

The magnificent seven: Africa's response to US article 98

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Summary

What are the motivating factors that enable certain states to withstand pressure from other states? To ensure that the International Criminal Court does not gain jurisdiction over its nationals, the United States is currently seeking to sign Bilateral Immunity Agreements (BIAs) with all countries under the rubric of the American Service Members' Protection Act. This article examines the debates over the BIAs and goes further by analysing responses to the BIAs of seven countries within the African region. It specifically examines the ways in which states are able to withstand the pressure to sign a BIA by taking advantage of internal and external institutional structures and mechanisms. It also fills a gap in the literature by examining one region's response to the BIAs relative to the US position concerning the International Criminal Court.

1 Introduction

What are the factors within the African region that explain how some states are able to withstand pressure from the United States (US), even at the cost of a loss of aid? This article examines how seven African countries are willing to sacrifice US military and economic aid by not signing a US article 98 Bilateral Immunity Agreement (BIA). To ensure that the International Criminal Court (ICC) does not gain jurisdiction

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over its nationals under any circumstance, the US is currently seeking to sign BIAs with all countries under the rubric of the American Service Members' Protection Act (ASPA), which was signed into law on 2 August 2002 by President George W Bush, codifying US opposition to the ICC and restricting US ability to co-operate with ICC investigations and trials.¹ The date 1 July 2003 marked the deadline set out in the ASPA for the end of US military assistance to ICC state parties that had not signed a BIA.² Additionally, under the ASPA, the administration is obliged to take away military aid from countries that have ratified the Rome Treaty to the ICC unless they are North Atlantic Treaty Organisation (NATO) allies or specially designated non-NATO allies.³ The Bush administration is also empowered to waive sanctions on countries if it serves the national interest.⁴ As of May 2007, 100 governments worldwide have reportedly signed BIAs, while 54 have publicly refused for varying reasons. In Africa, out of 47 countries (North Africa excluded),⁵ 37 have signed BIAs while seven have continued to hold out. These countries are Kenya, Lesotho, Mali, Namibia, Niger, South Africa and Tanzania. The countries tallied are in Table 1.⁶

¹ American Service Members' Protection Act 2002, USC 7422 sec 2001 (2002). Sec 2008 authorises the President to use all means necessary and appropriate to bring about the release of any US military, elected or appointed USG personnel, or other persons working for or employed by the USG who is being detained or imprisoned by, on behalf of, or at the request of the court. This also applies to the same named individuals with NATO countries, major non-NATO allies, and Taiwan. In addition, this applies to individuals detained or imprisoned for official actions taken while one of the above-mentioned eligible individuals. Note: On 31 March 2005, with 11 votes supporting, and four countries, including the US, abstaining, the UN Security Council referred the situation in Darfur, Sudan, to the ICC. Although the American Service Members' Protection Act of 2002 prohibits the US from co-operating with the ICC, this legislation contains broad waivers that permit co-operation. Sec 2015 reads: 'Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.' Sec 2011 also grants the President the capacity to co-operate with the ICC or provide national security information to the Court, requiring only a notification of Congress within 15 days.

² Coalition for the International Criminal Court 'US bilateral immunity or so-called article 98 agreements' 30 September 2003 <http://www.iccnw.org/documents/FS-BIAsSept2003.pdf> (accessed 23 December 2003).

³ Defence Institute of Security Assistance Management 'Security assistance legislation and funding allocations'. This includes Argentina, Australia, Egypt, Israel, Japan, Jordan, Philippines, New Zealand, South Korea and Taiwan.

⁴ J Lobe 'US punishes 35 countries for signing on to the International Criminal Court' *Inter-Press News Agency* 1 July 2004.

⁵ North Africa is included in the Middle Eastern region.

⁶ Coalition for the International Criminal Court *Status of US bilateral agreements* 14 April 2006. Note: North Africa includes Algeria, Egypt, Libya, Morocco, Sudan, Tunisia and Western Sahara, which represent the Middle Eastern region. Morocco has administrative control over Western Sahara.

Table 1**STATUS OF US BILATERAL IMMUNITY AGREEMENTS/AFRICA**

| COUNTRY | NON-ICC STATE PARTY | ICC STATE PARTY | BIA STATUS BY COUNTRY | REFUSE TO SIGN A BIA |
|--------------------------|---------------------|-----------------|-----------------------|----------------------|
| Angola | Signed | | Ratified | |
| Benin | | Ratified | Signed | |
| Botswana | | Ratified | Signed | |
| Burkina Faso | | Ratified | Signed | |
| Burundi | | Ratified | Signed | |
| Cameroon | **Signed | | **Signed | |
| Cape Verde | **Signed | | **Ratified | |
| Central African Republic | | Ratified | Signed | |
| Chad | | Ratified | Reciprocal | |
| Comoros | | Ratified | Executive | |
| Congo (Brazzaville) | | Ratified | Signed | |
| Congo (DRC) (Kinshasa) | | Ratified | Executive | |
| Côte d'Ivoire | Signed | | Reciprocal | |
| Djibouti | | Ratified | Signed | |
| Equatorial Guinea | Did Not Sign | | Executive | |
| Eritrea | Signed | | Reciprocal | |
| Ethiopia | Did Not Sign | | Reciprocal | |
| Gabon | | Ratified | Signed | |
| The Gambia | | Ratified | Ratified | |
| Ghana | | Ratified | Ratified | |
| Guinea | | Ratified | Signed | |
| Guinea-Bissau | **Signed | | **Exempt | |
| Kenya | | Ratified | | * |
| Lesotho | | Ratified | | * |
| Liberia | | Ratified | Signed | |

| | | | | |
|---------------------|----------------|-----------|-------------|----------|
| Madagascar | Signed | | Signed | |
| Malawi | | Ratified | Executive | |
| Mali | | Ratified | | * |
| Mauritania | Did not sign | | Ratified | |
| Mauritius | | Ratified | Signed | |
| Mozambique | Signed | | Ratified | |
| Namibia | | Ratified | | * |
| Niger | | Ratified | | * |
| Nigeria | | Ratified | Signed | |
| Rwanda | | | Reciprocal | |
| São Tomé & Príncipe | **Signed | | **Executive | |
| Senegal | | Ratified | Signed | |
| Seychelles | Signed | | Reciprocal | |
| Sierra Leone | | Ratified | Ratified | |
| Somalia | **Did not sign | | ** Exempt | |
| South Africa | | Ratified | | * |
| Swaziland | **Did not sign | | **Exempt | |
| Tanzania | | Ratified | | * |
| Togo | Did not sign | | Reciprocal | |
| Uganda | | Ratified | Executive | |
| Zambia | | Ratified | Signed | |
| Zimbabwe | Signed | | Signed | |
| TOTAL (47) | 17 | 29 | 37 | 7 |

** As of the publication date of this article, the aforementioned is not a state party to the Rome Statute; therefore, it is not prohibited by paragraph 2007 of the American Service Members' Protection Act of 2002 (22 USC 7421 et seq) from receiving military assistance: These countries are Cameroon, Cape Verde, Guinea-Bissau, São Tomé and Príncipe, Somalia and Swaziland.

