovereignty, remnants of a past era, the thesis has argued for a flexible and realistic understanding of sovereignty which acknowledges the evolution of international law and relations and which identifies RIGOs as a reality of today's international life which occupy a unique position particularly as relates to their potential to engage in international criminal accountability. In so arguing, the thesis does not posit that RIGOs are sovereign, but rather that they exercise elements of sovereign authority derived from the sovereign authority of their member states and with a reasonable degree of operational autonomy necessary to pursue collective values.

As argued in Chapter II, RIGOs provide an effective platform through which the validity of regional approaches to the protection and promotion of human dignity can be articulated and upheld. The thesis argues that human dignity is a human value shared by all of humanity, but that the processes and approaches for protecting, promoting and validating this value are multiple and all are equally valid. As the thesis insists, at the core of a reconceptualised cosmopolitanism – which is the thesis' theoretical underpinning – is the acknowledgment of the validity of the processes and forms of articulation by all members of the human family, including those historically marginalised and relegated to the margins of international life. These diverse processes and forms, the thesis has argued, are discoverable through a discursive process. In other words, an argument for active involvement of RIGOs in international criminal accountability is not an argument for parochial regional values. Rather, it is an argument for the validity and viability of regional approaches in validating humanity's most fundamental cosmopolitan value, human dignity.

As further argued in Chapters II and III, the values assaulted by the commission of international crimes are humanity's values, shared by all members of the human family. In other words, an assault on these values concerns all members of the human family. In turn, humanity, organised in the form of the political entity of the state, possesses the primary responsibility for validating these values, including through ensuring individual criminal accountability, when assaulted by immediate members of the polity or within the polity. Inter-governmental organisations such as RIGOs symbolise humanity acting as a collective, in this case to validate these values where an individual state is genuinely unable or unwilling to do so. The chapters further argued that in discharging their mandates, RIGOs can act as independent value systems which, in interpreting and implementing their constituent instruments, advance the values underpinning their existence to the extent that this is permissible under the RIGOs' legal framework. The establishment of these mechanisms is

therefore consistent with these cosmopolitan values, and the mechanism so-established is expected to uphold these values.

7.2.2 Reconciling Other 'Justifications' with Cosmopolitan Aims

While the thesis advances cosmopolitanism as the primary justification for international criminal accountability, RIGOs may very well publicly advance other considerations alongside cosmopolitan aims to justify their international criminal accountability interventions. For instance, some RIGOs may advance political justifications formulated ambiguously as 'international/regional peace and security' or 'regional integration', as has emerged prominently from the case study of the EU and the KSC/SPO in Chapter V, and to a lesser extent in the case study of the AU and the proposed Hybrid Court in Chapter VI. Further still, some RIGOs may advance the need to assert legitimacy and validity of regional responses, as has emerged from the case study of the AU and the proposed Hybrid Court in Chapter VI. This latter observation is particularly relevant when the arguments explored in Chapters II and III are recalled. These chapters argued that the concept of sovereignty can only be considered useful in contemporary international affairs if it acknowledges and reckons with historically-subjugated peoples' legitimate efforts to assert their membership of the international community including the validity of their approaches to the protection and validation of humanity's fundamental values. In this regard, some RIGOs may consider regional approaches to international criminal accountability as a way of overcoming what Jalloh refers to as 'the burden of history',[1036] that is, the historical subversion of international law to provide cover for colonialism, oppression, hegemony and exclusion.

If, as the thesis argues, there is agreement on the basic cosmopolitan aims of international criminal accountability, it is reasonable then to question why RIGOs, such as the EU and AU, advance other justifications alongside cosmopolitan aims, some of which may appear self-serving. At first glance, these may appear as either a contradiction or instrumentalisation of the cosmopolitan aims advanced in the thesis in pursuit of other dubious interests, a possibility that may appear irreconcilable with these cosmopolitan aims. The thesis, however, argues that what may appear contradictory or what may be perceived as instrumentalisation is in fact evidence of a confluence of interests. International affairs are not undertaken in a vacuum; multiple interests often converge or overlap. The existence of multiple interests is not necessarily a justificatory contradiction. The thesis takes the position that whatever other interests and justifications may overlap in RIGOs' involvement in accountability for international crimes, at the core of these endeavours is or should be the validation of the cosmopolitan value of human dignity. In any case, the 'peace and security' and 'validity of regional responses' arguments have the preservation of human dignity as their underlying core. In other words, the thesis argues that these other justifications are not inimical to the primary cosmopolitan justification of validating humanity's fundamental value of human dignity. Rather, they are advanced as

[1036] Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (n 40) 496.

supplementary to, rather than in opposition to, the validation of human dignity, which remains the primary deontological justification for international criminal accountability.

7.2.3 RIGOs as Institutional By-passes that 'By-pass' Impasse

The thesis has also sought to explain RIGOs' involvement in international criminal accountability as a form of institutional by-pass. Discussed in more detail in Chapter III,[1037] RIGOs and the accountability mechanisms they establish can be considered as institutional by-passes since the mechanisms so-established provide alternative institutional frameworks to perform hitherto state functions by plugging an impunity gap created by the dysfunction of these state institutions, but without dismantling the state institutions. Further, as institutional by-passes, they operate outside the governance structure of the concerned state, but within and compatible with the general legal framework governing the concerned state, that is, within the general framework of international law.

Ultimately, the aim of RIGOs as institutional by-passes in the context of accountability for international crimes is to provide a non-permanent alternative avenue for accountability especially where no effective mechanism exists domestically, while striving in the long-term to contribute to strengthening the capacity of the 'dysfunctional' state institutions which in any case retain the primary responsibility for international criminal accountability. Therefore, RIGOs can be considered as both direct by-passes by virtue of the act of establishing judicial mechanisms to ensure accountability for international crimes committed in a state and having administrative authority over such mechanism, and as indirect by-passes by virtue of the act of deferring to or entrusting the established mechanism to dispense judicial functions. Notably, a condition for the validity and legal legitimacy of this 'by-pass' is that while acting as institutional by-pass, RIGOs and the accountability mechanisms they establish must exercise their authority in conformity with the relevant domestic and international legal framework.

7.3 Legal Basis for RIGOs' Adjudicative Authority and the Question of Legal Legitimacy

Having justified the establishment of international criminal accountability mechanisms generally, and by RIGOs in particular, based on humanity's cosmopolitan values, the thesis then proceeded to identify the specific legal basis that RIGOs (can) rely on to establish these mechanisms. It is important that having provided a theoretical value-based justification for international criminal adjudication, the thesis engages with the international legal process of conferring legal authority. This is in recognition of the fact that while value-based theoretical and conceptual justifications explain the necessity and rationale of such mechanisms, they nevertheless do not provide the source of legal authority required to establish and operate these mechanisms. In other words, the cosmopolitan nature of the values to be validated and enforced

[1037] Chapter III, s 3.7.

by these mechanisms does not presuppose the existence of these mechanisms, which existence ought to be legally justified.

