# Chapter 7
# Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court

**Sarah M.H. Nouwen**

**Abstract** Writing in 1964, Pieter Kooijmans challenged the principle of legal equality of states: it would have to prove its value or be discarded. He also predicted the relevance of the principle for a new subject of international law: the individual. Almost fifty years later, this article reviews how the principle has fared in international criminal law, a field of international law relevant both to states and to the individual. The review shows how the emergence of a more vertical international legal order has weakened the position of the principle of equality between states. The weakening of the principle in the relation between states has in turn affected the equality between individuals, which has contributed to further actual inequality between states. Contrary to one of Kooijmans's scenarios, the emerging international legal order has not diminished the role of the 'factual conditions of power politics'. Legal questions on permitted differentiations always involve inherently political assessments. For instance, Kooijmans's concept of 'juridically relevant' differences requires a determination of which differences are 'of intrinsic value for the existence of legal order', and thus a decision on what that order should look like and how it is to be pursued. Moreover, factual conditions of power politics continue to encroach upon the principle of legal equality. Perhaps the principle of legal equality, like the fight against impunity, is more of an ideal than a reality. But the pursuit of the fight against impunity has thus far undermined the fight for more equality.

**Keywords** Legal equality · Immunity · International Criminal Court · Equality before the law · Africa · Impunity

The author is University Lecturer, University of Cambridge, Fellow of the Lauterpacht Centre for International Law and Pembroke College, Cambridge.

S. M.H. Nouwen (✉)
University of Cambridge, Cambridge CB3 9BL, UK
e-mail: smhn3@cam.ac.uk

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## Contents



> 'The value of the principle of the legal equality of states is now being put to the test. While in the past, in the unorganized society of states it may have been possible to explain certain encroachments upon equality through the factual conditions of power politics etc., now that the first steps have been taken towards an international legal order, the principle of equality shall either have to prove its value or be radically discarded.'[1]

> 'It is … incorrect to think that equality in international law coincides with the equality of states. Equality is a legal principle which requires "positivization" in every field of law. Since the states are no longer the only subjects of international law there is also a need for realization of equality elsewhere. And since the individual in particular will play an increasingly important role in international law, a closer study of the demands of justice and equality is not superfluous here.'[2]
>
> P.H. Kooijmans

## 7.1 Legal Equality on Trial

Writing in 1964, Pieter Kooijmans challenged the principle of legal equality of states. In the emerging international legal order, the principle would have to prove its value or be radically discarded. Adding to the challenge, he anticipated an increasing role of the individual in international law and suggested the relevance of the principle of equality for this new subject.

[1] Kooijmans 1964, at 4.

[2] Ibid., at 246.

Almost fifty years later, it is appropriate to assess how the principle of equality has fared. At least three pertinent questions emerge. First, now that the principle of legal equality of individuals has been clearly established, in particular in international human rights law,[3] how does this principle relate to that of legal equality of states? What is the impact of *de facto* inequality between states on the legal equality of individuals? What is the impact of *de facto* inequality between individuals for the legal equality of states? Reviewing these questions in the field of international criminal law, we will see that *de facto* inequality between states increases legal inequality between individuals, which in turn entrenches *de facto* inequality between states.

But how does this *de facto* inequality relate to the principle of legal equality? This brings us to the second question, namely what is nowadays the meaning of legal equality? Aristotle, Kooijmans and modern international human rights law have all recognised that the principle of legal equality does not prohibit *all* different treatment. According to Aristotle, likes must be treated alike, and different things differently, to the extent of the inequality.[4] In Kooijmans's view, legal equality requires equal treatment only in case there are no *juridically relevant* differences, namely differences 'that are of intrinsic value for the existence of legal order.'[5] Modern international human rights law allows differentiation where there is a reasonable and objective justification, in other words, a legitimate aim, proportionality and subsidiarity.[6] All in all, different treatment can be justified by differences that justify different treatment. However, as Kooijmans recognised,[7] the circularity of these explanations begs the question: which inequalities must be considered, what is a 'legitimate aim' and which differences are 'of intrinsic value to for the existence of legal order'? Kooijmans admitted that 'it cannot be said exactly when the law takes certain inequalities into account.'[8] His guiding question is 'whether the international legal order demands that in a concrete situation the existing differences between the states should be considered as relevant, and should therefore be drawn into the standard of valuation, or whether they are irrelevant.'[9]

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[3] See, *inter plurima alia*, the 1976 International Covenant on Civil and Political Rights 999 UNTS 171, arts. 14(1) and 26; the 1966 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195; the 1950 (European) Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 222, art. 14(1) read in conjunction with art. 6; the 1978 American Convention on Human Rights 1144 UNTS 123, art. 8, the 1982 African [Banjul] Charter on Human and Peoples' Rights 21 ILM 58, arts. 3 and 19 and the Arab Charter on Human Rights, arts. 3, 11 and 12.

[4] Henrard 2008, para. 1. See also Kooijmans 1964, at 20-25.

[5] Kooijmans 1964, at 30.

[6] See Henrard 2008, para. 27.

[7] Kooijmans 1964, at 223. 'It is regrettable … that the problem of equality is so often pushed aside with the maxim, "The equal equal, the unequal unequal", without the realization that this maxim itself does not mean much, precisely because the question is *what* is equal for the law, and *what* is unequal.'

[8] Ibid., at 33.

[9] Ibid., at 238.

This brings us to the third question considered in this review. Has the 'unorganized society of states' transformed into an international legal order in which 'certain encroachments upon equality' can *no longer* be explained 'through the factual conditions of power politics'? This question must go beyond asking whether equality is now purely a matter of law and outside the realm of the political. As Aristotle implied, questions of equality are *inherently* political.[10] Whilst Kooijmans at times juxtaposes the legal and the political,[11] his concept of equality also depends on a political judgement. Citing his doctoral supervisor, Gesina van der Molen,[12] he defines politics as 'the pursuance of certain aims, the attempt to realize certain interests, for a certain group.'[13] Determining which differences are 'of intrinsic value for the existence of legal order' requires identifying an ideal order and is itself an attempt to realise such an order, and thus political. The emphasis of the question must thus be not on the political as such, but on the role played by the *factual conditions of power* politics. Rephrased, the real question is whether encroachments upon legal equality can no longer be explained by *de facto* inequality.

After a few preliminary reflections on the concept of legal equality (Sect. 7.2) and introducing the concept in the context of the field of international criminal law generally (Sect. 7.3), this article focuses on the International Criminal Court (ICC). It illustrates how the ICC theoretically upholds the legal equality of both states and individuals (Sect. 7.4), but practically also entrenches existing inequalities (Sect. 7.5). It will then analyse the arguments that the ICC has used in response to this reality of *de facto* inequality (Sect. 7.6), which revolve around denial and justification of inequality, the latter possibly transforming material inequality into legal inequality.

## 7.2 Legal Equality of States: A Matter of Perspective

Introductions to the principle of legal equality between states often hasten to explain what the principle does *not* amount to. Legal/formal/juridical equality on the one hand is not the same as material/political/economic/factual/substantive/*de facto* equality on the other.[14] However, it is one thing to observe (correctly) that

[10] Aristotle (translated by Ross) 1999, at 76. 'All men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit.'

[11] See, for instance, Kooijmans 1964, at 221.

[12] Gesina van der Molen was the first woman to obtain a PhD at Amsterdam's Free University, a resistance fighter and an international legal scholar.

[13] Kooijmans 1964, at 94.

[14] See, for instance Oppenheim 1905, at 19-20, para. 14 and Aust 2010, at 100. See also Crawford 2012, at 449, observing, with a reference to Orwell's *Animal Farm*, '[o]bviously, the allocation of power and the capacity to project it in reality are different things, which suggests that while all states are equal, some are more equal than others' (footnote omitted).

the principle of legal equality does not entitle or commit states to distribution of wealth or political power, or that material inequality does not necessarily indicate legal inequality.[15] It is quite another to say (incorrectly) that political or economic distribution does not affect legal equality. The two concepts of equality are distinct but not hermetically separated. Moreover, whether a particular situation amounts merely to material inequality or actually also *prima facie* violates the principle of legal equality depends on one's concept of legal equality. Views vary on the minimum amount of equality required for the principle of legal equality to be complied with. According to Kooijmans, for instance, legal equality means that '[a]ll states should occupy the same position at conferences, which aim at establishing certain rules of international law.'[16] Others, however, do not include equality in the law-making process as covered by the principle; in their view, legal equality covers merely legal personality and capacity.[17]

The point of this contribution is not to draw the boundary between legal and material equality or to identify the minimum amount of equality required for legal equality to be respected. Instead, it shows that significant material/political/economic/factual/substantive inequality may leave the principle of formal equality with little meaning. This is even more so where material/political/economic/factual/substantive inequalities provide a justification for formal inequality, namely when they are deemed 'juridically relevant differences' because 'of intrinsic value for the existence of legal order'.