BIA TERMS

STATE PARTY TO BIA (SP): Agreement of non-surrender to the ICC any US national or US military/government employee (past or present)

RECIPROCAL: US has agreed not to surrender nationals of this country to the ICC.

RATIFIED AND EXECUTIVE AGREEMENT: BIA has entered into force. Based on public news reports; it is possible that other agreements have also entered into force, especially all countries that have received permanent waivers.

EXEMPT: Exempted under the American Service Members' Protection Act; military assistance cannot be suspended.

WAIVED: President Bush has declared that the country will continue to receive aid, despite being an ICC member state.

UNCONFIRMED: Not disclosed by the state department/country requested that the agreement not be revealed.

Information updated 15 May 2007. Sources: Coalition for the International Criminal Court and Citizens for Global Solutions Status of US BIAs.

This research will not debate the merits or not of the ICC,⁷ albeit the implications within the domestic policy of certain African states do send a message that the ICC's purpose should not be hindered in any way through other legal instruments. The emphasis on the African region is important for three reasons: First, African proponents of the ICC argue that the BIAs undermine the legitimacy of the ICC, thereby affecting the Court's potential. Currently there are four referrals to the ICC: the Central African Republic, Democratic Republic of the Congo (DRC), Sudan and Uganda.⁸ Africa is therefore the litmus test as to the success of the ICC.⁹ Although the ICC is not the subject of this study, the BIA issue is of indirect significance in relation to the ICC, therefore, the response of the African states is of importance when examining the foreign policy behaviour of the BIAs between two separate actors who see the ICC from two extreme viewpoints. Also, since the US has withheld millions of dollars in military assistance from state parties to the ICC that refuse to sign the BIAs, those countries that refuse to sign the BIAs are at risk of losing the aid that would assist them in combating the very crimes for which the ICC was instituted.¹⁰

Second, for almost a decade, the US has sought to strengthen Africa's ability to tend to its own crises. According to a report from the World Policy Institute in June 2005, although the millions of dollars being spent on US military aid and sales to Africa pale in comparison to the billions being spent in the Middle East and South Asia, all of the major US bilateral aid and sales programmes have increased in recent years. Funding to sub-Saharan Africa under the largest US military aid pro-

⁷ See *CICC bibliographic sources* <http://www.iccnw.org/?mod=bibliography> (accessed 31 March 2007).

⁸ International Criminal Court 'Situation and cases' <http://www.icc-cpi.int/cases.html> (accessed 31 March 2007).

⁹ Côte d'Ivoire has also accepted the ICC's jurisdiction for specific crimes.

¹⁰ See 'Countries opposed to signing a US bilateral immunity agreement (BIA): US aid lost in FY04 and US aid threatened in FY05' http://www.iccnw.org/documents/CountriesOpposedBIA_AidLoss_16Dec05.pdf (accessed 31 March 2007).

gram, Foreign Military Financing (FMF), doubled from \$12 million in fiscal year 2000 to a proposed \$24 million in the FY 2006 budget proposal and the number of recipient nations has grown from one to nine. The Pentagon's International Military Education and Training (IMET) programme has increased by 35% from 2000 to the 2006 proposal, from \$8,1 million to \$11 million, and from 36 participating nations to 47. FMF more than quadrupled from \$9,8 million in the fiscal year 2000 to \$40,3 million in the fiscal year 2003 (the most recent year for which full statistics are available). The commercial sales of arms licensed by the state department grew from \$0,9 million to \$3,8 million over the 2000 to 2003 period. These bilateral programmes are just the tip of the iceberg in terms of overall US military aid commitments going forward. The US European Command (EUCOM) has requested \$125 million over five years for the Pan-Sahel Initiative, which provides training and exercises with Chad, Mali, Mauritania, Niger and other nations in the region. US engagement under the programme has gone far beyond traditional training to include involvement in combat operations.¹¹ Additionally:¹²

The US cut \$13 million for training and equipping troops in Kenya, where operatives of Al Qaeda killed 224 people when they bombed the American Embassy compound in Nairobi in 1998 . . . In 2003, the flow of \$309,000 annually was suspended to Mali, where Pentagon officials contend an Algerian separatist group with ties to Al Qaeda, known as the Salafist Group for Preaching and Combat, or GSPC had established a base.

Pentagon officials concur: 'It makes little sense to ask for Kenya's support in fighting terrorism while denying it the money it needs for training and equipping troops.'¹³ Therefore, the loss of aid would be detrimental to those struggling democracies the Bush administration is concerned with when it comes to training personnel in order to protect their borders against would-be terrorists.

Lastly, the loss of funds would not only consist of aid for regular military training which the US has given Africa throughout the years, but also through the Nethercutt Amendment, effective 26 November 2004.¹⁴ The amendment, originally included in the House version of

¹¹ F Berrigan & WD Hartung with L Heffel 'US weapons at war 2005: Promoting freedom or fuelling conflict? US military aid and arms transfers since September 11' World Policy Institute, June 2005 <http://www.worldpolicy.org/projects/arms/reports/waw-june2005.html> (accessed 3 July 2005).

¹² KJ Heller 'Article 98 agreements and the war on terror' *Opinio Juris* 25 July 2006.

¹³ As above.