The overarching theme explored in this thesis is the legitimacy of international criminal accountability mechanisms established by RIGOs. Legitimacy, as Kiyani notes, is a complex and indeterminate concept, and this indeterminacy inextricably pervades international criminal justice.[1038] Without deviating into the veritably intractable debate on legitimacy in international law generally and international criminal law in particular,[1039] which is in any case beyond the scope of this thesis, the thesis acknowledges that there is a difference between considering a mechanism to be legitimate because it exercises authority acquired through a legally sound process, at least procedurally speaking, and legitimacy deriving from the mechanism being perceived as such by the communities it is supposed to serve.[1040] The thesis has focused on the former, that is, legal legitimacy, thereby undertaking a legitimation exercise through legality. As understood and used by the thesis, legal legitimacy refers to both the existence of legal sources of authority claimed by the entity establishing the mechanism – a substantive question – and adherence by this entity, when exercising such authority to establish such mechanism, to the procedural requirements demanded by these legal sources. In other words, the thesis' examination of legitimacy is primarily a source-based theory of legitimacy[1041] which seeks to objectively determine the legal basis and justify the exercise of authority by RIGOs to establish international criminal accountability mechanisms.

As Vasiliev has correctly observed, international criminal mechanisms 'are immanently in a state of crisis and haunted by legitimacy deficits … [and] are in constant pursuit of legitimacy'.[1042] Indeed, the legal legitimacy of previous international criminal tribunals has consistently been challenged.[1043] The first mechanism so far established by a RIGO, the KSC/SPO, has similarly had its legal legitimacy constantly challenged, as discussed exhaustively in Chapter V.[1044] This fact emphasises the importance of establishing a solid legal foundation for the existence of international criminal accountability mechanisms established

[1038] Asad Kiyani (n 285) 93.
[1039] *See for example* Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017).
[1040] The latter legitimacy could, as discussed by Hobbs, more appropriately be referred to as sociological legitimacy, and is necessarily empirically determined and thus subjective. *See* Harry Hobbs, 'Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy. Chicago Journal of International Law' (2016) 16 Chicago Journal of International Law 482. For a similar observation, see Aidan Hehir (n 767) 272. It suffices to note that a more complete construction of the concept of legitimacy would have to acknowledge its elasticity and treat it as 'less a checklist and more a space loosely bounded by legal, moral, and constitutional norms'. Asad Kiyani (n 285) 108.
[1041] Asad Kiyani (n 285) 107; Sergey Vasiliev (n 285) 85–86.
[1042] Sergey Vasiliev (n 285) 70.
[1043] *Prosecutor v Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-94-1 (02 October 1995); *Prosecutor v Charles Ghankay Taylor,* Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I (31 May 2004).
[1044] Chapter V, s 5.4; *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021; *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021.

by RIGOs. Appreciating this state of affairs, therefore, the thesis sought to contribute to overcoming this 'crisis' by laying down a point of reference for overcoming the first huddle in this seemingly-unending legitimacy quagmire. This the thesis does by providing a guide on how to determine the legal basis for RIGOs' establishment of international criminal accountability mechanisms, which legal basis contributes to the legal legitimacy of the mechanism so-established. Besides forming the legal foundation for these mechanism's existence, the mechanism's legal legitimacy can, as DeGuzman has argued, 'contribute productively to efforts to increase support for the institution'.[1045]

7.3.1 Legal Basis for RIGOs' Adjudicative Authority

In determining the legal legitimacy of international criminal mechanisms established by RIGOs, the thesis first sought to establish the legal authority of these RIGOs to establish such mechanisms. The thesis' central argument in this regard is that the legal legitimacy of international (criminal) tribunals is as much a function of their establishment as it is of how they perform their judicial tasks. In other words, the legal basis for RIGOs' adjudicative authority, that is, the authority to establish international criminal accountability mechanisms, determines and justifies the legal legitimacy of the mechanisms so-established. In this regard, the thesis disagrees with Luban's argument 'that the legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments'.[1046] While the mechanisms' effective, independent and fair discharge of their functions indeed contributes to their 'overall' legitimacy, an examination of this 'overall' legitimacy must necessarily begin by determining that the mechanisms' existence rests on unimpeachable legal foundation. Indeed, as Duff has rebutted, 'The legitimacy of that [court's] process depends both on its procedural fairness, and on the court's authority to call the defendant to answer; a deficiency in one of these dimensions cannot be compensated by adequacy, or even by perfection, in the other.'[1047] That said, however, the thesis agrees with Kiyani that '[l]egitimacy is no longer simply about legality – it is about processes, outcomes, observations, and balancing conflicting ethical frameworks'.[1048] Nonetheless, the thesis places particular premium on source-based theory of legitimacy[1049] and considers that the legal authority of the political entity to establish such judicial mechanism is the foundation from which an examination of the mechanism's overall legitimacy begins. The importance of such criminal mechanism resting on solid legal foundation is heightened by the fact that nearly all international criminal accountability mechanisms established by or with the involvement of inter-governmental organisations since the 1990s have had the basis of their existence legally

[1045] Margaret M. deGuzman (n 169) 10.
[1046] David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010) 579.
[1047] Antony Duff (n 155) 592.
[1048] Asad Kiyani (n 285) 110.
[1049] Asad Kiyani (n 285) 107.

challenged, and these mechanisms have been at pains to justify their existence in the face of these questions, as mentioned above.[1050]

In determining this legal basis, Chapter IV of the thesis thus examined the position of general international law on the question of the authority of international organisations in general, and RIGOs in particular. The purpose was to determine the source of substantive law upon which RIGOs derive their authority. The thesis has therefore located the general authority of RIGOs in both general international law and in the legal instruments specific to these organisations, primarily their constituent instruments. This theoretical examination in Chapter IV and the practical examination in Chapters V and VI also grappled with the ways in which RIGOs acquire specific authority or competence with regard to specific issues, in the case of the thesis, how RIGOs acquire specific adjudicative authority, that is, the competence to establish mechanisms for adjudicating international crimes. The thesis has determined that the specific competence of RIGOs in respect of international criminal accountability can be explained by resort to two theories of allocating legal competence: the doctrine of conferred powers; and the doctrine of implied powers.

7.3.2 Deriving Legal Powers through the Doctrine of Attributed or Conferred Powers and the Doctrine of Implied Powers

The thesis has argued, in Chapter IV, that the primary doctrine that explains and regulates the grant of competences and legal powers to RIGOs is the doctrine of attribution or conferral. By this doctrine, the relevant substantive powers can either be conferred through the RIGO's constituent instrument or through a separate legal instrument which must nevertheless trace its basis to the constituent instrument. The main thrust of this doctrine is therefore that the actions of RIGOs can and should be based on those powers that are expressly provided in their relevant legal instruments. However, as further argued in Chapter IV, the doctrine of attribution may not by itself be sufficient to explain the entirety of RIGOs' legal powers, particularly as relates to international criminal accountability. The doctrine often only partly explains the legality of RIGOs' (possible) action as regards international criminal accountability, and if RIGOs' legal powers are to be conceived as strictly based on the doctrine of attribution, then it would be untenable to argue for the degree of autonomy necessary for RIGOs to engage in international criminal accountability.