One's minimum requirement of equality is not the only factor that influences one's assessment of whether the principle of legal equality is respected. The distance of observation is also significant. At close sight, states may seem to be in an unequal legal position. However, international law can still square this situation with the principle of legal equality if, further away, one can observe a legal justification for this inequality. One such justification is that a state has consented to legal inequality. (In 1964, Kooijmans would have disagreed, fulminating as he did against positivists' reliance on the principle of consent).[18] But also with the principle of consent, the question may arise as to how real this consent has been and thus how real, and relevant, the principle of legal equality is or remains.

## 7.3 Legal Equality and International Criminal Law

International criminal law, involving as it does both states and individuals, is a pertinent area of international law in which to take stock of the principle of legal equality and to explore the relationship between equality of states and individuals.

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[15] Kooijmans 1964, at 124-125.

[16] Ibid., at 102.

[17] See, for instance, Shaw 2008, at 215.

[18] Kooijmans 1964.

This field was in its infancy when Pieter Kooijmans wrote on legal equality in 1964. However, the Nuremberg trials had already revealed two key features of the principle of legal equality as applied in the context of international criminal law. First, as a matter of principle, international criminal law enhanced legal equality of individuals by dismissing someone's official position as a juridically relevant inequality. According to Principle III of the Nuremberg Principles, '[t]he fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.'[19]

Whilst enhancing the legal equality between *individuals*, the denial of the relevance of official capacity may at first sight appear as undermining the legal equality of *states*. The fact that state officials cannot invoke the defence of official capacity also denies the relevance of immunity *ratione materiae*, and thus of the principle of equality of states. Immunity law is a concretisation of the principle of equality of states: it prohibits states to exercise jurisdiction over other states, including the individuals who acted on behalf of those other states.[20] However, here the distance of observation becomes relevant: from a further distance, Nuremberg Principle III as such does not seem to undermine the legal equality of states since it is formulated in general and abstract terms and applies to the officials of *all* states.

What did contribute to *de facto* inequality between states, and individuals, is the second feature related to the principle of legal equality in international criminal law that the Nuremberg trials began to reveal: selective application and enforcement of universal norms. The Nuremberg and Tokyo tribunals were established with a view to prosecuting and punishing only the Axis powers.[21] In practice, it was thus only the Axis powers that faced the consequences of the unavailability of the state-official defence.

Substantive international criminal law, 'universal' in character, did not provide a justification for the unequal enforcement. Instead, the unequal enforcement was the consequence of the Tribunal's limited jurisdiction, which in turn was the result of political decision-making, in this case by the victors of World War II. In the victors' eyes, this unequal treatment may well have been in the interest of legal order; perhaps less so in the eyes of those who suffered from possible international crimes committed by the Allied powers. Either way, the unequal enforcement subsequently served to *justify* inequalities in the post-WWII legal order.[22] The 'factual conditions of power politics' thus determined which inequalities were

[19] International Law Commission, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 1950, Report of the International Law Commission covering its Second Session, 5 June - 29 July 1950, UN Doc. A/1316, Principle III.

[20] See e.g. Crawford 2012, at 448-449. But *cf contra* Kooijmans 1964, at 245.

[21] 1945 Charter of the International Military Tribunal 82 UNTS. 280, arts. 1 and 6; and 1946 International Military Tribunal for the Far East Charter TIAS 1589, arts. 1 and 5.

[22] See, for instance, 1945 Charter of the United Nations, 1 UNTS XVI, arts. 53 and 107.

deemed 'of intrinsic value for the existence of legal order' and these inequalities were subsequently 'juridicalised' in that legal order, for instance in the membership of the UN Security Council.[23] Inequality could thus not merely be explained by power politics; law, the product of such politics, also entrenched inequalities by bringing them within its realm.

The Nuremberg experience thus planted the seeds of a field that in theory enhances legal equality between individuals and upholds equality between states, but that has a highly unequal outcome in practice because of selective application. Unequal application of international criminal law, in turn, plays a role in justifying inequality by highlighting the criminality of some and, through its silence, overlooking that of others. When applied to crimes committed by people in powerful positions or to crimes committed on the territory or by nationals of powerful states, it confirms the principle of equality of individuals and states by demonstrating that even the powerful are held to account by the law. By contrast, if international criminal jurisdiction is exercised only over crimes committed by less powerful people, or by the nationals or on the territory of less powerful states, this suggests that international law justifies this different treatment. It gives *de facto* inequality a normative endorsement, implying as it does that those targeted also *should be* less powerful, given their international criminal record, whilst the enforcers of international criminal law *should be* more powerful, given the need for international criminal law's policemen to be stronger than the criminals.

Established just over fifty years after the Nuremberg trials, the ICC appears promising for legal equality at first sight. Its jurisdiction covers crimes committed on the territory or by nationals of states parties who have committed themselves to the Statute without being sure as to whether they will be subject of ICC intervention in any future scenario. Rather than the victors subjecting the losers to international criminal justice (as in Nuremberg and Tokyo), or powerful states (in particular the permanent members of the Security Council) subjecting less powerful states (in particular, states who are not permanent members of the Security Council, such as the former Yugoslavia and Rwanda), in the ICC all states parties have subjected crimes committed on their own territory and their own nationals to the Court's jurisdiction, for the present and the unknown future. Moreover, the Security Council's power to refer situations in states not parties to the Statute renders the Court's jurisdiction potentially universal.

In the reality of its first ten years of operation, however, the ICC has struggled in upholding both the equality of states and that of individuals. The International Criminal Court seems to have become a Court for African Crimes: the Court has opened investigations and prosecutions only with respect to crimes committed on the territory, and by nationals, of African states.[24] This, in turn, has challenged

[23] See also Simpson, who uses the term 'juridical sovereignty' for the interaction between sovereign equality and two legal forms in which distinctions between states are mandated or authorised. Simpson 2004, at 6.

[24] See, more elaborately, Nouwen 2012, at 171.

equality among individuals. Whilst the Court has issued a few arrest warrants for powerful individuals (most notably, incumbent President Bashir), these have always been powerful individuals within relatively weak states. Neither weak nor powerful individuals of powerful states have been investigated or prosecuted. Moreover, even when investigating crimes within less powerful states, the Court has mostly investigated and prosecuted less powerful persons (in particular, government opponents).

## 7.4 The ICC and Legal Equality: In Theory

In theory, it is possible to argue that the ICC upholds the legal equality of both states and individuals. As regards states, a key question is whether they are equal in the establishment of jurisdiction. For individuals, a key question is whether that jurisdiction is equally exercised with respect to them.

With respect to states, the Statute *seems* to create inequality between states parties and non-states-parties. The conditions under which the Court can exercise its jurisdiction over the nationals of these two categories of states differ.[25] However, from a more distant perspective the inequality between states parties and non-states-parties disappears. As Kooijmans observed,

> not all states have an exactly equal number of international obligations and rights. This is a consequence of the fact that states can make treaties, and may derive rights and duties possessed by other states. … In itself this need not mean a denial of the legal equality of states, as long as it is stipulated that it is not a question of concrete rights and duties, but of equal possibilities for all states to obtain certain rights: no 'equality of rights' but 'equality of capacity for rights'.[26]

Theoretically, in the creation of the Rome Statute (RS), all states had an equal capacity for obtaining obligations. In contrast to the Nuremberg and Tokyo tribunals, which were created by the victors of World War II, and the tribunals for the former Yugoslavia and Rwanda, which were established by the Security Council, the ICC was created by treaty.[27] Unlike a legal instrument of a foreign power or a Security Council resolution, a treaty is the result of a law-making process that, theoretically, respects the sovereign equality of states. In Rome, delegations from states from all over the world were present. Moreover, after the Statute's adoption, states were free to decide whether to join or not.

The theoretical situation is more complex as regards the Court's jurisdiction over non-states-parties. According to the Statute, the Court can exercise its

[25] See 1998 Rome Statute of the International Criminal Court, 2187 UNTS. 90 (hereinafter RS), art. 12.

[26] Kooijmans 1964, at 102.