¹⁴ US Congressional Record, House of Representatives debate on 15 July 2004, under the Heading H5881 and H5882 to Amend the Foreign Operations Appropriations Bill. Note: The countries in this study would be ineligible for assistance from this fund meant to help strengthen African countries' capabilities to impede the flow of terrorist finances, improve border and airport security and improve judicial systems. Also see Citizens for Global Solutions 'Nethercutt amendment: Cutting off our nose to spite our face' 23 July 2004.

the foreign aid spending bill in July 2004, prohibits assistance from the Economic Support Fund (ESF) for countries that refuse to sign a BIA. With a budget of over \$2,5 billion, ESF promotes the foreign policy interests of the US by assisting allies. The importance of this latest sanction is paramount as it would not only undermine the effectiveness of US counter-terrorism efforts in Africa, such as peace building, democratisation and counter-drug initiatives, but the frozen funds are intended to improve peacekeeping capacity and enhance border and maritime controls, thereby strengthening regional stability and decreasing reliance on US peacekeeping capabilities.¹⁵ In the 16 March 2006 testimony before the House Armed Services Committee concerning ASPA sanctions, General Bantz J Craddock, Commander of EUCOM, stated: 'Decreasing engagement opens the door for competing nations and outside political actors who may not share our democratic principles to increase interaction and influence within the region.'¹⁶ Similarly, Major General Jonathan S Gration, Director of Strategy, Policy and Assessments, US European Command, stated: 'We're severely restricted [by ASPA] in what we can do. The restrictions we've put on our ability to move in Africa may be hurting the very people we are trying to help.'¹⁷ US Secretary of State, Condoleeza Rice, has also suggested that withholding aid is self-defeating to countries that are co-operating with the US on combating terrorism or drugs, or that are assisting in the war efforts in Afghanistan or Iraq:¹⁸

We are looking at the issues concerning those situations in which we may have in a sense . . . [been] shooting ourselves in the foot . . . I think it is important from time to time to take a look to make sure we are not having a negative effect on the relationships that are really important to us.

Thus, withholding aid is paradoxical and detrimental in that it may further undermine the ability for some countries in Africa to tend to their own crises, not to mention assist the US strategically. These complaints have led the US Congress to re-examine its stance on the BIAs. In section 1222 of the John Warner National Defense (DOD) Authorisation Act for FY07 signed 17 October 2006 (PL 109-364), Congress amended

¹⁵ According to the State Department, the military co-operation programme reinforces democratising efforts, develops peacekeeping capabilities, enhances regional stability, institutionalises respect for human rights and combats terrorism; World Federalist Association 'Sanctioning allies: Effects of the article 98 Campaign' December 2003.

¹⁶ General Bantz J Craddock, United States Army Commander, United States Southern Command, Statement before the 109th Congress House Armed Services Committee 26. Note: The impact of art 98 has caused an increase in China's influence in the region. The impact of this is noted in D Cotton's forthcoming article 'China-Africa trade: Implications for the rule of law and good governance'.

¹⁷ P Hess 'Ungoverned areas threaten North Africa' *The Post Chronicle* 17 February 2006 http://www.postchronicle.com/news/security/article_2127155.shtml (accessed 6 April 2006).

¹⁸ A Gearan 'Rice: 'Administration needs to rethink some policies involving International Criminal Court' *Associated Press* 10 March 2006.

the ASPA to remove IMET from the definition of military assistance that is prohibited to a country that is a party to the ICC.¹⁹ Although ASPA restrictions still apply to FMF and Excess Defense Articles (EDA) programmes, this law removed IMET restrictions from all ASPA countries and a waiver is no longer required for countries by President Bush. Additionally, on 10 May 2007, Secretary Rice provided testimony before the Senate Appropriations Subcommittee on Foreign Operations and reiterated the importance of 'assisting those countries that need US funding through foreign assistance so that they may do their jobs well'.²⁰ Thus, 'the US government is beginning to re-evaluate its counterproductive BIA policy and work toward separating its ideological opposition to the ICC from its foreign aid policy with key allies and friends'.²¹ This is a great step forward. However, according to the USAID statutory checklist for FY 2007, ESF aid is not addressed by the aforementioned amendments. Fortunately, this prohibition only applies to ESF funds and does not apply to Millennium Challenge Act (MCA)²² assistance to MCA-eligible countries. Therefore, a country that is ineligible to receive ESF assistance under this provision can still be eligible for MCA assistance.²³

The spirited efforts of the US through the ASPA and the Nethercutt Amendment and the subsequent efforts of African countries to remain steadfast against tremendous pressure by the US, lay the groundwork for the following hypotheses:

- (1) The seven countries refuse to sign a BIA because of an alignment and/or obligation to regional organisations.
- (2) The countries refuse to sign a BIA because they are under pressure from civil society and non-governmental organisations (NGOs) that oppose signing a BIA.
- (3) Based upon domestic jurisprudence, the countries refuse to sign a BIA because they believe it will violate their obligations as state parties to the Rome Treaty and the Vienna Convention on the Law of Treaties (VCLT).
- (4) The countries refuse to sign a BIA because they believe the request by the US to sign a BIA violates state sovereignty.

¹⁹ US 109th Congress, Senate Report 109; J Warner *National Defence Authorisation Act for fiscal year 2007* 853.

²⁰ US Department of State 'Diplomacy, foreign assistance critical to national security secretary Rice' 10 May 2007.

²¹ Citizens for Global Solutions 'US recognises counterproductive BIA Policy' 10 October 2006.

²² The Millennium Challenge Corporation is a United States government corporation designed to work with some of the poorest countries in the world. Established in January 2004, MCC is based on the principle that aid is most effective when it reinforces good governance, economic freedom and investments in people. See <http://www.mcc.gov/about/index.php> (accessed 31 March 2007).

²³ These countries are Kenya, Lesotho, Mali, Namibia, Niger and Tanzania.

Our theory is that the countries in this study will continue to hold out in signing a BIA despite pressure applied by the US.

The aid factor and its influence concerning the 37 countries that have signed a BIA is discussed in depth in forthcoming research,²⁴ but is alluded to in this article, in order to clarify certain statements regarding the BIAs relative to the countries that refuse to sign. Lastly, this article fills a gap in the literature by examining one continent's response to the BIAs relative to the US stance concerning the ICC.

Why should one bother with studies of certain regions? First, state behaviour deserves to be studied for the sake of understanding international relations behaviour as a whole. Second, according to Anda:²⁵

Neglecting the behaviour of weak states in foreign relations is contradictory and unjustifiable as the weakness of states should provide the basis for scholarly understanding of their efforts at co-operation in international fora.

Third, there seems to be a general assumption that weak states have no voice, no influence and no power. This study reinforces that weak states are powerful in their own right and do have avenues available to them should they seek to use them. African countries are more likely to obtain a greater benefit from co-operating with other institutional structures and allying with other regions that are cognisant of Africa's needs. This enables the weaker state to resist pressure or gain advantage over the stronger state.