The thesis considers that such legal powers can sufficiently and exhaustively be explained by resort to the doctrine of attribution as the primary doctrine, and the doctrine of implied powers as a subsidiary and complementary, but indispensable doctrine. The doctrine

[1050] *Prosecutor v Duško Tadić,* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-94-1 (02 October 1995); *Prosecutor v Charles Ghankay Taylor,* Decision on Immunity from Jurisdiction, Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2003-01-I (31 May 2004); *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021; *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021.

of implied powers holds that in order to appreciate the full extent of RIGOs' powers, consideration must be had to those powers that while not expressly codified in the RIGOs' constituent instruments or other legal instrument whose basis is the constituent instrument, are discernible from the express powers in these instruments. These powers are discernible by resorting to rules of treaty interpretation, particularly the teleological approach, and by taking into consideration the special nature of RIGOs and their object and purpose. It is then possible to discern and derive from the expressly codified general powers of the RIGOs in their constituent instruments the specific implied powers necessary to achieve their object and purpose. In other words, the implied powers doctrine calls for a circumscribed teleological interpretation of express provisions of RIGOs' constituent instruments in order to determine what specific powers not expressly codified are essential in ensuring the effective and efficient performance by RIGOs of their express objectives. These are powers that are so inextricably linked to the performance of RIGOs' expressed objectives as to be implied from expressly conferred powers as indispensable and necessary for the performance of these objectives.

The thesis emphasises, however, that in relying on the implied powers doctrine to provide a legal basis for RIGOs' actions, these implied powers must be traceable to and derive from the express provisions of the RIGOs' constituent instruments or other relevant instruments whose basis is the constituent instrument. The implied powers doctrine is not an excuse for widening the scope of RIGOs' powers beyond the framework of their constituent instruments. Rather, the proper purpose of the doctrine is to give logical meaning to the object and purpose of a RIGO as expressed in its constituent instrument, clarify its scope and enable the RIGO to effectively discharge its functions within the legal bounds of the constituent instrument, with the express provisions of the constituent instruments remaining, at all times, the primary basis for competence. This is especially so where the express provisions of constituent instruments are either ambiguous or inexhaustive with respect to the specific functions in question.

Having examined the express and implied powers of RIGOs and the position of general international law, the thesis concludes that while international criminal accountability mechanisms may not expressly be listed as measures through which RIGOs can intervene in states, the power to establish or accept requests to establish such mechanisms can be discerned from the express legal provisions of some RIGOs' legal instruments relevant to their powers of intervention, particularly those relevant to the preservation and promotion of human dignity. If the legal examination of authority proceeds in the manner adopted by the thesis – by resort to the doctrines of attributed and implied powers – and the establishment is undertaken after such examination and in the manner suggested, then the thesis posits that the legal foundation for mechanisms so-established would be unimpeachable. Indeed, as the case studies in Chapters V and VI have demonstrated with the EU's role in the establishment of the KSC and SPO and the AU's proposed role in the establishment of the Hybrid Court, RIGOs' legal powers with regard to international criminal accountability mechanisms can sufficiently be explained by resort to the doctrine of attribution and the implied powers doctrine. To avoid the kind of legal challenge to such mechanisms' existence witnessed in previous tribunals as mentioned above, the thesis emphasises that the legal basis for RIGOs' action should be solidly determined before these mechanisms are established.

7.3.3 Explaining the Exercise of RIGOs' Legal Powers through the Theory of Constitutionalism

While appreciating that RIGOs are functional vehicles for the realisation of states' collective interests, the thesis argues that RIGOs are also emerging as organisations with a degree of autonomy from their member states. Therefore, while the two doctrines of attributed powers and implied powers can quite sufficiently explain the source or basis of legal powers of RIGOs, these doctrines do not tell us much about how these legal powers should then be exercised. As such, while proffering the doctrines of attribution and implied powers to explain the source of the legal powers of RIGOs, the thesis also proffers the theory of constitutionalism to explain how these powers should then be exercised. The theory posits that in order to properly appreciate the scope (extent or limits) of RIGOs' legal powers, these powers ought to be considered in light of the values underpinning the existence of RIGOs and upon which RIGOs' functioning should be evaluated.[1051] Constitutionalism as a theory therefore assists us in appreciating how RIGOs should exercise their powers in a manner that promotes legal unity, consistency, effectiveness and accountability, and how RIGOs can influence their members (and perhaps even other actors) through the exercise of their legal powers.

7.3.4 Step-by-Step Guide to Ascertaining the Legal Capacity of RIGOs to Engage in International Criminal Accountability

Having articulated above the general basis in international law for the involvement of RIGOs in international criminal accountability and the applicable doctrines, this section provides a brief step-by-step guide for determining the legal basis to ground intervention by a specific RIGO in a state with respect to international criminal accountability.

Firstly, the legal justification commences by resort to general international law, that is, a preliminary determination of the status of the RIGO as an intergovernmental organisation with legal personality. As discussed in Chapter IV, contemporary international law considers the question of a RIGO's legal personality as trite, that is, as flowing from the status of the organisation. As such, a determination that the organisation is indeed a RIGO would ideally suffice to conclude that it has international legal personality. However, to add a layer of legal certainty, it is imperative to ascertain the position of the RIGO's constituent instrument (or of its other legal instruments) on the question of legal personality. The constituent instruments of some RIGOs expressly confirm this personality, as has been observed with the EU discussed in Chapter V. Others, however, are silent on this question, as has been observed with the AU discussed in Chapter VI. In the latter case, it is important to interrogate the jurisprudence of courts relevant to the RIGO to ascertain if they have addressed the question. That said, however, and as mentioned above, the silence of a RIGO's constituent instrument on the question of legal personality and the absence of any relevant jurisprudence on the question do not necessarily mean that the organisation lacks legal personality. In this case, a determination that the organisation is indeed a RIGO would suffice, that is, its international legal personality

[1051] *See* Chapter IV, s 4.6.

would be assumed once its status as a RIGO is determined. To make this determination, resort can be had to the general guidance provided in Chapter I on the definition of a RIGO.[1052]

Secondly, having ascertained the status of the organisation as a RIGO and its legal personality, the next step is to determine whether the RIGO is competent to engage in the specific area, that is, international criminal accountability. The first port of call here is the constituent instrument of the RIGO, an examination of which should reveal the powers expressly conferred upon the RIGO. The conferred or attributed powers doctrine discussed in Chapter IV and highlighted above is instructive in this regard. However, and as discussed in Chapter IV, a RIGO's expressly conferred powers may not be exhaustive or specific enough to the question of international criminal accountability. In this case, resort should then be had to the implied powers doctrine discussed in Chapter IV and highlighted above to determine the extent of the RIGO's powers as derivable from the express powers in its constituent instruments, taking into consideration the object and purpose of the RIGO. In this regard, it is important to thoroughly examine the jurisprudence of courts relevant to the RIGO, if any, to ascertain if they have addressed the question of the scope of the RIGO's legal powers.

The 'formula' for determining the source/basis of RIGOs' legal powers and the scope of these powers, summarised above and laid out in detail in Chapter IV, is consequently useful in determining RIGOs' capacity to interact with other subjects of international law in a standard-setting exercise, particularly through the conclusion of treaties, a fundamental capacity with regard to the establishment and administration of international criminal accountability mechanisms. Whatever actions RIGOs engage in, including the treaties that they conclude by whatever named called, will therefore depend on the RIGOs' specific areas of competence and their legal powers as discernible from their constituent instruments by reference to the doctrines of attribution and implied powers.