[27] See more elaborately on (in)equality before the Nuremberg and Tokyo tribunals and the ICTY and ICTR, Cryer 2005, at 206-221.

jurisdiction with respect to states that have not consented to it, namely when a national of a non-state-party commits a crime on the territory of a state party, a national of a state party commits a crime on the territory of a non-state-party, or the Security Council refers a situation in a non-state-party.[28]

In the first two scenarios, the Court's jurisdiction can be justified by reference to the fact that the state in the territory where the crime was committed, or of whom the suspect is a national, would have had jurisdiction itself under international law. It has merely pooled this jurisdiction with an international court.

In case of a Security Council referral, the jurisdiction is based on the Security Council's powers pursuant to the UN Charter. The inequality in the Security Council (both in terms of permanent membership and even more so in terms of the veto power) is undeniable. Yet, again, at a further distance the legal inequality in the Council can be justified by consent to a treaty, at least theoretically: UN member states have agreed to a regime in which some states have more powers than others. In reality, this theoretical justification is rather weak – newly independent states had little choice other than participating in the existing legal order and 'consenting' to a division of powers based on the post-WWII reality.[29] In Kooijmans's theory, more relevant than the existence of 'consent' is whether the inequality of states in terms of Security Council powers reflects power differences that are of 'intrinsic value to the existence of legal order'.[30] Kooijmans questioned whether the veto of the Great Powers in the Security Council could be squared with the principle of legal equality.[31] Whatever the justification – consent, the requirements of legal order or none – the result of the UN Charter is, in Gerry Simpson's words, one of 'legalised hegemony': Great Power prerogatives are realised through legal forms.[32] Law thus not merely reflects the inequalities present in the decision-making on its creation, but also legitimises them. Similarly, the ICC's selective application of international criminal law (for instance, why not in Sri Lanka, Israel or Chechnya) can be partly 'justified' by reference to decision-making in the Security Council; in other words, to the UN Charter and thus to international law itself.

With respect to individuals, the distinction between states parties and states not parties creates inequality in the circumstances under which individuals fall within the Court's jurisdiction. But once within the Court's jurisdiction, individuals are theoretically equal before the law. Article 21(3) of the Rome Statute (RS) provides, first, that '[t]he application and interpretation of law pursuant to [article

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[28] RS, arts. 12 and 13.

[29] But according to Kooijmans the principle of equality is of little to help to new states objecting to being bound by pre-existing law: '[it] is an inadmissible exaggeration of the principle of equality … to hold that each new member of a legal community should first lend his approval to the law of which he will be subject in the future.' Kooijman 1964, at 5.

[30] See ibid., at 112. 'For only then can a special position be awarded to the Great Powers, if the inequality as to power is a relevant factor for the establishment of a legal order.'

[31] Ibid., at 243.

[32] Simpson 2004, at x.

21 on the applicable law] must be consistent with internationally recognised human rights.' One such internationally recognized human right is equality before the law.[33] Secondly, article 21(3) RS explicitly prohibits 'adverse distinction founded on grounds such as gender…, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.'

Following Nuremberg, the Rome Statute also explicitly declares one type of inequality as irrelevant to its application, providing that it

> shall apply *equally* to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.[34]

The Rome Statute goes one step further than the Nuremberg principles, and indeed, than the Statutes of the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), by also declaring irrelevant immunities *ratione personae*. Article 27(2) provides:

> Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

The Statute at the same time ensures that in their horizontal relations, states continue to be able to respect the sovereign equality of states, providing as it does that

> [t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.[35]

There is no contradiction between articles 27(2) and 98(1): they apply in different relationships. Article 27(2) applies in the context of the relationship between the ICC and an individual; article 98(1) in the relationship between the ICC and states parties among themselves. Taken together, these provisions enhance legal equality of individuals by not allowing an official position as a defence or procedural bar and at the same time protect the sovereign equality of states by not forcing states to violate customary immunity rules in the execution of cooperation requests from the ICC.

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[33] See, the International Covenant on Civil and Political Rights, arts. 14(1) and 26, the International Convention on the Elimination of All Forms of Racial Discrimination, the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14(1) read in conjunction with art. 6, the American Convention on Human Rights, art. 8, the African [Banjul] Charter on Human and Peoples' Rights, arts. 3 and 19 and the Arab Charter on Human Rights, arts. 3, 11 and 12.

[34] RS, arts. 27(1) (emphasis added).

[35] RS, art. 98(1).

## 7.5 The ICC and Legal Equality: In Practice

> 'On what grounds do we decide that Robert Mugabe should go the International Criminal Court, Tony Blair should join the international speakers' circuit, bin Laden should be assassinated, but Iraq should be invaded, not because it possesses weapons of mass destruction, as Mr Bush's chief supporter, Mr Blair, confessed last week, but in order to get rid of Saddam Hussein?'
>
> Desmond Tutu[36]

In practice, the ICC has been criticised for treating states and individuals unequally. The Sudanese ambassador to the United Nations, for instance, has described the Court's first Prosecutor as 'a screwdriver in the workshop of double standards'.[37] Not only representatives of states involuntarily subjected to ICC intervention have criticised the Court's apparent selection bias. The Chairman of the African Union stated that while the AU was 'not against international justice,' it seemed that 'Africa [had] become a laboratory to test the new international law.'[38] Whilst the Court has kept crimes committed on other continents under 'preliminary examination',[39] it has opened investigations only with respect to situations on the African continent. All 30 individuals for whom the Court has issued public arrest warrants or summonses to appear are African.

Given the apparent inequality in the *outcome* of the ICC's work, we must assess to what extent inequality in earlier stages could be an explanatory factor. Here we look at four stages: the creation of jurisdiction, the triggering of jurisdiction, the use of prosecutorial discretion and the (ir)relevance of immunity law.

### *7.5.1 The Creation of Jurisdiction*

As has been set out above, by virtue of its treaty base, the ICC's jurisdiction over crimes committed on the territory or by nationals of states parties is more based on sovereign equality of states than the jurisdiction of earlier international criminal tribunals. In theory, states could participate in the drafting of the treaty on an equal basis and were free to decide whether to ratify the Statute or not.

The reality, however, has been different. First, states did not participate in the drafting of the Statute on an equal basis. After the International Law Commission

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[36] D. Tutu, 'Why I Had No Choice but to Spurn Tony Blair', *Observer*, 2 September 2012.

[37] S. Tisdall, 'Technicians in the Workshop of Double Standards', *Guardian*, 29 July 2008.

[38] 'Vow to pursue Sudan over "crimes"', *BBC News*, 27 September 2008. See also, inter plurima alia, 'Rwanda's Kagame says ICC targeting poor, African countries', *AFP*, 31 July 2008; R. Lough, 'African Union accuses ICC Prosecutor of Bias', *Reuters*, 29 January 2011.

[39] See ICC-OTP, Report on Preliminary Examination Activities (13 December 2011), http://www.icc-cpi.int/NR/rdonlyres/63682F4E−49C8-445D-8C13-F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf. Accessed 16 January 2013.

had made a first draft, much of the re-drafting was done by a small group of states during informal working sessions. Agreements reached in these informal settings placed states not present at these discussions before a '*fait accompli*'.[40] As Tallgren and Buchet observe with respect to the informal meetings that took place in Syracuse, at an academic institute co-founded by the chair of the *Ad Hoc* Committee on the Establishment of an International Criminal Court: '*Les exclus de Syracuse ont le sentiment, difficilement contestable, que le processus leur échappe*'.[41]

In the final round of negotiations in Rome, the 160 states present were formally equal participants. But the requirement that Kooijmans derived from the principle of legal equality for the law-making process, namely that '[a]ll states should occupy the same position',[42] was not fulfilled. Most of the negotiations on the Rome Statute did not take place in the plenary, but in dozens of small monolingual groups, all addressing some small element of the Statute. In these discussions, states occupied *different* positions due to different sizes of delegations, different abilities to negotiate in the dominant language and different invitations to meetings.

The size of the delegation influenced the ability to attend, and thus influence, the parallel negotiations that took place during the Rome conference. As a delegate from a small European nation opined: 'To be successful at this meeting, you really need at least 10 people to attend all the committees and working groups. … And then you still need faxes, computers, an entire arrangement that smaller delegations simply don't have here.'[43] Whilst many European states were represented by more than 30 people (indeed, France by 45) and the US by over fifty, delegations of developing countries comprised not more than a handful of members. Uzbekistan was represented by one delegate.[44] The larger delegations could attend all meetings, influence the discussions and submit 'an endless supply of clauses and amendments'.[45] Small delegations missed most of what went on.[46] As a result, many informal consultations were conducted only among Western states. According to one ambassador during the conference, '[a]s the negotiations continue, the amount of input from the developing countries declines'.[47]

At the last minute an initiative was launched to strengthen the delegations of developing countries by seconding foreign members (often young western post-

[40] Buchet and Tallgren 2012, at 175.