As foreign policy scholars emphasise, studies of foreign policy that are generalisable should be applicable to all types of states. However, the factors we analyse may not be regionally specific. Regional organisations, NGOs, civil society, legal obligations and the issue of sovereignty are all variables that may be issues within other regions, although some variables may be more important than others. In attempting to generalise factors concerning the BIAs, we cannot have a general explanation or explanations to account for the trend in different countries.

Country approaches to the BIAs remain domestic affairs. It is interesting how the approaches remain diverse yet baffling on occasions. Each country is specific with a unique relationship with the US. (These positions may be similar or converging for some countries). Hence, unique and diverse political, economic and social contexts would explain the different positions. Perhaps key government players in these countries, such as heads of states, foreign affairs ministers and others may give us specific explanations as to how they approach US requests to sign or ratify BIAs. As it is, we can only speculate, provided this is grounded on some justification. Domestic variables, such as politics, social issues, elite behaviour, executive and judicial issues may also

²⁴ D Cotton *Carrots and sticks: The economic consequences of article 98 in the African region* (2007) (due in fall).

²⁵ MO Anda *International relations in contemporary Africa* (2000).

contribute to states' decisions in signing a BIA. These variables could be of further relevance concerning regional or individual country studies.

It is also useful to look at some additional data observations concerning this study. There has been some difficulty in finding certain country data in relation to the BIAs. Therefore, one weakness of this study is that some of the countries that are included in the regional organisations we discuss have not publicly released information as to why they signed a BIA. Was it pressure over aid that caused them to sign? One cannot positively say without delving deeper into each country's domestic affairs. It is suspect that after speaking with experts within Africa, some governments are hard-pressed to relinquish information in order to bypass fallouts from other governments. However, a lack of data should not keep a researcher from dealing with a particular issue.

Inquiries into the African Union (AU) did not produce anything substantial concerning mandates and the like. What we did find was that the AU deems the issue of jurisdiction a sovereign matter, thus it is hesitant to pressure states on the issue of a BIA. Since all 47 sub-Saharan African states are members of the AU, one recommendation would be for the AU to play a more prominent role in issues such as the BIAs through harnessing a collective political role considering its high profile involvement in peacekeeping. This issue would be relevant for future inquiry and research considering the huge obligations the AU is involved in currently; most notable, its peacekeeping initiatives in the region and its support to Sudan. Further research might also include the domestic politics of each individual country as a possible variable. This would involve a very large case study. These issues will be useful for an expanded study of Africa and for the inclusion of other geographical regions of the world. Another area for future research might include examining existing status of forces agreements (SOFA) in each government in Africa. In addition, examining each governmental response relative to understanding the legal ramifications of the BIA could be important. This would involve examining the constitution of each country to see if the executive may sign the BIA without the knowledge of parliament.

2 The International Criminal Court

In April 2002, the ICC Statute came into force with over 60 ratifications. The ICC is a permanent tribunal in which the crimes of genocide, war crimes and crimes against humanity are addressed. In May 2002, the US declared that it no longer intended to pursue ratification of the Rome Statute and asked to remove its signature from the Statute.²⁶

²⁶ Bill Clinton had then War Crimes Ambassador David Schaffer sign the Rome Statute on 31 December 2001. This signature would ensure that the US would still be able to be involved in the process of negotiations on the Court. US Department of State *Fact sheet: The International Criminal Court*, May 2002.

Threatening to withdraw American peacekeepers from Bosnia, the US pushed through Resolution 1422 in the UN Security Council in July 2002, exempting all UN peacekeepers from the ICC's jurisdiction for one year. This was renewed in June 2003.²⁷ The US then launched a campaign to ensure that its nationals would not fall within the jurisdiction of the Court.

The US concern lies within a situation where a US national could be accused of a crime in the territory of a state that is a party to the ICC. Under the 'principle of complementarity', the state where the crime occurred is obligated to surrender the US national to the ICC, if the state itself is unable or unwilling to prosecute the matter.²⁸ Of utmost importance to the US, this obligation applies even when the accused is a national of a state that is not a party to the ICC.²⁹ Additionally, the US has argued that the ICC lends too much discretion to prosecutors who may bring politically motivated charges against US citizens, officials and military personnel.³⁰ The BIAs sought by the US would require states to send an American national requested by the ICC back to the US instead of surrendering him or her to the ICC.

According to Rosenfeld, 'the terrorist attacks of September 11, 2001 dramatically changed US military strategy'.³¹ He explains:³²

While foreign countries have recently allowed the US to station troops on their soil as part of the US war on terrorism, it remains to be seen whether or not they will provide immunity against ICC jurisdiction in the form of Status of Forces Agreements (SOFAs).

Thus, Rosenfeld reasons: 'The war on terrorism has also exposed a need for access to foreign bases, thereby shifting some negotiating leverage in favour of the receiving country and away from the US.'³³ He continues:³⁴

²⁷ C Fehl 'Explaining the ICC: A practice test for rationalist and constructivist approaches' (2004) 10 *European Journal of International Relations* 357 362.

²⁸ Rome Statute of the International Criminal Court, Issues of Admissibility (1998) art 17(1)(a).

²⁹ n 28 above, arts 12 & 13.

³⁰ US Department of State (USDOS) Bureau of Political-Military Affairs *Frequently asked questions about the US government's policy regarding the International Criminal Court* (2003).

³¹ E Rosenfeld 'Application of US status of forces agreements to article 98 of the Rome Statute' (2003) 2 *Washington University Global Studies Law Review* 273 288.

³² Status-of-forces agreements define the legal status of US personnel and property in the territory of another nation. The purpose of such an agreement is to set forth rights and responsibilities between the United States and the host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and resolving damage claims; Status of forces Agreement (SOFA) <http://www.globalsecurity.org/military/facility/sofa.htm> (accessed 3 December 2004).

³³ As above; Rosenfeld (n 31 above) 288.

³⁴ Rosenfeld (n 31 above) 291.

In several cases, the US has obtained exclusive jurisdiction over military personnel from countries where it has been involved in humanitarian relief efforts or similar military interventions. These agreements have usually been negotiated with countries in dire need of US assistance that are willing to sacrifice legal jurisdiction in order to obtain economic or military aid... Negotiated on a case-by-case basis, these agreements responded to the necessity for immediate US military involvement.