7.4 How RIGOs (Can) Exercise Adjudicative Authority

Following the two-step process proposed above for ascertaining the legal basis of a RIGO's involvement in international criminal accountability, it should be possible to identify two possibilities or approaches by which RIGOs can exercise elements of sovereign authority in order to promote accountability for international crimes: the exercise of pre-existing and permanent authority; and substantive conferral of *ad hoc* authority. These possibilities have been further practically examined in Chapters V and VI.

7.4.1 Exercise of Pre-existing and Permanent Authority

First, it is possible to determine whether a RIGO has the legal powers necessary for it to intervene on its own initiative. The RIGO can exercise substantive powers conferred in or implied from its constituent instrument (or other legal instrument deriving from the constituent instrument) as the legal basis for such intervention. This approach entails the RIGO exercising

[1052] Chapter I, s 1.3.1.

its powers within its geographical and jurisdictional reach, that is, in respect of international crimes committed in a member state. As the case of the AU and South Sudan demonstrates, the RIGO's involvement in this case is possible by the RIGO exercising its pre-existing and permanent legal powers under its constituent instrument. One option is that the RIGO can by itself trigger such intervention, as is the case with the AU's powers under Article 4(h) of the Constitutive Act, as discussed in Chapter VI. Another option is that the RIGO's intervention can be triggered upon request by another member state to the RIGO to exercise its substantive powers with regards to another member state, as is the case with the AU's powers under Article 4(j) of the Constitutive Act, as discussed in Chapter VI.

In these scenarios where the RIGO exercises pre-existing authority, the basis of this specific authority is the constituent instrument. It must be emphasised here that the AU Constitutive Act is, so far, the only constituent instrument of a RIGO that empowers the RIGO to directly intervene in a member state in the event of violations amounting to international crimes, and this is restricted to the RIGO's membership. The thesis therefore reiterates the emphasis laid in Chapter IV on the requirement to trace the RIGO's authority to its constituent instrument, by whatever method adopted. Authority to engage in this regard cannot be assumed for any one RIGO.

Establishment by a RIGO of an international criminal accountability mechanism by resort to this pre-existing authority may raise controversy concerning state consent and the source of obligations. This is because the authority claimed arises from provisions of a treaty that is of a general nature and for a general purpose, and state consent to the specific action of the establishment of an international criminal accountability mechanism is not quite direct, as this depends on interpretation and application by the RIGO of an otherwise imprecise and omnibus provision.[1053] However, as the thesis has argued and demonstrated in Sections 6.2.3–6.2.4 of Chapter VI with respect to the AU's intervention powers under Articles 4(h) and 4(j), such controversy can easily be dispelled by appreciating that these provisions are treaty provisions which while ordinarily of a general nature, become specific when they are applied to the establishment of the mechanism. As such, state consent here is still based on treaty law by virtue of the concerned state being a party to the relevant RIGO's constituent instrument. By becoming a party to such treaty, the state expressed its consent to be bound by these provisions. The RIGO therefore has pre-existing consent from the member state to the intervention.

7.4.2 *Ad Hoc* Conferral of Substantive Authority

Second, it is possible to determine whether a RIGO is competent to accept an express conferral by the concerned state on an *ad hoc* basis of legal powers enabling the RIGO to engage in international criminal accountability with respect to the concerned state. *Ad hoc* conferral of legal authority takes the form of a formal invitation by the concerned state, in exercise of its sovereign prerogative, to the RIGO to assist. This invitation, if accepted by the RIGO,

[1053] *See* Sergey Vasiliev (n 285) 86.

constitutes an international agreement between the RIGO and the state, with obligations for both the RIGO and the concerned state. The basis for the RIGO's authority here is therefore the RIGO's constituent instrument which empowers the RIGO to accept invitations of such nature, and the specific international agreement between the RIGO and the state.

This possibility is particularly relevant in circumstances where a RIGO is not legally competent to intervene on its own initiative, whether or not the concerned state is a member of the RIGO. This is admittedly the case with most existing RIGOs – with the sole exception of the AU – as their legal frameworks do not bestow upon them *proprio motu* intervention powers in the event of international crimes in member states. It is also the most likely possibility for intervention by a RIGO in a state that is not a member state of the RIGO, that is, beyond its ordinary jurisdictional reach and in respect of international crimes allegedly committed in a non-member state. By this approach, RIGOs can pursue international criminal accountability by accepting conferral of substantive powers by non-member states, ideally in the same geographic region such as the EU in Kosovo, but possibly also beyond. The possibility, evidenced by the EU's role in the establishment and operation of the KSC and SPO, is only possible with the consent of the concerned state. Consent can be expressed by invitation by that state to the RIGO, as was the case with Kosovo. It is also possible for this consent to be sought by the RIGO itself requesting and receiving consent from the concerned state. This option is also available to a RIGO which has pre-existing authority in respect of a member state, but is nonetheless hesitant to invoke such interventionist powers. For instance, this possibility also explains the option envisioned under the international agreement between South Sudan and the AU for the establishment and operation of the proposed Hybrid Court, as discussed in Chapter VI.

This agreement between the RIGO and the concerned state constitutes an international agreement with obligations for both the RIGO and the concerned state. As a matter of general international law, discussed in Chapter IV, RIGOs indeed have the capacity in international law to conclude international agreements with individual states or other organisations. The mechanism so-established thus exists as a result of a treaty which then forms the source of obligations and as such, state delegation of authority by expressly conferred powers constitutes the legal foundation of the mechanism.

The status of the concerned state vis-à-vis the RIGO is therefore instrumental in determining the intervention approach adopted by the RIGO and the legal basis grounding such intervention. That is, the intervention approach and the legal basis for such intervention would depend on whether or not the state concerned is a member of the RIGO. Notably, a pre-existing and permanent authority of RIGOs to establish international criminal accountability mechanisms may be perceived as an intrusion on (or threat to) sovereignty as this authority may potentially be deployed against any member state, that is, there is always that possibility hovering over these states. *Ad hoc* intervention, on the other hand, is not a constant 'threat' to sovereignty as such intervention is undertaken only when situations arise, in respect of a specific state, and upon the concerned state's express invitation. Therefore, states are more

likely to be receptive to *ad hoc* approaches, which may be considered as less controversial and less intrusive as state consent here is express and specific to the mechanism to be established.

7.5 Considerations When Exercising RIGOs' Adjudicative Authority

International criminal accountability mechanisms established by RIGOs have a complex identity. These mechanisms are established by RIGOs with the involvement of and/or in respect of specific states, with the key purpose of validating the cosmopolitan value of human dignity. They therefore cater directly to the justice needs of affected communities in the concerned state, and in this regard their identity reflects the domestic. They also have a regional identity as they are institutional exemplars of the RIGO's authority and values. It follows then that the framework and design of the mechanism should reflect this complex identity.

Therefore, in determining the legal authority of RIGOs to establish international criminal accountability mechanisms and the implication of this authority on the legal legitimacy of such mechanisms, the thesis also sought to examine, particularly in Chapters V and VI, how the legal framework of such mechanisms cater to this complex identity and how they address the relationship between the relevant RIGO and the state concerned vis-à-vis the mechanism. The thesis' central argument in this regard is that the legal legitimacy of international criminal accountability mechanisms established by RIGOs does not end with legally justifying the existence of the mechanism, but is also influenced by how the relevant legal framework addresses the complexity of the mechanism's identity and the relationship between the RIGO and the state concerned vis-à-vis the mechanism. In other words, the legal legitimacy of international criminal mechanisms established by RIGOs is both a function of their establishment as well as of how they are structured to function.