[41] Ibid.

[42] See Kooijmans 1964, at 102.

[43] F. Haq, Yes, size does matter. Terraviva (1998), http://www.ips.org/icc/tv250602.htm. Accessed 9 November 2012.

[44] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, UN Doc. A/CONF.183/13 (Vol.11), at 5-41.

[45] F. Haq, Yes, size does matter. Terraviva (1998), http://www.ips.org/icc/tv250602.htm. Accessed 9 November 2012.

[46] Ibid.

[47] Ibid.

graduates) to their teams. However, these new members were more committed to the goal of establishing a strong International Criminal Court than to defending the interests of a state they hardly knew. Similarly, *l'Organisation internationale de la francophonie*, at the time still called *l'Agence de coopération culturelle et technique*, encouraged timid delegations of some African countries to speak up during the conference – in support of positions taken by Paris.[48]

Another factor leading to inequality in the ability to participate was that of fluency, linguistically and culturally, in the language of the dominant group. The key negotiations took place in English and in 'informal' sessions; those delegations that required translations from and into another language, or those that were skilled only in formal negotiations, could not keep up with the pace, or fit into the format, of the negotiations, largely conducted 'informally' and in English.[49]

Finally, even with human resources and language skills, some delegations still missed most of the key negotiations because they did not manage to obtain an invitation for the crucial 'informal' meetings. As Gerry Simpson recalls:

> Sovereign equality operated in the plenaries but there were small groups of powerful states in meetings euphemistically called 'informal informals', good citizen middle-ranking states in 'like-minded groups' and representatives from 'outlaw' states like Iran and Iraq exiled in coffee shops.[50]

In the Rome negotiations, states were unequal.

In the subsequent stage of deciding whether to join this new legal regime, the principle of equality played a double role. On the one hand, the *promise* of equality before the law provided a reason for less powerful states to support the Rome Statute. An international institution could do what less powerful states could not do individually, namely hold to account the more powerful states. In that way the ICC could promote equality before the law. Indeed, the rule of law, as opposed to the rule by law, is primarily to protect the weak. Hence the insistence of many developing countries that the Court's jurisdiction included the crime of aggression, a crime characteristically committed by the more powerful vis-à-vis the less powerful.[51] (And, on the other side of the coin, hence the US resistance to the Court).

On the other hand, *de facto* material inequality limited the actual freedom of some states to decide whether to join the Statute. Some states have been put under pressure to ratify. The EU has made support for the Rome Statute an explicit

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[48] See Buchet and Tallgren 2012, at 185.

[49] See ibid., at 176. With respect to Japan: '*Japon, qui malgré l'expérience directe qu'il peut faire valoir dans ce contexte, et en dépit de sa participation très active aux phases préalables, au cours desquelles il s'était distingué par la production de propositions écrites très complètes sur les principes généraux du droit pénal ou la coopération judiciaire, est mis en difficulté par l'empressement et le caractère informel des négociations*.'

[50] Simpson 2004, at xiv.

[51] On international law's promise to, and often deception of, countries in the Global South in other fields of law, see Pahuja 2011.

condition for some development cooperation.[52] The US, by contrast, has adopted legislation restricting foreign assistance to countries with which it has not concluded bilateral agreements promising non-surrender to the ICC.[53] As a result of these conflicting incentives, Africa is not just the continent with most states parties to the Rome Statute, but also with most so-called 'Bilateral Immunity Agreements' with the US.[54]

In addition to explicit pressure, many developing states felt that ratification of the Rome Statute was a useful and harmless way to belong to the club. For states that are constantly struggling to continue fulfilling the criteria of statehood, in particular control over a population on a territory and independence, sovereignty is manifested mostly by external recognition. Such external recognition is given, time and again, when a state ratifies a universal treaty: by becoming party to the treaty and its regime, the state showcases that it belongs to the international community of states. Some of these states perceive of ratifying 'human rights treaties', the category within which the Rome Statute is often mistakenly classified,[55] in the first instance not as a *threat* to state sovereignty, but as way to *prove* it.[56] It is thus that some sub-Saharan African states have been serial but also sleepwalking ratifiers of human rights treaties:[57] serial in that they have ratified so many; sleepwalking in that they often failed to scrutinise the possible consequences prior to ratification.[58] In case of the Rome Statute, these consequences are more far reaching than with most human rights treaties.

In sum, a normative commitment to the anti-impunity struggle is thus not the only factor explaining Africa's leading participation in the Statute. Material conditions of dependency have made it difficult in practice for many states to use their

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[52] See Agreement amending the Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Members States, in particular art. 11(6)(a). 'The Parties shall seek to take steps towards ratifying and implementing the Rome Statute.'

[53] See American Servicemembers' Protection Act (ASPA) and the Nethercutt Amendment (part of the US Foreign Appropriations Bill).

[54] See http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf. Accessed 14 January 2013.

[55] For a clear distinction between the loose and proper concepts of 'human rights law', see O'Keefe 2011, at 1003-1004.

[56] See also *S.S. Wimbledon,* Permanent Court of International Justice, Judgment of 17 August 1923, PCIJ ser. A vol. 1, at 25. 'No doubt any convention creating an obligation of this kind places 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 in attribute of State sovereignty.'

[57] Thanks to lawyer Barney Afako for a discussion on this topic.

[58] For instance, in Uganda, relevant ministers conceded never to have read the Rome Statute prior to ratification, indeed prior to the referral of the situation concerning the Lord's Resistance Army to the ICC (interviews, Kampala, October 2008). It was only when the ICC was seen as an obstacle to the successful conclusion of the Juba peace process that they began to scrutinise the Rome Statute. See, more elaborately, Nouwen 2013, Chaps. 3 and 5.

sovereign right *not* to join the Rome Statute. In other words, for some states parties, 'consent' to the creation of the Court's jurisdiction is more fiction than real.[59]

As an aside, none of this is to say that only the world's most powerful states have refrained from ratifying the Rome Statute. Indeed, some less powerful states have done so, too, precisely because they were suspicious of the Court's equality promise and predicted that the Court would be used as a western instrument of intervention or punishment. A participant in a meeting of the African Union Peace and Security Council reported how one North-African state warned other African countries against ratifying the Rome Statute, because it would amount to inviting in 'an Amnesty International with legal powers'.[60]

With respect to non-states-parties subjected to the ICC's jurisdiction by way of a Security Council referral, their consent to jurisdiction can be construed only by way of consent to the UN Charter. For their part, the basis of the ICC's jurisdiction is no different from that of the tribunals for the former Yugoslavia and Rwanda, namely *ad hoc* creation of jurisdiction for specific incidents. Whether and where such jurisdiction is created is dependent on Security Council politics. Accordingly, the Security Council created tribunals for the former Yugoslavia, Rwanda and Lebanon, and referred the situations in Darfur and Libya to the ICC, but did not create international criminal jurisdiction for crimes committed in the Occupied Palestinian Territories, Iraq or Afghanistan.

International tribunals have not seriously engaged with the inequality before the law ensuing from the Security Council's selectiveness. As a defendant, former Serbian president Milošević argued before the ICTY that 'an international court established to prosecute acts in a single nation and primarily, if not entirely, one limited group is pre-programmed to persecute, incapable of equality'.[61] The Trial Chamber dismissed the motion by shifting the focus from the creation of the jurisdiction to the application of the law. It stated that human rights bodies had held that

> there is nothing inherently illegitimate in the creation of an ad hoc judicial body, and that the important question is whether that body is established by law, in the sense that, as it is stated in the *Tadic Jurisdiction Appeal*, it 'should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights'.[62]

The Chamber found that the ICTY met this requirement and dismissed the challenge.[63] In other words, once a defendant is before it, the tribunal will protect a

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[59] See also Clarke 2009, at 37; Waddell and Clark 2007, at 16, summarising Barney Afako's intervention.

[60] Interview with the participant, Khartoum, December 2008.

[61] *Milošević motion*, 30 August 2011, cited in *Prosecutor v. Slobodan Milošević*, Trial Chamber, Decision on Preliminary Motions, Case No. IT-02-54, 8 November 2001, para. 8 (*Milošević Preliminary Motions decision*).

[62] Ibid., para. 9 (footnotes omitted).