However, in our view, with the recent history of wartime abuses; the alleged torture at Guantanamo Bay, the torture incidents at Abu Ghraib and the assault on Fallujah in 2004, the debate over the BIAs has become more prominent, which serves to re-emphasise the importance of the BIAs to the US and, ultimately, the scope of BIAs to governments around the world. In this respect, some governments are hesitant to sign a BIA. Moreover, the resultant pressure to do so means finding a way in which to resist. One way of resisting pressure is with and among regional organisations.

3 Resisting pressure: Regional organisations and others

3.1 Regional organisations

One factor that may influence a country's decision making is pressure within and among regional organisations. Pressure on a country in this sense refers to the influence that regional organisations have upon countries when it comes to decision making. Regional organisations often unite when supporting certain issues, thereby forming a coalition on deterring neighbouring states from doing what is against their interests. This is often accomplished by regional organisations creating mandates for their members to follow or making membership contingent upon states following certain requirements of the organisation. In Africa, there is widespread recognition of the benefits to be derived from regional collaboration.³⁵ As Peck explains:³⁶

Regional organisations are superior in being more familiar with local conditions, culture and actors. These organisations have expanded their capacity to take on certain objectives other than that for which they were originally designed, for example: Organisations such as the OAU (now the AU), ECO-WAS and the SADC, which originally formed for economic reasons, are now taking on a peace and security role, because of the realisation that the two issues are closely linked.

Thus, acting as a solid front, regional organisations often unite on common goals when it comes to foreign policy. The human rights

³⁵ R Gibb 'Southern Africa in transition: Prospects and problems facing regional integration' (1998) 36 *Journal of Modern African Studies* 287 289.

³⁶ C Peck 'The role of regional organisations in preventing and resolving conflict' in CA Crocker *et al* (eds) *Turbulent peace: The challenges of managing international conflict* (2001) 563 578.

issues that have affected African countries past and present, the obligations that arise from being a party to the ICC and the subsequent act of regional organisations taking on expanding roles may be a factor in a country's refusal to sign a BIA. Stein³⁷ suggests that '[r]egimes arise because actors forego independent decision making in order to deal with the dilemmas of common interests and common aversion. They do so in their own self-interest.' Hence:

Hypothesis 1: The seven countries refuse to sign a BIA because of an alignment and/or obligation to regional organisations.

This variable examines the regional organisations of the East African Community (EAC), the Economic Community of West African States (ECOWAS) and the South African Development Community (SADC) in order to see if there is a correlation between any of the states being a member of the organisation(s) and/or being a party to the ICC. Specifically, do these organisations have specific mandates that would reinforce their legal obligation to the ICC, thus influencing countries' decision to sign a BIA? Have they organised meetings relevant to the issues of the BIAs, thereby forming a coalition on deterring members from signing them? Lastly, what accounts for the fact that some members of these organisations have signed BIAs while others have not? Statements from personal interviews, communiqués, mandates and reliable news sources are used to determine whether regional organisations exert an influence on a country's decision to sign a BIA. Not unlike regional organisations, civil society, NGOs and the media are also important in mobilising public opinion and mobilising government entities into making decisions.

3.2 Civil society, non-governmental organisations and the media

According to Almeida:³⁸

NGOs have learnt that . . . educating and mobilising public opinion provides leverage to influence policy decisions of states. The strategy used domestically is to target key actors in the government and members of parliament. Internationally it is to use every opportunity available to work within the framework of the UN and to place the establishment of the ICC on the political agenda of world leaders.

Civil society, NGOs and the media have had an impact on governments concerning the BIAs. For example, NGOs in Africa have offered workshops and/or mandates in support of the ICC of which the seven countries are members. These workshops have been instrumental in training officials on the issues and workings of the mechanisms of the ICC and BIAs. The workshops have also encouraged and involved civil society

³⁷ A Stein 'Co-ordination and collaboration: Regimes in an anarchic world' in S Krasner (ed) *International regimes* (1983) 116.

³⁸ I Almeida *Non-governmental organisations and the International Criminal Court* (date unknown) 63.

participation in engaging with governments to ratify and implement legal instruments important to the promotion and protection of human rights. Also, journalists, scholars and representatives of the African and US government involved in BIA issues have had a remarkable influence on ordinary citizens and local governments by educating them through the media on BIA basics. For example, the Kenyan media has been at the forefront of encouraging robust debate on both sides of the argument through commentaries such as those put forth by former US Ambassador to Kenya, William Bellamy, legal commentators such as Godfrey Odongo, members of parliament and the public. Television has also been an outlet for debates, especially in the case of Benin. Hence:

Hypothesis 2: The countries refuse to sign a BIA because they are under pressure from civil society, NGOs and the media that oppose signing a BIA.

Civil society and NGOs consist of a group of persons and/or a network of organisations that represent other persons and organisations in their communities concerning cultural, ideological or political issues. Pressure within civil society and NGOs represent the influence that these groups have on their respective governments concerning the BIA issue. This factor will be analysed by examining the influence of civil society and NGOs. Specifically, what steps have they taken and how significant has their influence been concerning the BIAs? Also, what impact has the media had on educating the public and alternately, influencing government decisions concerning the BIA issue? A third issue concerns the legal realm, surrounding the BIA itself, the ICC and constitutional statutes and existing international treaties of which these states are members.

3.3 Legal issues

While theories vary, there is a general understanding among international lawyers that states act within two realms: the external, where they are members of the international community, and the internal, where they exercise sovereignty over matters within their own territories. One consequence of this division is that international law generally leaves each state to give its own domestic effect to treaty obligations. In this respect, some states follow a 'monist' approach to international law. That is, international law and domestic law form a single body of jurisprudence governing internal affairs. Once ratified, treaties are regarded as self-executing or directly applicable, and they automatically have the force of law. Others adopt a 'dualist' view. They see international law as quite separate and distinct from domestic law, requiring an act of domestic legislation in addition to ratification before international norms become binding nationally. The legislation becomes the sole legal authority in the state. In this regard, African states vary widely in how they give effect to treaty commitments at home. So what happens when a court must choose between a treaty

provision and national law? One possible resolution is a constitutional provision giving treaties superior status over domestic law.³⁹ Many African constitutions incorporate such a provision, including those of Benin, Mali and Niger.

Certain governments in Africa have declared openly that they believe signing a BIA would violate their obligations as state parties under the Rome Statute. This is especially true concerning South Africa, a dominant power in the region, which has been very vocal in espousing its reluctance on signing a BIA which it believes would undermine the ICC. Another example is Benin, which originally sent the BIA to the Supreme Court for a legal analysis in order to get feedback on whether the BIA was consistent with domestic legislation per their obligation under the Rome Statute. Also, another trend within legal obligation includes the issue of accountability for human rights violations. The strong belief of African leaders as to the success of the ICC acting as a vehicle to end impunity and therefore increase the chance for regional stability is valid and one issue that should not be neglected.