7.5.1 Appealing to Multiple Audiences and Identities

When RIGOs exercise elements of sovereign authority to establish mechanisms for adjudicating international crimes allegedly committed in specific states, interests may overlap. While these mechanisms are established to validate humanity's cosmopolitan value of human dignity, these mechanisms have implications for multiple audiences, particularly the RIGO establishing the mechanism, the state concerned and the directly affected communities of the concerned state. The complex identity of the mechanism as reflecting a regional as well as a national character is implied in the source of legal authority for its establishment. On the one hand, the RIGO establishing the mechanism legitimately expects the mechanism to be identified with the RIGO and for the RIGO's members to identify with the mechanism. After all, the foundation of these mechanisms is grounded in the RIGOs' normative and legal frameworks, and the ideological, political and policy positions of RIGOs often feature in justifications proffered in support of RIGOs establishing such mechanisms.[1054] As such, the RIGO has legitimate interest in ensuring that the mechanism reflects the RIGO's fundamental values as reflected in its normative framework. On the other hand, the state and directly affected

[1054] *See* Chapters IV–VI.

communities also have legitimate, and perhaps even primary, interest in and expectations of the mechanism since the mechanism is established specifically to provide accountability for crimes allegedly committed in these states and against these communities. In a sense, and as Vasiliev has argued with regard to international criminal tribunals generally, '[n]ot only have they to stay in good grace with the actors delegating them power, but they must also keep their legitimacy capital from drying up by continually winning support for themselves from those over whom that power is exercised'.[1055]

With the RIGO taking the active lead in the establishment and operation of the mechanism, it is easy to lose sight of the fact that the jurisdiction of the mechanism so-established is specific to a particular state and that the state and the affected communities have legitimate expectations regarding the mechanism. It is therefore vital to the effective functioning of the mechanism and for its overall legitimacy that the mechanism's design speaks to these key audiences. As argued in the thesis' various chapters, a cosmopolitan conception of international criminal accountability demands that the interests to be served by the institutionalisation of international criminal accountability ought to be those of the international community. The thesis' understanding of 'international community', as discussed in Chapter II, is an amalgam of the community of all the peoples of the world connected by their shared basic values and interests and aspirations, and the community of world states as political representations of the various peoples of the world. As such, while appealing to regional and global constituencies, mechanisms established by RIGOs must not lose sight of the domestic constituency that is more directly affected by the crimes in question, for all these constituencies together form these mechanisms' audience. In any case, it should not be considered that the interests of these constituencies are necessarily mutually exclusive, as the basic values being validated by these mechanisms are those of the collective, that is, the international community.

The thesis argues that for the mechanism to have a legitimate claim to validating humanity's cosmopolitan value of human dignity and for its appeal to multiple audiences to be sustainable, reasonable and active – though not controlling –involvement by the concerned state in the establishment and functioning of the mechanism should be ensured. In other words, a balance of authority or control as between the RIGO and the concerned state needs to be ensured. Without this assurance, these mechanisms risk 'orbit[ing] in space, suspended from political reality and removed from both the individual and the national psyches of the victims'.[1056] The thesis' contribution in identifying possible models that balance validation of humanity's cosmopolitan value of human dignity through international criminal accountability mechanisms established by RIGOs with the various ideological, legal, policy, political and social interests of the various audiences – RIGOs, states and communities – is an attempt, therefore, to bridge the conceptual and ideological distance that has characterised other international criminal mechanisms.

[1055] Sergey Vasiliev (n 285) 70.
[1056] Makau Mutua, 'What Is the Future of Transitional Justice?' (n 178) 6.

As the research reveals, appealing to multiple audiences to achieve domestic identity, local ownership and regional identity without losing sight of the primary cosmopolitan values to be vindicated revolves around two main concerns: the applicable law and jurisdiction of the mechanism; and the balance of authority between the RIGO and the concerned state over non-judicial (administrative) aspects of the mechanism.

7.5.2 Applicable Law and Jurisdiction

7.5.2.1 Applicable Law

These mechanisms' jurisdiction is limited to specific states or situations and ought therefore to address crimes that are of particular concern to that constituency. The international criminal law framework may not always exhaustively address all serious crimes in all situations, and may leave gaps especially where specific crimes or modes of criminality that are of particular concern in the situation being addressed by the mechanism are nonetheless not of general concern to the international criminal law framework. As such, and as Okowa has aptly noted when discussing the SCSL, the legitimacy of such criminal accountability mechanisms is enhanced if they are 'rooted in international ideas of justice but also in [concerned state's] legal traditions'.[1057] The incorporation of some specific domestic laws as applicable law of the mechanism could therefore plug some gaps that would be occasioned by only applying the international criminal law framework, in as far as these domestic laws are compatible with international standards.

However, for the sake of legal certainty and fairness of judicial processes, and as the jurisdictional challenges raised before the KSC demonstrate,[1058] it is imperative to define with sufficient precision the law applicable before and by the mechanism. This includes stating with as much clarity and precision as possible the specific domestic laws applicable and their substantive, procedural and evidentiary import, as well as the specific sources of international law. Relatedly, it is imperative to define the relationship between domestic law and international law before the mechanism, including questions of hierarchy of these sources and the resolution of possible conflict.

7.5.2.2 Setting Jurisdiction

The mechanism's material jurisdiction should ideally cover the core international crimes committed in the specific context, with a specific catalogue of crimes listed and their elements sufficiently defined. Additionally, the mechanism should have jurisdiction over crimes defined in domestic law which are of a comparably serious nature. However, and as mentioned in the preceding section, to avoid uncertainty and possible contestation over domestic law, the

[1057] Phoebe Okowa (n 643) 337.

[1058] See *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/F00412, Pre-Trial Judge, Decision on Motions Challenging the Jurisdiction of the Specialist Chambers, 22 July 2021; *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi, and Jakup Krasniqi*, KSC-BC-2020-06/IA009/F00030, A Panel of the Court of Appeals Chamber, Decision on Appeals Against "Decision on Motions Challenging the Jurisdiction of the Specialist Chambers", 23 December 2021.

mechanism's legal instrument should expressly list, in as far as this is possible, the specific domestic law applicable before the mechanism.

In order to comprehensively capture the relevant periods when crimes are alleged to have been committed, the mechanism's temporal jurisdiction should be defined in such a manner that its lower ceiling does not prevent an interrogation of events immediately preceding the relevant period, but which have a logical causal relationship with or link to violations during the relevant period. As the cases of the KSC[1059] and Hybrid Court[1060] demonstrate, there's a possibility that a lower temporal ceiling that is set without much regard for the historical and evolutionary context of conflicts risks placing relevant events beyond the jurisdiction of the mechanism, with the result that prosecutions undertaken may not be comprehensive in terms of crimes and persons charged.