[63] Ibid., para. 10 and 11.

fair trial, including equality of arms. But the tribunal avoided the question of unequal enforcement of international criminal law as a result of the Security Council's selectiveness.

### 7.5.2 The Triggering of Jurisdiction

With respect to states parties, the Court's jurisdiction can be triggered by states parties referring situations (involving their own nationals and territory, or those of other states) or by the Office of the Prosecutor's (OTP) use of its powers *proprio motu* to open an investigation.[64] While state referrals are inherently dependent on political decision-making, the Prosecutor's *proprio motu* powers ensure, according to the Court's first Prosecutor, 'that the requirements of justice could prevail over any political decision.'[65]

And yet, in his first years of action, the first Prosecutor of the ICC seemed reluctant to use these powers. Instead, he invited states to refer situations on their own territory (through a so-called 'self-referral') to the Court. For the OTP, a self-referral had at least two potential advantages.[66] First, fears of the ICC's trampling state sovereignty could be calmed: when states referred situations on their own territory to the Court, ICC intervention would seem in accordance with state sovereignty – the state *invited* the ICC to intervene – and a vote of confidence in the Court. Secondly, a self-referral could ease the Court's greatest handicap, namely its total dependence on state cooperation for acts ranging from issuing visas for its investigators to executing its warrants of arrest. A state that invites the ICC is more likely to cooperate than a state that opposes ICC intervention.[67]

From a perspective of equality, the result of this policy is that jurisdiction is triggered particularly by those states where the government welcomes, or at least does not oppose, ICC intervention and less so in states where the government opposes ICC intervention. During the first decade of the ICC's existence, the OTP has primarily opened investigations in states where the government invited the ICC in (Uganda, Democratic Republic of the Congo (DRC), the Central African Republic (CAR) and Mali). In the situations that were referred by the Security Council (Darfur and Libya), there was no such cooperation from the incumbent government (but very much so from rebel movements). But the OTP could offset resistance from the respective governments by support, at least politically, from the Security Council. To date, the OTP has used its *proprio motu* powers only twice, and in one of these situations (Côte d'Ivoire) the state concerned had invited

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[64] RS, art. 13.

[65] Moreno-Ocampo 2007–2008, at 219.

[66] See, more elaborately, Nouwen and Werner 2010a, b.

[67] See also L. Moreno-Ocampo, Address to the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (The Hague, 6 September 2004).

the ICC by accepting its jurisdiction on an *ad hoc* basis.[68] Only in Kenya did the OTP use its *proprio motu* powers against the will of the government (but without opposition from powerful international actors). The Court has kept several other situations under 'preliminary examination' (for instance, Colombia, Georgia/Russia, Afghanistan). For some situations, this 'preliminary' examination has lasted over a decade (Colombia). The OTP has decided not to open an investigation into the conduct of British servicemen in Iraq.[69]

The fact that some 'weaker' states have invited the ICC to intervene shows that governments of such states do not necessarily consider ICC intervention as against their interests. (Indeed, they consider it in their interests as long as the ICC strengthens the *government's* position vis-à-vis its internal enemies).[70] The practice of self-referrals does not, however, counter the strong impression that the triggering of the Court's jurisdiction – and thus the first determination of potential suspects – have been greatly influenced by the extent to which the OTP expected cooperation from states, if not from the state concerned, then from other states, in particular from powerful states, and if not for the situation at hand then more generally for the Court's work. Thus far, the OTP has not used its *proprio motu* powers in situations where powerful states would strongly oppose ICC intervention (Colombia, Afghanistan, Iraq).

With respect to non-states-parties, a referral by the Security Council both establishes and triggers jurisdiction.[71] The practice so far shows the same selectiveness as with the *ad hoc* tribunals: the Security Council decides to refer some situations (Darfur, Libya) and not others (Iraq, Syria, Israel/Occupied Palestinian Territories). Irrespective of the political reasons, from a rule-of-law perspective the Council's message is that those with friends among the permanent members of the Security Council are beyond the reach of international criminal law.

The Council has also sent this message when actually referring situations to the Court by trying to exclude troops of states not parties to the Statute from the Court's jurisdiction.[72] In the context of referrals by states, the OTP has communicated to states that a state cannot focus the OTP's proceedings on only certain groups – a referral concerns all persons in a situation.[73] But in response to the Security Council's attempts to select groups for ICC proceedings, the OTP has remained silent and has simply opened an investigation. It is thus unclear whether the OTP has considered the paragraph limiting the scope of the investigation as

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[68] RS, art. 12(3).

[69] ICC-OTP, Letter to Senders re Iraq (9 February 2006), http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. Accessed 16 January 2013.

[70] See Nouwen and Werner 2010a.

[71] RS, arts 13(b) and 12 *a contrario*.

[72] UN Doc. S/RES/1593 (2005), para. 6 and UN Doc. S/RES/1970 (2011), para. 6.

[73] Letter from the Chief Prosecutor to the President of the Court Uganda, 17 June 2004, attached to *Situation in Uganda*, Decision assigning the situation in Uganda to Pre-Trial Chamber II, Presidency, Case No. ICC-02/04-1, 5 July 2004, at 4.

severable or whether it has treated it as valid.[74] It thus remains to be seen whether the Court allows the Security Council to be selective in ways that states are not (and in ways that the Statute *prima facie* does not seem to allow).

Seen through the equality lens, two features of the OTP's current practices stand out. First, in terms of equality of individuals, the OTP has generally not reversed inequality before the law at the domestic level. At the domestic level, impunity is particularly a risk in case of crimes committed by individuals protected by those in power; governments tend to shield from justice those who are loyal to them, while prosecuting their political opponents when possible. Rather than focusing on those who control the legal machinery at the domestic level, however, the ICC has also focused on the enemies of those in power (or, in the case of Libya, of those who were likely to be in power soon). Only in Sudan and Kenya has it opened cases against officials of the ruling (and not crumbling) regime. In most situations, the Court has thus not reversed possibly existing inequalities in the application of domestic law.

Secondly, in terms of equality between states, the Court has not opened investigations into situations where powerful states on whose support it relies (e.g. the UK) or that it wishes to obtain (mostly the US) object to ICC intervention. This – justice conforming to power – is the reality of a court that is modelled on an ideal of legal independence but in practice is dependent on states' cooperation for almost everything it does.[75]

### *7.5.3 The Use of Prosecutorial Discretion*

The OTP uses prosecutorial discretion not only when deciding whether to trigger the Court's jurisdiction, discussed above, but also when the Court's jurisdiction has been triggered, to decide whether to an open an investigation and whom to prosecute.

In most criminal justice systems, prosecutors have some discretion, even in those systems in which the *Legalitätsprinzip* obliges the prosecutor to prosecute. But at the international level, two factors in practice enlarge the discretion. First, many of the situations in which the ICC intervenes are characterised by a 'universe of criminality',[76] in which it is impossible for almost any justice system, let alone the ICC with potentially global jurisdiction, to investigate and prosecute all

[74] See also Nouwen 2013, Chap. 4.

[75] See also Simpson 2007, at 46, on the paradox of cosmopolitanism which is that it represents an attempt to transcend sovereignty while remaining largely reliant on particular instantiations of it. See also A. Branch, What the ICC Review Conference can't fix (2010), http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 8 November 2012.

[76] Rastan 2008, at 439.

crimes. Secondly, there is little possibility for judicial review of the OTP's refraining from opening an investigation or prosecution.[77]

Prosecutorial discretion always leads to some kind of selective enforcement of the law. This is not necessarily wrong; there may be good reasons for it.[78] The question is whether the grounds on which the selection is made are legally acceptable. From the perspective of equality, prosecutorial discretion will mean that some get prosecuted and others not; whether this is legally justified depends on whether there are legally relevant differences in the cases.

Legally, the ICC Prosecutor has little discretion in deciding whether to open an investigation after a referral, and more in deciding whom to prosecute and what to charge.[79] However, in the Prosecutor's view, the OTP, 'in the light of its limited resources', has substantial discretion as to whether to open an investigation.[80] The OTP has declared itself willing to consider, '[i]n addition to … the factors listed under Article 53',[81] the availability of evidence, the security of victims, witnesses and staff,[82] the feasibility of conducting an effective investigation in a particular territory[83] and whether 'the necessary assistance from the international community [will] be available, including on matters such as the arrest of suspects'.[84] The last enumerated factor makes selection dependent on whether states show willingness

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[77] RS, art. 53(3) provides for a review procedure in the event of a referral, but as long as the OTP does not decide *not* to open an investigation or prosecution, there is little to review. Moreover, without the OTP's providing any information, the Chambers do not know whether the OTP should have sufficient material to open an investigation or pursue a prosecution.