There are a few more factors that may be less significant under legal obligation that we believe need to be discussed and that may contribute to whether a country signs a BIA. It should be mentioned here that these are personal opinions and are not quotes from government officials, scholars or journalists. Legal principles involving state obligations under the Rome Statute also include the issue of ICC judges elected from Ghana, Mali and South Africa to sit on the ICC bench. It serves to reason that any country that has a judge on the ICC bench would not do anything to undermine the functions of the Court. In this respect, we will analyse why Ghana chose to sign a BIA in spite of the fact that it has a judge on the ICC versus why Mali and South Africa refuse to sign a BIA. Another factor that might influence the legal principle is the International Criminal Tribunal for Rwanda (ICTR), which has its seat in Tanzania. Tanzania's relationship as the home of the ICTR falls under useful determinants in signing a BIA. A common sense approach is used regarding this issue because of the human rights issues that arise from being the host of the ICTR and because of the Tanzanian Embassy bombing (terrorism). In this respect, Tanzania has more than enough reason to refuse a BIA on the grounds of its history. It is also useful to explore why Rwanda signed a BIA and Tanzania has not relative to the ICTR. Hence:

Hypothesis 3: Based upon domestic jurisprudence, these countries refuse to sign a BIA because they believe it will violate their obligations as state parties to the Rome Statute and the Vienna Convention on the Law of Treaties.

³⁹ A Angwenyi & C Briggs 'How to ensure the judiciary enforces treaty obligations' African Centre for Technology Studies http://www.briggslawcorp.com/articles/Innovations_article.pdf (accessed 3 July 2005).

Common domestic jurisprudence as it applies to the legal factor means the application of foreign law to domestic law. This factor will be tested using comments from country officials, legal opinions from domestic courts and interviews with African journalists, law scholars and ICC experts. The data obtained for the case of Ghana and Rwanda are quite valid as it is derived from African news sources, scholarly writings and communiqués. The fourth and final issue concerns the much-examined and debated decision to maintain state sovereignty.

3.4 Sovereignty

One of the oldest factors concerning a state's decision to honour certain legal instruments is whether the state believes the instrument or the request in itself violates a nation's sovereignty. A common refrain popularly espoused about treaties is that they surrender national sovereignty and therefore represent a threat to a country's interests. Accordingly, the right to enter into a treaty and be legally bound by it is a vital aspect of any nation's sovereignty. Kilby discusses the issue of political sovereignty within the realm of aid. Although his essay is structured around official international aid, we have applied it to the bilateral aid relationship, since aid is at stake and weighs upon a country's decision to sign a BIA. Stressing the importance of the territorial domain and domestic policies of a sovereign state, he explains:⁴⁰

Any action that directly or intentionally threatens the integrity of the state or the welfare of its citizens is prohibited . . . The duties of the aid donor appear to require aid conditionality that conflicts . . . with respect for recipient state sovereignty . . .

Alternately, Herbst, in his influential study, entitled *States and power in Africa*, concludes that:⁴¹

African nations are still extremely insecure about their sovereignty because they do not exercise authority across their territories. Indeed, African nations jealously guard their sovereignty because it is so critical to the exercise of power and have consistently refused to implement arrangements like the European Union's that diminish the authority of states.

Hence:

Hypothesis 4: The countries refuse to sign a BIA because they believe the request by the US to sign a BIA violates state sovereignty.

In examining this factor, we will proffer statements from country officials, scholars and journalists who have stressed the importance of national sovereignty as a major issue in a country's refusal to sign a BIA. In sum, the following factors will be analysed in this study:

⁴⁰ C Kilby 'Aid and sovereignty' (1999) 25 *Journal of Social Theory and Practice* 84.

⁴¹ J Herbst *States and power in Africa* (2000) 234.

- Factor 1: An alignment and/or obligation to regional organisations;
- Factor 2: Pressure from civil society, NGOs and the media that oppose signing a BIA;
- Factor 3: Based upon domestic jurisprudence, the BIA would violate countries' obligations as state parties to the Rome Statute and the Vienna Convention on the Law of Treaties;
- Factor 4: The BIA violates state sovereignty.

The majority of countries in Africa need aid. However, aid does not seem to be a factor for deciding whether the seven countries in this study sign a BIA, thus, the need for other factors to be examined. The following section examines these factors in detail.

4 Data analysis and discussion

Hypothesis 1: The seven countries refuse to sign a BIA out of an alignment and/or obligation to regional organisations.

Regional organisations often unite when supporting certain issues, thereby forming a coalition on deterring neighbouring states from doing what is against their interests; especially if the organisation in question has a member mandate concerning a foreign policy issue at stake, then all things being equal, it would seem to hold true that countries would refuse to sign a BIA. Consistent with liberalism in that states may co-operate through internal mechanisms and bargaining, African countries have used regional organisations to their advantage; although it is obvious that not all countries within Africa have abided by regional organisation mandates. Regionally, at least 16 networks and organisations have been created in various African countries to support the ICC campaign.⁴²

Regionally, ECOWAS has always been highly involved and committed in the ICC ratification process by attending the early workshops available by ICC NGOs.⁴³ For example, in January 2002 in Abidjan, Côte d'Ivoire, ECOWAS and the ICRC co-hosted a seminar on the ratification and implementation of the ICC Statute. The meeting observed that all ECOWAS member states are party to the 1949 Geneva Convention and their additional Protocols of 1997, and that these treaties require state parties to adopt national implementing measures in respect of the Geneva Convention and the repression of grave breaches of international humanitarian law based on universal jurisdiction.⁴⁴

⁴² See CICC Key Networks 'Africa country information' <http://www.iccnw.org/?mod=regionalnetworks®ion=1> (accessed 31 March 2007).

⁴³ Human Rights Watch 'Special issue and campaigns for the ICC: World Report 2002' <http://www.hrw.org/wr2k2/contents.html> (accessed 12 April 2005).

⁴⁴ BC Olugbuo 'Implementation of the Rome Statute of the ICC in Africa: An analysis of the South African legislation' (2004) 1 *Eyes on the ICC* 197-194.