The upper ceiling should also be broad enough not to foreclose the possibility of accountability for crimes possibly committed after the specific period in question but that nonetheless have a logical link to the events of that period, particularly as a continuation thereof. As the case of the KSC[1061] demonstrates, an upper ceiling set without much regard for the historical and evolutionary context of conflicts risks placing beyond the jurisdiction of the mechanism crimes committed after the relevant period which nonetheless have a logical link to the specific period as well as crimes of a continuing nature. By contrast, the Hybrid Court's temporal jurisdiction[1062] has set an upper ceiling which appreciates that while the conflict has since largely subsided, crimes are nonetheless still being committed in a sporadic manner, and also that there are relevant crimes of a continuing nature. However, care should be taken to ensure that the temporal jurisdiction is not exceedingly broad as to overload the mechanism with jurisdiction over events outside the relevant period that have no causal link or logical relationship to the relevant period.

In order to avoid unchecked intrusion upon the sovereignty of third states, the mechanism's territorial jurisdiction should generally be limited to the territory where the crimes have allegedly been committed, presumably within the territory of the concerned state. However, this formulation should be undertaken after having properly considered the historical and evolutionary context of the conflict. Where the violations committed have cross-border elements, then a balance should be struck between ensuring a broad enough territorial jurisdiction to overcome possible sovereignty constraints against prosecuting crimes that while not entirely committed on the territory of the relevant state, were either commenced or completed on that state's territory, and ensuring a narrow enough territorial jurisdiction to ensure that only those crimes with a sufficient and logical link or connection to the concerned state's territory are subject of the mechanism.

[1059] *See* Chapter V, s 5.4.2.2.
[1060] *See* Chapter VI, s 6.4.2
[1061] *See* Chapter V, s 5.4.2.2.
[1062] *See* Chapter VI, s 6.4.2.

The mechanism's personal jurisdiction should be broad enough to cover any (natural) persons allegedly involved in violations in the situation regardless of their nationality. This is particularly important when the nature of contemporary conflicts in which international crimes are committed is considered. In such situations, and as demonstrated by the Kosovo[1063] and South Sudan[1064] situations, it is often the case that multiple state and non-state actors are involved, including nationals of states other than the concerned state.

7.5.2.3 Avoiding Jurisdictional Ambiguities and Loopholes

As demonstrated by the discussion of the jurisdiction of the KSC[1065] and the Hybrid Court[1066] in Chapters V and VI, it is important that the governing instrument of the mechanism is drafted in such a manner that the mechanism's material, temporal, territorial and personal jurisdiction when read together, are consistent and do not give rise to the kind of ambiguities, inconsistencies and uncertainties that have plagued the KSC. Lack of clarity on the precise scope of the mechanism's jurisdiction and difficulties in reconciling these jurisdictions may result in controversy as to who is prosecuted, who is not prosecuted, which crimes are prosecuted and which crimes are not prosecuted, thereby bearing on the legal and sociological legitimacy of the mechanism. In drafting the mechanism's governing instruments, RIGOs should therefore take particular care to ensure that the mechanism not only has jurisdiction over all relevant actors and crimes, but also that the mechanism's material, temporal, territorial and personal jurisdiction when read together do not give rise to any ambiguities, inconsistencies and uncertainties.

7.5.3 Balance of Authority between RIGO and State over Administrative Aspects

The thesis reiterates that a distinction needs to be made between judicial aspects of the mechanism and non-judicial (administrative) aspects. Concerning the former, the thesis insists on complete independence of the mechanism from the RIGO and from the concerned state; the mechanism should be guided in this regard by fidelity to the law and to fair trial guarantees. Concerning administrative aspects of the mechanism, the thesis acknowledges that striking a balance between the powers of the RIGO and the concerned state with regard to the mechanism is a key consideration when contemplating the establishment of such mechanisms. As discussed in Chapters V and VI, support for international criminal accountability mechanisms from multiple stakeholders, primarily the state concerned and the international organisation establishing them, is fundamental to these mechanisms' effective operation, relevance and legitimacy.

The state's support can be guaranteed through a balance of power that assures a reasonable degree of control or responsibility for the state. A collaborative relationship between the government of the concerned state and the international organisation in question

[1063] *See* Chapter V, ss 5.4.2.3–5.4.2.5.
[1064] *See* Chapter VI, s 6.4.3.
[1065] *See* Chapter V, s 5.4.2.
[1066] Chapter VI, s 6.4.

in the creation of such criminal accountability mechanisms establishes 'a special bond between the Court and the people of [the concerned state]'.[1067] For this bond to be established, there must be 'genuine buy-in from the concerned country [and communities], not its mere appearance'.[1068] However, a fine balance should be struck here because too much state control may ultimately frustrate the mechanism's functioning especially since political elites are likely to be entangled in the circumstances over which the mechanism has jurisdiction. On the other hand, no role at all for the state may not only attract outright political hostility, but may serve to cast the mechanism as an alien imposition, as the case of the KSC/SPO discussed in Chapter V has demonstrated.

The thesis therefore proposes a balance of authority between the RIGO and concerned state whereby the RIGO has primary responsibility for administrative aspects of the mechanism. This would ensure that the mechanism is cushioned from state influences that may interfere with its judicial independence and its ability to objectively undertake its judicial functions. Recognising the multiple audiences served by the mechanism, the thesis also proposes some nominal role for the concerned state regarding the administrative aspects of the mechanism. This is important if the mechanism is to maintain its complex identity as a domestic and regional mechanism designed to validate cosmopolitan values. While this balance of power or allocation of authority between the RIGO and the concerned state is context-specific, the thesis has identified, through the case studies, what can be considered as good practices or minimum guarantees. Specifically, the thesis considers this balance to be achievable with regard to the composition of the mechanism's bench, the mechanism's funding model, the location of the mechanism, and the power to terminate the mechanism's mandate.

7.5.3.1 Appointment of Judges and Its Implications for Judicial Independence and Fair Trial

The identity of the judicial mechanisms subject of this research is significantly defined by who sits on the bench, and who the appointing authority is. As is apparent from the case study of the KSC/SPO,[1069] it is difficult to identify the judicial mechanism with the state concerned (and with affected communities) where the selection and appointment of judges is exclusively the prerogative of the RIGO, without any involvement of the concerned state. The research argues that when selecting and appointing judges, two considerations ought to be borne in mind. Firstly, the RIGO should ideally be the appointing authority as it is assumed that compared to the concerned state, the RIGO enjoys an acceptable degree of impartiality and objectivity in this regard. Secondly, however, in order to ensure that the mechanism reflects the concerned state in its identity, the concerned state should ideally be involved, albeit in a nominal role, in the selection of candidates for appointment. Specifically, the research proposes that an advisory body established to advise the RIGO on suitable candidates based on defined qualifications should include a minority of members appointed by the concerned state. This way, the

[1067] Phoebe Okowa (n 643) 337.
[1068] Elena A. Baylis (n 780) 17.
[1069] *See* Chapter V, s 5.5.2.

concerned state participates in the selection process without a veto influence while the RIGO retains the ultimate power of appointment.