[78] See also Cryer 2005, at 192.

[79] Contrast RS, art. 53(1) with art. 53(2).

[80] ICC-OTP, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications (2003), at 1. http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf. Accessed 16 January 2013.

[81] ICC-OTP, Criteria for Selection of Situations and Cases (June 2006), unpublished draft document, at 8. It could be argued that the Prosecutor has more discretion when deciding whether or not to open an investigation by using his or her *proprio motu* power than after a referral. According to art. 15(1) the Prosecutor 'may' initiate an investigation and according to art. 15(3) 'shall' submit a request for authorization if he or she concludes that there is a reasonable basis to proceed (taking into account, pursuant to rule 48, the criteria of art. 53). After a referral, art. 53 determines that the Prosecutor 'shall' initiate an investigation, *unless* certain criteria are fulfilled.

[82] ICC-OTP, Criteria for Selection of Situations and Cases (June 2006), unpublished draft document, at 8.

[83] ICC-OTP, Annex to the 'Paper on Some Policy Issues before the Office of the Prosecutor': Referrals and Communications (2003) at 1, http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf. Accessed 16 January 2013.

[84] ICC-OTP, Paper on Some Policy Issues before the Office of the Prosecutor (September 2003) at 2, http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf. Accessed 16 January 2013. But *cf contra* ICC-OTP, Criteria for Selection of Situations and Cases (June 2006), unpublished draft document, at 1 'The duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source, nor the importance of the

to cooperate. From the perspective of Kooijmans's theory, the OTP treats states' willingness to cooperate as a juridically relevant difference, potentially justifying unequal enforcement of international criminal law.

From a practical perspective, the criterion of expected cooperation is understandable: in late Professor Cassese's metaphor, the ICC is a giant without arms and legs and needs artificial limbs to walk and work.[85] However, the use of artificial limbs could also result in *de facto* immunity for those that provide them: the prosecutorial part of the body is unlikely to hurt its artificial limbs that allow it to walk and work. Take the following examples: the ICC's case against the Lord's Resistance Army (LRA) has been based to a large extent on evidence obtained through generous cooperation from the Ugandan government. As in traditional diplomacy, such cooperation is encouraged by and rewarded with courtesies. For instance, senior officials of the OTP, including then Prosecutor Moreno-Ocampo, took senior officials of the Ugandan government, including Amama Mbabazi, once Minister of Defence and partly responsible for the Ugandan army's conduct, on a leisurely boat trip in The Netherlands.[86] Given the extensive support from the Ugandan government to the ICC in its LRA case and these strong diplomatic relations, how likely is it that the same Prosecutor independently investigates the same Ugandan government for *its* potentially criminal conduct in the conflict with the LRA or in eastern DRC?

The dependence on cooperation influences not merely the selection of prosecutorial targets within a situation, but also the selection of situations itself. Take the United States, a state not party to the Rome Statute but clearly of relevance to the ICC: it has the potential to make the Court much more effective or seriously to obstruct its work. During the first years of the Bush administration, it threatened to do the latter. However, since it discovered that in reality the Court selected only those situations and cases that coincided with its interests, the US has done the former by providing cooperation. The OTP, in turn, has welcomed the announcement of US support, stating *inter alia*:

> We have our shopping list ready of requests for assistance from the American government … The American government first has to lead on one particular issue: the arrest of sought war criminals. … We need … the operational support of countries like the U.S., to the DRC, to Uganda, to the Central African Republic, to assist them in mounting an operation to arrest [LRA leader Joseph Kony]. They have the will – so it's a totally legitimate operation, politically, legally – but they need this kind of assistance. And the U.S. has to be the leader.[87]

(Footnote 84 continued)
cooperation of any particular party, nor the quality of cooperation provided. The selection process is independent of the cooperation-seeking process.'

[85] Cassese 1998, at 13.

[86] See Nouwen and Werner 2010a, at 952.

[87] G. Lerner, Ambassador: U.S. moving to support International Court. CNN (25 March 2010). See also, critically, S. Al-Bulushi and A. Branch, Africa: Africom and the ICC - Enforcing international justice in Africa? (2010), http://allafrica.com/stories/201005271324.html. Accessed 8 November 2012.

This leadership role is paid for in the currency of legal equality. By providing the US a leadership role in enforcement, the Court also, implicitly, promises impunity: the Court is unlikely to amputate its most instrumental artificial limb by threatening it with prosecution. The result is a violation of the principle that 'whatever is [un]lawful, [un]just or [in]equitable for one State [or individual] in a particular situation, should be equally [un]lawful, [un]just, and [in]equitable for all other States [and individuals] in that situation.'[88]

Is this different treatment justified? The law does not say so explicitly. One rationale could be that given its military presence throughout the world and its diplomatic clout, a US leadership role in enforcement of ICC decisions could enhance the Court's effectiveness. If the OTP adopts this argument, explicitly or implicitly, it effectively transforms this political argument into what it would take to be a juridically relevant fact, thus justifying a departure from the principle of equality. Or, in Kooijmans's line of argument:

> The Great Powers are … not given a privileged position *because* they have acquired it on the strength of their status of power, but they are given a special function when, on account of their relevant special characteristics, they can serve the cause of law in this function; a function that, in a different field and on the basis of different characteristics, can be given to smaller states.[89]

The OTP's view as to what is 'of intrinsic value for the existence of [*its*] legal order' could thus transform a material inequality into an inequality recognised and juridicalised by international law, like Nuremberg did with respect to the post-World War II legal order. As a result, what governments have to offer the Court in terms of cooperation influences the likelihood that people protected by them will be held to account by the ICC. States that have a lot to offer in terms of cooperation when their enemies are prosecuted or that are protected by powerful states can effectively immunise their nationals from the Court's jurisdiction. *Vice versa*, those who are not protected by their governments, indeed, sought by them (for instance, rebel movements in Uganda, DRC and CAR) or those governments that lack protection from the hegemonic order (for example, members of the present Sudanese and former Libyan government) are targeted by ICC proceedings.[90] Inequality between states thus also leads to inequality among individuals before the Court.

### *7.5.4 The (Ir)relevance of Immunity Law*

Finally, once the Prosecutor has selected the situation and the case, distinctions may have to be made on grounds of immunities. As has been set out above, whilst

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[88] Kokott 2011, para. 23, on sovereign equality.

[89] Kooijmans 1964, at 112.

[90] This is not unique to the ICC. The Rwandan government could influence the ICTR's prosecutorial policy by refusing or threatening to refuse cooperation. See Cryer 2005, at 221. See also Ibid., at 230.

article 27 makes it impossible for a *defendant* successfully to invoke immunity before the Court, article 98 prohibits the *Court* to proceed with a request for surrender or assistance if this required the requested State to act inconsistently with its obligations under international law with respect to a third state. According to one ICC Pre-Trial Chamber, article 98 is relevant not for all 'third states' in the sense of 'states other than the requested states' but only to states other than the requested state that are not parties to the Statute. For, in its view, 'acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings of the Court.'[91]

This waiver is not obvious – the fact that states agree that Heads of State as *defendants* may not invoke procedural immunity (article 27(2)) does not mean that they therefore also agree that their Heads of State do not enjoy procedural immunity when confronted with an ICC arrest warrant in another state. Be that as it may, for states not parties to the Statute it is *a fortiori* evident that they have not consented to any waiver of immunity. From the perspective of legal equality of *states*, respect for such procedural immunity is thus essential; parties to the Statute may have agreed among themselves to waive immunity *ratione personae,* but this agreement *inter se* does not allow them to infringe the rights of states not parties to the Statute.

The Pre-Trial Chamber, however, has held that 'customary international law creates an exception to Head of State immunity when international courts seek a Head of State's arrest for the commission of international crimes'.[92] In response to Malawi's refusal to execute an arrest warrant for the incumbent President of Sudan, the Chamber found 'that the principle in international law is that immunity of either former or sitting Heads of State can not (*sic*) be invoked to oppose a prosecution by an international court' and that this 'is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction'.[93] In other words, according to the Chamber *international* tribunals are allowed to do what national courts are not allowed to do, namely to ignore immunity. Conceptually, this is unconvincing. When two states conclude a treaty establishing a tribunal, this is an international court because of its origins in an international instrument. Why would these two states together be allowed to do what they are not allowed to do individually?