In addition, there is evidence to substantiate that external relations have played a big part in motivating and educating African states on the workings of the ICC in general. For example, Canada is one of the largest donors to ECOWAS and one of the strongest proponents of the ICC.⁴⁵ Canadian justice officials, at a meeting with ECOWAS members in Abidjan, Côte d'Ivoire in January 2002, advised the West African states on the implementation of the Rome Statute. Participants agreed that political capacity exists in most ECOWAS communities to work towards a smooth transitional process in implementing domestic legislation. All participants drafted a plan of action based on a common strategy to collaborate with governments to further the ICC campaign in the region.⁴⁶

South Africa also wields enormous influence in the southern region of Africa and has been a leader of the 'like-minded group' of more than 90 states, which seeks to form an ICC with strong and independent powers.⁴⁷ It has played an important role in the establishment of the ICC. Delegations from Lesotho, Malawi, South Africa, Swaziland and Tanzania had participated in the effort to establish the ICC from as early as 1993. A number of consultative meetings were held between 1995 and 1997 to consider the possible implications and benefits arising from the establishment of the ICC. Additionally, on 14 September 1997, legal experts from the SADC states adopted the 'Principles of Consensus' in Pretoria and later issued a 'Common Statement' which subsequently became the instruction manual for SADC's negotiations during the Rome Conference in 1998.⁴⁸ Approximately one year after the Rome Conference in 1998, the members of SADC assembled a workshop in Pretoria to develop legislation intended to address all of the members' domestic concerns with ratifying the Rome Statute and to prompt its members (Lesotho, South Africa and Tanzania) to co-operate on advancing its causes, thereby showing the importance of international and regional co-operation for the future of the ICC.⁴⁹

Furthermore, the Pretoria Statement adopted by the delegates of the SADC states lists three elements of which 'legal principles' play a role in their decision to abide by the Rome Statute and its provisions: (1) the importance of safeguarding the integrity of the Rome Statute; (2) affirming their desire to work together as SADC states; and (3) acknowl-

⁴⁵ Human Rights Watch *The status of ICC implementing legislation*.

⁴⁶ 'African countries stress importance of national implementation' (2002) 20 *ICC Monitor* 1 5.

⁴⁷ Human Rights Watch *Rights group praises South Africa for stand on International Criminal Court* 15 June 1998.

⁴⁸ Olugbuo (n 44 above) 192-193.

⁴⁹ Pretoria statement of common understanding on the International Criminal Court adopted by the delegates from the SADC states at the Conference on the International Criminal Court, Pretoria 5-9 July 1999 <http://www.iccnw.org/publications/monitor/12/monitor12.199908.pdf> (accessed 2 May 2005).

edging the important role played by the SADC countries in the adoption of the Statute.⁵⁰ Additionally, during the treaty negotiations for the ICC in Rome in 1998, South Africa, a democratic leader in the region, along with other states from the SADC, played an essential role in thwarting the efforts of some major powers to weaken the Court. The strong united support for the ICC from SADC nations, which South Africa helped to forge, was critical to the successful adoption of the Rome Treaty in the face of strong opposition from the US.⁵¹ It openly opposed the invasion of Iraq by the US and has been verbally dominant in its approach to the BIA issue. Alternately, Lesotho, Namibia and Tanzania are all SADC states, not to mention that they were regarded as frontline states in the ending of apartheid in South Africa. Lesotho is surrounded geographically by South Africa and economically dependent upon it. Additionally, its internal affairs are strongly influenced by South Africa. South Africa and Namibia also have a very long historical link in that Namibia, being formerly South West Africa, is largely economically dependent upon South Africa. This commonality between the three could reinforce the stance that their respective governments have taken on the BIA issue. According to Thuita Mwangi, former Political Affairs Officer in Kenya, '[t]here was an effort to form an East African position on the BIAs, but once Uganda signed a BIA, the issue became moot'.⁵²

However, Uganda is the only country in the East African Community (EAC) trade bloc that has signed a BIA with the US.⁵³ In addition, the ACP-EU Joint Parliamentary Assembly met in Brazzaville, Republic of Congo from 31 March to 3 April 2003. At this meeting, the assembly specifically addressed the incompatibility of the Rome Statute with the BIAs and its relationship with the ACP-EU member states:⁵⁴

- (4) recognises that the agreements proposed by the US are contrary to the Rome Statute and the treaty commitments of the EU member states;
- (8) Expects the EU and ACP governments and parliaments to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute; considers therefore that ratifying such an

⁵⁰ As above.

⁵¹ Human Rights Watch 'South Africa praised on International Court: Pretoria becomes 23rd state to ratify War Crimes Tribunal' New York, 27 November 2000.

⁵² T Mwangi 'Relevance of ICC to Kenya: Interpretation of article 98 to the Rome Statute' Kenya National Commission on Human Rights The Forum on the ICC and African Court on Human and People's Rights 27-30 October 2004. Follow up on article: Phone interview with author July 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

⁵³ F Oluoch 'Kenya on collision course with ICC' *The East African* 25 April 2005 <http://www.nationmedia.com/EastAfrican/25042005/Regional/Regional2.html> (accessed 27 April, 2005). However, Burundi and Rwanda, who will become members of the EAC in July 2007, have both concluded BIAs.

⁵⁴ ACP-EU Joint Parliamentary Assembly 'Resolution of the International Criminal Court (ICC)' ACP- EU3560/03/fin.

agreement is incompatible with membership of or our association with the EU or the ACP-EU Joint Parliamentary Assembly.

Unfortunately, out of the number of member states in the aforementioned organisations, more have signed BIAs than not. Although organisations may entertain the notion of a mandate concerning a certain foreign policy issue, the states themselves, if they are not held to a mandate, may feel obliged to go along with the US request to sign a BIA. Thus, the mandates of organisations within Africa have not had an overwhelming impact concerning the BIA issue, unlike the EU, which at one point entertained the idea of membership contingent upon not signing a BIA, thus another reason why countries within the African region may feel less hesitant about complying with the US request to sign a BIA. We must therefore entertain the notion of additional factors.

Hypothesis 2: Countries refuse to sign a BIA because they are under pressure from civil society, NGOs and the media that are against signing a BIA.