The nationality of judges of the mechanism is also important. As discussed in Section 7.5.1 above, the mechanism's primary audience are affected communities in the concerned state. As such, it is important that the affected communities and state identify with the mechanism's judges. As the case of the KSC demonstrates,[1070] a mechanism staffed entirely with foreign judges fails to live up to its declared identity as a mechanism dedicated to accountability for crimes committed in the concerned state. On the contrary, such mechanism would be a foreign court in everything but name. In considering who should serve as judges of the mechanism, the thesis proposes that two factors should be taken into account. Firstly, the need to tap into expertise from within the concerned state. After all, this is a mechanism primarily concerned with criminal accountability for crimes allegedly committed in a specific state. As such, since the state and its peoples have primary responsibility for such accountability, it follows that judges from that state should be part of this process. Secondly, since the mechanism's identity is partially a regional mechanism established by the RIGO as guarantor of its independence and success, the RIGO has legitimate interest in ensuring that its membership is reflected on the bench of the mechanism, and in ensuring independence and impartiality of the mechanism. The thesis therefore proposes, influenced by the model of the proposed Hybrid Court,[1071] that a majority of judges of the mechanism should hail from other member states of the RIGO other than the concerned state. The thesis proposes a mixed bench on a 1:2 ratio of judges from the concerned state and judges from other member states of the RIGO.

This proposed model is not only important in ensuring that the mechanism can be identified with both the concerned state and the RIGO, but it also guarantees that the judges appointed possess the necessary qualifications and are also capable of discharging their functions independently, impartially and fairly. Additionally, the inclusion of national judges on the bench would ensure that the bench has judges with contextual understanding, which understanding is crucial in appreciating the context of crimes in order to holistically and effectively engage with the evidence and apply the law. Further, it may be argued that such a bench enhances the mechanism's ability to facilitate diffusion and adoption of normative standards into the domestic legal system as well as enhancing capacity of domestic systems.

7.5.3.2 Funding Model and Its Implications for Judicial Independence

The funding structure of international criminal courts and tribunals not only has implications for these mechanisms' ability to operate, but also for their judicial independence. The thesis argues that the budgets (or significant parts thereof) of these mechanisms should be funded either by a specific and fixed allocation from the general annual budget of the RIGO that establishes the mechanism or through compulsory assessed contribution of members of the RIGO. The concerned state should also be required to contribute a specific and fixed amount

[1070] *See* Chapter V, s 5.5.2.
[1071] *See* Chapter VI, s 6.5.3.

to the mechanism's annual budget. While voluntary contributions by member states of the RIGO and other stakeholders including non-member states and other international organisations are encouraged, these should be additional to rather than the primary source of funds, and should be limited in order to avoid the possibility of specific stakeholders taking advantage of their outsize contributions to exert undue influence over the mechanism.[1072] Further, any voluntary contributions should be received by and centrally managed and disbursed by the RIGO. As the experience of the SCSL – which was funded through voluntary contributions[1073] and which was consistently underfunded during its existence – demonstrates, primary reliance on voluntary contributions is unsustainable and it affords undue influence over the mechanism to a few states or stakeholders.

The funding model proposed herein is beneficial for several reasons. Firstly, the mechanism would be assured of sustained and predictable funding which would enable it to effectively plan for its future operations including its completion strategy. Secondly, this model guarantees against the RIGO or its member states or the concerned state using the possibility of withholding funds to unduly influence the judicial functioning of the mechanism. Thirdly, this model enables the RIGO to claim ownership of the mechanism in order to guarantee its existence and operational sustainability and independence and to cement its regional character. As a mechanism primarily established by the RIGO, it is important that the RIGO takes responsibility not just for establishing the mechanism, but also for ensuring its continued operations including through sustained financing. Fourthly, this model enables the concerned state to identify with and claim ownership of the mechanism, but without making the mechanism necessarily dependent on the state's contribution for it to operate. As a mechanism established to ensure accountability for international crimes committed in the concerned state, it is imperative for the mechanism's social legitimacy that the state and its peoples identify with the mechanism as an institution and with its work, even if the concerned state does not wield controlling power over its establishment and operation. Taken together, a funding model that ensures sustainable financing for the mechanism while guarding against the use of funding by the RIGO or by states to exert undue influence over the mechanism guarantees that the mechanism can perform its judicial functions with the requisite independence, impartiality, integrity and fairness.

Particularly instructive on the link between funding of international criminal accountability mechanisms and fairness and impartiality of the mechanism is the SCSL case of

[1072] As Taylor has observed in her research on funding of the SCSL, ECCC and STL, 'Whilst there are no examples of voluntary contributions leading to judicial bias and threatening someone's right to a fair trial, they could certainly admit of this possibility' *See* Mistale Taylor, 'Financing Lady Justice: How the Funding Systems of Ad Hoc Tribunals Could Lend Themselves to the Possibility of Judicial Bias' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017) 445.

[1073] UN Security Council Resolution 1315 (2000) (15 August 2000), art 8(c); Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art 6; *See also* Charles Chernor Jalloh, 'Conclusion: A Positive (Not Perfect) Legacy' in Charles Chernor Jalloh (ed), *The Sierra Leone Special Court and its Legacy: The Impact for Africa and International Criminal Law* (Cambridge University Press 2014) 773.

Prosecutor v Sam Hinga Norman.[1074] The preliminary motion, which argued that the Court's funding structure opened the court up to external influences which were detrimental to its independence and to fair trial rights, was largely speculative in this regard and the Court did not find a violation of Mr Norman's fair trial rights. However, the motion raised important questions concerning the likelihood of judges' decisions being influenced by the possibility of states withholding their contributions in response to judicial decisions, and the effect on judicial independence of possible control over the mechanism by contributing states.[1075] The unfortunate fate of the Special Tribunal for Lebanon is also instructive, particularly on the dangers of such mechanisms relying on primary funding from voluntary contributions and from the concerned state. The STL which was envisioned to be funded on a 51%:49% ratio (voluntary contributions by states: Lebanon),[1076] ended up almost insolvent and was forced to wind down its activities after only one first instance in-absentia conviction.[1077]

7.5.3.3 Location of the Mechanism

The thesis considers that a mechanism located as close as possible to the affected communities and to the locus of crime, ideally in the concerned state, is preferable. This is important since, as discussed above, the mechanism's primary constituency are the affected communities in the concerned state. As such, it is ideal for the mechanism to be located in the locus of the crimes where it is physically and psychologically accessible to affected communities. This way, affected communities can easily identify with the mechanism and its work.

However, as is often the case in states emerging from conflicts, contextual considerations such as security and political realities may militate against locating the mechanism in the concerned state. The security situation may still be too tenuous to guarantee the safety of personnel of the mechanism and of witnesses and of the evidence collected. Further, persons who may bear responsibility for the alleged crimes may still wield significant political influence that may be deployed towards frustrating the operations of the mechanism if located in that state. As such, because of these (in)security concerns and political realities, and to minimise potential political interference and guarantee a degree of safety and security to the mechanism's operations, it may be necessary to locate the mechanism in a third state.

At least two considerations should inform the choice of third state. First, the state should be within reasonable geographical distance from the concerned state to ensure reasonable access by affected communities to the mechanism and to also ensure that investigators,

[1074] *Prosecutor v Sam Hinga Norman,* Decision on Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence), Special Court for Sierra Leone, Appeals Chamber, Case No. SCSL-2004-14-AR72(E) (13 March 2004).
[1075] See Mistale Taylor (n 1072) 434–438.
[1076] UN Security Council Resolution 1757 (2007) (30 May 2007), Annex, Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, art 5(1).
[1077] Janet H Anderson, 'The Inglorious End of the Lebanon Tribunal' (04 June 2021) *JusticeInfo.Net* https://www.justiceinfo.net/en/78159-inglorious-end-lebanon-tribunal.html (accessed 29 January 2022); Atticus Blick, 'The Special Tribunal for Lebanon: How Did It Survive for this Long?' (20 September 2021) EJIL:Talk! https://www.ejiltalk.org/the-special-tribunal-for-lebanon-how-did-it-survive-for-so-long/ accessed 29 January 2022.

prosecutors and defence staff have relatively easy access to the locus of the crime for purposes of evidence-gathering. To maintain its identity as a mechanism of the RIGO establishing it, and since member states of the RIGO are assumed to share or have similar socio-political and perhaps even cultural realities, the mechanism should be located in a member state of the RIGO, as physically close as possible to the concerned state.