The Chamber did not address this conceptual issue. Instead, it advanced precedents, ranging from the opinion of a Commission on the aftermath of World War I and the Nuremberg and Tokyo tribunals to the tribunals for the former Yugoslavia and Rwanda. None of these precedents apply to the situation at hand, however, since the cited instruments contained provisions denying the availability

[91] Situation in Darfur, Sudan, *Prosecutor v. Omar Hassan Ahmad Al Bashir,* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir of 12 December 2011, Pre-Trial Chamber I, Case No. ICC-02/05-01/09-139, para. 18 (Malawi Cooperation Decision).

[92] Ibid., para. 43.

[93] Ibid., para. 36.

of a defence of official position to escape 'responsibility'; they did not contain a provision on the (un)availability of immunity *ratione personae*, probably because most of these tribunals dealt only with *former* officials, for whom immunity *ratione personae* was no longer relevant.[94]

In its decision, the Chamber also cited the International Court of Justice (ICJ), which had reasoned, *obiter*, that 'an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before *certain* international criminal courts'.[95] In its decision, the ICC Chamber omits the crucial word 'certain', suggesting that 'international courts' *in general* can ignore immunity law.[96] Undeniably, the ICJ had explicitly cited the ICC as an example. However, the ICJ had cited article 27(2), not a rule of customary law. The ICJ did not argue, as the ICC Chamber did, that article 27(2) reflects a customary rule before international tribunals as a result of which article 98(1) is of no relevance. In other words, by relying on article 27(2), the ICJ did not exclude the continued relevance of article 98(1) in the event of a cooperation request to a third state.

The ICC Pre-Trial Chamber has tried to justify the distinction between proceedings before national and international courts on the basis of the following reasoning:

> This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state's ability to engage in international action. Cassese emphasised that this danger does not arise with international courts and tribunals, which are '*totally independent of states* and subject to strict rules of impartiality'.[97]

The Court then cited the only relevant precedent, namely the denial of immunity *ratione personae* to Charles Taylor by the Special Court for Sierra Leone. That Court, too, had denied such immunity on the basis of a distinction between national and international tribunals:

> A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.[98]

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[94] In *Milošević* the ICTY dodged the issue of immunity *ratione personae* by interpreting his motion as an invocation of immunity *ratione materiae*. See *Milošević Preliminary Motions decision*, para. 28. See, more elaborately, Nouwen 2005, at 665.

[95] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ, Judgment of 14 February 2002, at para. 61 (emphasis added).

[96] *Malawi Cooperation Decision*, para. 33.

[97] Ibid., para. 34 (footnotes omitted; emphasis added).

[98] Ibid., para. 35. The original is *The Prosecutor v. Charles Ghankay Taylor*, Appeals Chamber, Special Court for Sierra Leone, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-1-AR72(E), 31 May 2004, para. 51.

From the perspective of equality of states, the key point in this reasoning is that the principle is considered of no relevance to international tribunals. In the views of Professor Cassese, the Special Court for Sierra Leone and the ICC Pre-Trial Chamber, international tribunals may do what states individually may not do; namely, ignore the immunity of a head of state even where it has not been waived by the state. Equality of states has no relevance when some states unite in the name of 'the international community'.

From the perspective of *individuals* before the Court, this approach theoretically enhances equality: one's official capacity does not matter. In practice, however, this decision affects only individuals of those states actually targeted by the Court. Then inequality reappears because, as we have seen above, the idea that the ICC is '*totally independent of states*' is a fiction – for cooperation, it is entirely dependent on states. As long as the ICC prioritises obtaining such cooperation, allows such dependence to influence its decision-making and therefore dances to the tune of power, inequality between states leads once more to inequality among individuals.

### *7.5.5 Conclusion on the ICC and Legal Equality in Practice*

The visible inequality as the *outcome* of the application of the Rome Statute is preceded by inequality in earlier stages, namely in the creation of the Court's jurisdiction, its triggering, the use of prosecutorial discretion and the reasoning with respect to immunity law. Inequality is particularly the result of the fact that in order to be seen as 'effective', the ICC requires cooperation. Legally independent, but practically heavily dependent on states, and in particular averse to antagonising states with the power to make or break the Court, the ICC may be in the process of transforming material inequalities into seemingly relevant juridical differences, thus legitimising inequality.

## 7.6 Responses to Inequality

In response to allegations that the ICC has enforced the Rome Statute unequally, namely only with respect to Africa, ICC officials have put forward three types of arguments:

1) Those who say that this Court targets Africa are apologists for war criminals;
2) A western Court for African Crimes? Quite the reverse, this is *Africa's court*!
3) *And rightly so* – the world's worst crimes are committed on the African continent and Africa does not have the capacity to deal with these crimes itself.

The first two types of arguments are forms of denial; the third is one of justification.

### 7.6.1 Ad Hominem *Denial: 'Those Who Say that this Court Targets Africa are Apologists for War Criminals'*

An example of this type of denial argument is the following statement by the ICC's first Prosecutor:

> The Africa bias is a baseless debate started and promoted by President Bashir. … I will not apologize for protecting the rights of African victims. As Archbishop Tutu said, you have to choose your side, to protect the criminals or their victims.[99]

This type of argument transforms the allegation of an Africa bias from an empirical observation into propaganda of an alleged war criminal and treats those who make the empirical observation as apologists for war criminals. The argument is so weak that it merits no discussion. It suffices to observe that no one resorted to it when Bishop Tutu himself criticised the unequal application of international criminal law.

### 7.6.2 *Denial by Reversal: A Western Court for African Crimes? On the Contrary, this is* Africa's Court!

The second type of denial argument is that Africa actually fully supports the ICC and its actions. The ICC Prosecutor has tried to make this point when stating during an address at a symposium in Africa:

> Today, I would like to present facts, not perceptions. The facts will show you that African institutions, African leaders and African activists are building the system of international justice designed by the Rome Statute to protect the victims of massive crimes.
>
> 3. Africans are leading the adoption of the Rome Statute and its implementation….
>
> b. African states led the ratification process. Senegal was the first state party. Africa is the most represented region of the world in the Rome Statute. 23% of the state parties.
>
> c. African judges are 25% of the bench.
>
> d. African leaders referred three situations to the Court.[100]

In another speech, the then Deputy Prosecutor added some more factors to the list of evidence that Africa supports the ICC:

- The Court is defending African victims
- African civil society is building a global coalition against impunity
- African leaders have condemned impunity

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[99] L. Moreno-Ocampo, Working with Africa: The view from the ICC Prosecutor's Office (Cape Winelands, 9 November 2009), at 9 http://www.iss.co.za/uploads/9Nov09Ocampo.pdf. Accessed 8 November 2012. See also Ibid., at 8.

[100] Ibid., at 2.

– African core values are consistent with norms of the Court / the ICC also reflects African forms of justice.[101]

This type of argument ignores the possibility that African states support the ideals that the ICC embodies, but at the same time object to the unequal application of the Statute across the globe.

### 7.6.3 *Justifying Inequality:* And Rightly So—*the World's Worst Crimes are Committed on the African Continent and Africa Does not Have the Capacity to Deal with These Crimes Itself*

The final type of argument does not deny inequality, but justifies it on the ground that the situations are not equal. In Kooijmans's terminology, there are juridically relevant differences. The argument is that the worst crimes are committed in Africa; Africa does not have the capacity to address them, and the ICC must intervene to bring justice. Portraying the situation in these colours, the OTP has, for instance, stated:

> About targeting Africa. There are 14 accused, all of them are Africans. There are more than 5 million African victims displaced, more than 40.000 African victims killed, thousands of African victims raped. Hundreds of thousands of African children transformed into killers and rapists. 100% of the victims are Africans. 100% of the accused are African.[102]

By painting this image, the OTP not only explicitly justifies its Africa focus. It also exonerates the rest of the world by implication. The fact that all the attention of the world's only permanent International Criminal Court is usurped by Africa suggests that the world's worst crimes and worst criminals reside in and stem from that continent. Crimes committed on other continents, and by other actors, are invisible as a result of the ICC's blind eye.

The second part of the 'and rightly so' argument is that African countries are incapable of addressing these crimes themselves and that therefore the ICC must intervene. In the words of a senior legal officer of the ICC: 'No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and

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[101] ICC-OTP, Deputy Prosecutor's Remarks: Introduction to the Rome Statute Establishing the ICC and Africa's Involvement with the ICC (14 April 2009), http://www.icc-cpi.int/NR/rdonlyres/214816FF-DD8F-4908-97CF-B315C33F24FE/280279/20090414FatouRomeStatute.pdf. Accessed 8 November 2012.

[102] Moreno-Ocampo, see above n. 99, at 3. See also the film 'The Reckoning' (by Yates, de Onis and Kinoy 2009).

accountability'.[103] The ICC paints Africa, in Ferguson's words, in the cliché of 'western presence and eternal African absence – as if the earth, like the moon, had a permanently darkened half, a shadowed land fated never to receive its turn to come into the "light" of peace and prosperity'.[104] As Achille Mbembe has observed, this dark story of Africa tells us 'nearly everything that African states, societies, and economies *are not*', while telling us little or nothing what they actually *are*.[105] What Edward Said has observed with respect to the relations between 'East' and 'West' applies, *mutatis mutandis*, to the relationship between Africa on the one hand and 'the international community' and, operating in its name, the 'International Criminal Court' on the other. To paraphrase Said, the idea of Africa is a form of 'meridionalism':

> a way of coming to terms with [Africa] that is based on [Africa]'s special place in … western experience… [Africa] has helped to define …the west … and its contrasting image, idea, personality and experience. [Western] culture gained in strength and identity by setting itself off against [Africa] as a sort of surrogate and even underground self.[106]

Africa provides the radical other that the 'international community' uses for the construction of its own identity: civilised, orderly, enlightened, developed, modern, and, in the context of the ICC, just. In this vision, unequal application of the law is not an injustice in itself, but justified in light of supposedly juridically relevant differences between Africa and the rest of the world. But rather than merely justifying unequal application of the law, the unequal application of the law also entrenches existing inequalities. No matter how socially constructed and arbitrary, the idea of Africa is thus also real and consequential.[107]

## 7.7 Conclusion

So how has the principle of legal equality fared, in particular in international criminal law, since Pieter Kooijmans challenged the principle in 1964? Kooijmans suggested that the emergence of an international legal order meant fewer possibilities to explain encroachments upon equality by reference to power politics. He did *not* state that the emerging international legal order would be more respectful

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[103] Cited in ICC-OTP, Deputy Prosecutor's Remarks: Introduction to the Rome Statute Establishing the ICC and Africa's Involvement with the ICC (14 April 2009), at 3. http://www.icc-cpi.int/NR/rdonlyres/214816FF-DD8F-4908-97CF-B315C33F24FE/280279/20090414FatouRomeStatute.pdf. Accessed 8 November 2012.

[104] Ferguson 2006, at 10.

[105] A. Mbembe, *On the Postcolony*, cited in Ferguson 2006, at 10.

[106] Said 1995, at 1.

[107] Ferguson 2006, at 5.

of the principle. He was right not to do so. As the developments in international criminal law with respect to immunity illustrate, the argument of an emerging international legal order is invoked precisely to *deny* the relevance of the principle of equality of states. The principle is treated as belonging to the old era in which the law of nations was a law between states rather than above them;[108] as a principle relevant in the perhaps traditionally horizontal legal order of states, but anachronistic in the emerging vertical legal order. This emerging vertical order is presented as having its own values to pursue, some of which are prioritised over the principle of legal equality between states. The 'fight against impunity' is a key example. Consequently, the principle of legal equality may be losing its position as 'basic constitutional doctrine of the law of nations.'[109]

But what has come instead? Is it no longer possible to explain encroachments on the principle with reference to 'the factual conditions of power politics'? Officially not; dressed up as 'juridically relevant' differences, power politics are transformed into legal justifications for unequal treatment. But the underlying reality is still that of the factual conditions of power politics. Think of the different treatment of those on whom the ICC depends and of those on whom it does not. The notion of juridically relevant differences, or that of 'reasonable and objective justification' for that matter, does not transform what is political into legal, but makes the legal another battlefield for the contestation or legitimisation– inherently political activities – of inequality.

The weak position of the principle of legal equality of *states* – explicitly, as in the immunity decisions; implicitly, as a result of the introduction of juridically relevant differences, or in practice – has a bearing on the legal equality of *individuals*, another subject of international law for whom Kooijmans predicted the relevance of the principle. Individuals may be equal once they are called before the law, but they are, in practice, unequal in the chances of having to appear before the law, as a result of inequality between states. This in turn cements inequalities between states: the work of the ICC does not purely reflect 'international

[108] See, e.g. Oppenheim 1905, at 19-20, para. 14. 'Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law. States are by their nature certainly not equal as regards power, extent, constitution, and the like. But as members of the community of nations they are equals, whatever differences between them may otherwise exist. This is a consequence of their sovereignty and of the fact that the Law of Nations is a law between, not above, the States.'

[109] Brownlie 2008, at 289. Indicative is the difference between the 7th edition of Brownlie's Principles, written by Ian Brownlie, and the 8th edition, edited by James Crawford. Whereas the 7th edition still opened the chapter on 'sovereignty and equality of states' with the sentence '[t]he sovereignty *and equality of states* represent the basic constitutional doctrine of the law of nations' (emphasis added), the opening line of the same chapter in the 8th edition is: 'The sovereignty of states represents the basic constitutional doctrine of the law of nations' (Crawford 2012, at 447). The subsequent text also illustrates that Crawford is more sceptical of the actual role played by the principle: whereas Brownlie still wrote 'states are equal', Crawford writes 'then *in this respect* [sovereignty] *at least* [states] are equal' (emphasis added).

criminality' but also constructs the world's understanding of it. As a result of the Court's exclusive focus on Africa, African states are, yet again, portrayed as the unequal shadow of a western role model; a role model that can serve as such because it is exonerated by the Court's looking elsewhere.

The final question is whether the demise of the principle of equality, at least in the enforcement of international criminal law, matters. The answer depends on which value one prioritises. Those promoting international criminal justice often concede, with regret, that international criminal law is enforced unevenly. However, they stress that the glass is half full rather than half empty and that the glass is progressively filled: more and more individuals, hopefully one day irrespective of their nationality, will be subjected to international criminal law. This is the argument of those for whom anti-impunity is the primary value to be pursued. They are filling the anti-impunity glass.

For others, however, equality is the primary principle to be pursued. That is particularly so for those, states and individuals, who have suffered from a lack thereof. They focus on the ICC's impact on equality. Their glass, that of equality, is half empty, if not emptier. Moreover, they see the unequal enforcement of international criminal law as risking emptying their glass completely: less impunity can mean more inequality. Rather than sharing the faith of anti-impunity activists that one day everyone will be accountable to the law, they challenge this evolutionary narrative for its lack of empirical grounding.[110] In their view, the ICC's anti-impunity work legitimises rather than challenges existing inequalities. Under the mantle of a 'legal' and 'just' anti-impunity fight, the 'international community' – 'a post-Cold War nom de guerre for the Western powers'[111] – reconstitutes itself on an altar of superiority by punishing its enemies. And then, as Adam Branch observes, 'the doctrine that some justice is better than no justice can end up not only making justice conform unapologetically to power, but also making justice an unaccountable tool of further violence and injustice.'[112]

The evaluation of the changing status of the principle of equality in the field of international criminal law thus depends on which value, accountability or equality, one values most. That prioritisation of values is a political exercise. For those at the forefront of the fight against impunity, accountability trumps equality. Others judge inequality, among states and individuals, as a greater injustice. They are not willing to sacrifice the principle of equality on the stage of accountability.

Who will win over the next 50 years? This will largely depend on the politics of fragmentation.[113] As Martti Koskenniemi has revealed, each specialist regime of international law has been developed precisely in order to enhance certain

[110] See A. Branch, What the ICC Review Conference can't fix (2010), http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 8 November 2012.

[111] Mamdani 2009, at 12.

[112] A. Branch, What the ICC Review Conference can't fix (2010), http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/. Accessed 8 November 2012.

[113] On which, see Koskenniemi 2007, 2009.

international legal values more than others. It is therefore not surprising that international *criminal* courts prioritise the anti-impunity struggle over the protection of the principle of legal equality. One could expect a more nuanced assessment of the relationship between competing values of international law from a court that adjudicates international law more generally, such as the ICJ.

It is particularly illustrative how Kooijmans as an ICJ judge dealt with the tension between two values of international law: accountability for international crimes on the one hand and immunity, a manifestation of the sovereign equality of states, on the other, when writing as one of three judges in a Separate Opinion in the *Arrest Warrant* case:

> The frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value …[114]

Whether the principle of equality survives, if only as an aspiration, depends in part on whether and to what extent it will be protected by scholars and judges like Pieter Kooijmans.

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[114] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* ICJ, Judgment of 14 February 2002, (Joint Separate Opinion Judges Higgins, Kooijmans and Buergenthal), para. 79.

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