Secondly, location in a third state should not be undertaken with the intention of making the third state the default location of the mechanism. Instead, the third state should always be considered as a temporary location, both in law and in fact, with relocation to the concerned state remaining a possibility as and when circumstances permit. Admittedly, after the mechanism has commenced operation, it may subsequently be too disruptive and expensive to uproot the mechanism and relocate it to the concerned state even where other circumstances allow. However, this reality should not entirely rule out relocation where feasible. At the very least, the mechanism should be required to conduct *ad hoc* proceedings in the concerned state on a need basis, especially where permanent relocation of the mechanism is not feasible. A situation where the third state becomes the default location, with the possibility of relocation to or the holding of *ad hoc* proceedings in the concerned state being merely symbolic words in the governing instruments, is untenable. As the case of the KSC has demonstrated,[1078] this would serve to alienate the concerned state and affected communities, victims and survivors and create legitimate perception within these audiences of remoteness and distance of the 'justice' dispensed by the mechanism.[1079]

7.5.3.4 Duration and Termination of Mandate and Implications for Judicial Independence

As demonstrated by the case of the KSC/SPO,[1080] the question of the duration and termination of the mandate of mechanisms established by RIGOs can be the subject of much legal and political intrigue. This is especially the case when the instruments providing the legal basis for the establishment and operation of the mechanism are either silent on the duration of the mandate or its termination, or where these provisions are ambiguously drafted. There is more likelihood of this when the mechanism is established by international agreement between a RIGO and concerned state (*ad hoc* conferral), and less so where the RIGO exercises pre-existing authority.

As proposed and discussed in Chapter V[1081] and in Chapter VI,[1082] resort can be had to creative treaty interpretation to avoid abuse of the power to terminate the mechanism's mandate. However, the thesis considers that this situation need not arise in the first place. The thesis proposes that any international agreement concluded between a RIGO and a state for the establishment of an international criminal accountability mechanism should expressly provide that neither the RIGO nor the concerned state can terminate the mandate of the mechanism,

[1078] *See* Chapter V, s 5.5.1.
[1079] For a discussion on the relevance of the (distant) location of international criminal accountability mechanisms on perceptions of justice, *see* Vincent Nmehielle (n 143); Oumar Ba (n 173); Phil Clark (n 173).
[1080] *See* Chapter V, s 5.5.3.
[1081] Chapter V, s 5.5.3.
[1082] Chapter VI, s 6.5.4.

and that the mechanism shall operate until such time as the President of the mechanism shall notify the RIGO and the concerned state of the conclusion of all investigations and proceedings arising therefrom. Further, the international agreement should provide, for the sake of legal clarity, that the existence and operation of the mechanism shall not be affected by the denunciation of the international agreement by any party. By so doing, the power to determine the duration of the mechanism's mandate would lie with the mechanism itself, thereby guaranteeing its sustainable operation and avoiding any political interference from the concerned state or from the RIGO who may want to interfere with the mechanism's completion strategy.

7.6 Conclusion

The thesis locates the theoretical justification for the adjudicative authority of RIGOs in respect of international crimes, that is, the authority of RIGOs to establish international criminal accountability mechanisms, on humanity's legitimate desire to validate and protect its fundamental cosmopolitan value of human dignity.[1083] The thesis argues for collective responses at the regional level by RIGOs as potentially effective cosmopolitan responses to genuine inability or unwillingness of national responses and deadlocked or apathetic global responses. In a sense, therefore, the thesis advances collective action through RIGOs as a symbolic expression of humanity's commitment to uphold its fundamental values, and as a functional and practical effort to plug an accountability gap that threatens humanity's fundamental values. The thesis further locates the legal basis of this authority in general international law, and in the legal instruments of these RIGOs using the doctrine of conferred/attributed powers and the doctrine of implied powers as analytical and interpretative approaches and tools.[1084] The thesis has thus attempted to provide an objective legal guide to RIGOs on how to establish international criminal accountability mechanisms in such a manner that these mechanisms rest on an unimpeachable legal foundation. The thesis' contribution, in summary, is therefore to (pre-emptively) contribute to lifting the 'legitimacy-related anxiety [which] is like a dark cloud hovering over the [international criminal justice] project'[1085] by: i) providing a guide for identifying a solid legal basis for the establishment of international criminal accountability mechanisms by RIGOs; ii) identifying possible approaches for the establishment of international criminal accountability mechanisms by RIGOs; and iii) suggesting possible design models that would bolster these mechanism's efficiency and overall legitimacy.

7.7 Suggestions for Further Research

The thesis acknowledges that, '[a]n institution's legitimacy is defined as part of an ongoing process of obtaining and responding to feedback, which ought to properly include a relational debate between competing descriptions of legitimacy',[1086] and that 'none of the aspects of

[1083] *See* Chapter II.
[1084] *See* Chapters III, IV and V.
[1085] Sergey Vasiliev (n 285) 71.
[1086] Asad Kiyani (n 285) 113.

legitimacy … would be generally and absolutely self-sufficient'.[1087] It is for this reason that the thesis lays no claim to determining the overall legitimacy of international criminal accountability mechanisms established by RIGOs, neither does it elevate legal legitimacy above all other forms of legitimacy. As Pavel argues, 'we must judge legitimacy [of institutions] as a continuous variable and not a dichotomous one, so we can assess whether institutions meet some threshold of partial legitimacy'.[1088] Therefore, the thesis' aim is modest and considers that the process of determining the overall legitimacy of such mechanisms involves an examination of multiple factors, aspects or 'types' of legitimacy, one of which is legal legitimacy. It further considers that determining legal legitimacy is the first step in this multifaceted process. As such, the thesis has interrogated and determined the legal basis for RIGOs establishing international criminal accountability mechanisms and implications thereof, not as an assessment of the overall legitimacy of such mechanisms, but rather as a foundational starting point for such assessment, or as 'a legitimising impetus'.[1089] In order to determine the overall legitimacy of these mechanisms including how they serve or have served the cosmopolitan values underpinning their existence, further research would therefore have to be undertaken that goes beyond questions of legality and examines other relevant extra-legal or sociological considerations such as the processes adopted by these mechanisms in the performance of their mandate, the outcomes of these processes, and perceptions of the mechanisms' multiple audiences. This wholesome examination would, however, only be possible once more of these mechanisms have been established and have either completed or performed a substantial portion of their mandates to provide a reasonable amount of evidence capable of empirical evaluation.

[1087] Sergey Vasiliev (n 285) 87.
[1088] Carmen E. Pavel (n 249) xxii.
[1089] Sergey Vasiliev (n 285) 88.

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