NGOs, civil society and the media educate and mobilise public opinion, thereby providing leverage in order to influence policy decisions of states. One senior official of a small West African country was recently surprised that the US was using tremendous pressure to approach his country, which has never been tied to any military co-operation with Washington and for which there is almost no possibility of troop presence.⁵⁵ To address this issue, a number of NGOs have worked with countries in order to speed up the implementation of domestic legislation concerning the ICC. There have been workshops held in Burundi, DRC, Nigeria and Tanzania addressing legislation, draft implementation and human rights issues. Meetings were held in countries in all regions, illustrating the importance placed on universal acceptance of the ICC.⁵⁶

Respectively, the same efforts have taken place in relation to the BIA issue. According to Kambale:⁵⁷

African NGOs are aware of the importance of forming a common strategy to address challenges to ratification and implementation in Africa. Their actions will have to rest on three pillars: the central role of local organisations; good coordination among organisations; and better access to decision-makers.

Furthermore, national NGOs are more familiar with the decision-makers and the political climate, and have a better sense of what strategies will be more effective in each country.⁵⁸ The plan of action of the civil society participants at the recent ECOWAS conference in Abidjan sent

⁵⁵ 'The United States attacks the ICC: Africa must consolidate its resistance' *ICC Monitor* 7 February 2003).

⁵⁶ 'Conferences stress implementation and universal ratification of Rome Statute' *ICC Monitor* 12 February 2003.

⁵⁷ P Kambale 'New momentum and new challenges for Africa's ratification campaign' *ICC Monitor* 6 April 2002.

⁵⁸ As above.

a clear message to the region. Participants decided to make a concerted effort between and within NGOs to involve other civil society representatives. The success of the talks in Niger between the Coalition for the International Criminal Court (CICC), the Lawyers Committee on Human Rights (LCHR), Human Rights Watch (HRW), the media, the Niamey Faculty of Law and the 20 or so national NGOs is a good example of the benefits of increased consultation with civil society.⁵⁹ Regional conferences are always an excellent opportunity for such consultations. They allow the NGOs of several countries of the same region to improve their respective campaign techniques by learning from one another. More direct and restricted meetings on a national level, however, can also be very effective in co-ordinating and raising awareness among civil society participants. This was confirmed at the meeting in Niger when the representatives of the entire national NGO community and of three international NGOs had an in-depth consultation and discussion of the ICC Statute, its mechanisms and potential challenges to practical application.⁶⁰

Tanzania also has a large NGO community that has close relations with the government, while Benin has a very strong human rights NGO presence in their country and is a model in the region concerning the education of civil society regarding ICC legislation and information on the BIA issue. Francis Dako of the CICC emphasises the importance of civil society and NGOs concerning the BIAs.⁶¹

In respect to Benin (that held out for so long), Mali and Niger and their ability to withstand US pressure concerning the BIAs, one main reason can be given for this: The present state of activeness within civil society organisations and NGOs have gone a long way by hampering the inability of the governments in these countries in acceding to the BIAs, even if the governments wanted.

He continues regarding Mali:⁶²

National pride has influenced policies in most African countries in recent times. In the case of Mali, for example, partisan pressures and national pride in not wanting to be stigmatised as a 'puppet government' of the US superpower status, irrespective of whatever economic incentives the US government gives to boost its economy, is, to my understanding, the reason why the Malian government has refused to sign the BIA.

Dako emphasises the importance of NGOs in promoting an awareness of issues related to the ICC:⁶³

⁵⁹ As above.

⁶⁰ As above.

⁶¹ F Dako, ICC Francophone Africa Co-ordinator (Cotonou, Benin), interview with Deborah Cotton 7 June 2005. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

⁶² As above.

⁶³ F Dako 'Benin: A model for co-operation between government and civil society' *ICC Monitor* June 2004.

In December of [2002], a dozen local NGOs created the Benin Coalition for the ICC. . . . Composed mainly of human rights specialists and law practitioners, [they] developed a close collaboration with government experts interested in the ICC process, including officials of the Ministries of Justice and Foreign Affairs. As a result, NGOs have been able to engage in frank dialogues with government institutions. . . . Furthermore, NGOs in Benin also successfully encouraged the government . . . to resist intense pressure from the Bush administration to sign a BIA . . . NGOs urged the government to not vote in favour of UN Security Council Resolution 1422 1487 which concerns the exemption of peacekeepers from non-state parties of the Rome Statute from the jurisdiction of the ICC. The good relationship between civil society and public institutions regarding the ICC is a positive development in Benin and serves as an example for other states in the region and elsewhere.

Additionally, South Africa is unique in that NGOs and civil society have a considerable say in the matters or affairs of government. Indeed, many government officials and Ministers were drawn from NGO ranks. This has meant that the South African government is very responsive to international influence, including the influence of international treaties; human rights treaties included.

There have been two human rights organisations within Namibia that have been instrumental in pressuring the government to not sign a BIA. The National Society of Human Rights (NSHR) urged law makers not to agree to US requests to sign a BIA and the Legal Assistance Center (LAC) backed the Namibian government to reject a request by the US to shield its soldiers from prosecution in the ICC.⁶⁴ Similarly, in Kenya, the National Commission on Human Rights (KNCHR) has been instrumental in educating the public and government concerning the ICC and BIAs. In a forum hosted by the Commission, the former Director for Political Affairs Thuita Mwangi stated:⁶⁵

Article 98 was never intended for use to enact new agreements and Kenya must be commended for standing up to the US purely for the stakes involved in as far as Kenya's role as a regional mediator and for resisting US pressure when it seeks to bully those states that have chosen to stand with the ICC.

In addition, KNCHR has been at the forefront of leading discussions by individuals and civil society on the need for an implementing domestic legislation as soon as Kenya ratified the Rome Statute. KNCHR has the statutory mandate to act as the chief government agent in ensuring that the government complies with its obligations under international treaties and conventions. It is under this mandate that the Commission

⁶⁴ Summary of information on Bilateral Immunity Agreements (BIAs) or so-called art 98 agreements as of 14 April 2006 http://www.iccnw.org/documents/BIADb_Current.xls (accessed 6 May 2006).

⁶⁵ T Mwangi 'Relevance of ICC to Kenya: Interpretation of article 98 to the Rome Statute', KNCHR, The Forum on the ICC and African Court on Human and People's Rights 27-30 October 2004. Note: These are personal opinions and should not be stated as an opinion of the Kenyan government.

has been actively involved in bringing together stakeholders such as government ministries, the judiciary, the police, academics and civil society organisations to ensure that Kenya complies with its international obligations under the Rome Statute. The Commission organised a workshop in October 2004 to raise awareness on the ICC and subsequently facilitated public deliberations on the significance of article 98 of the Rome Statute and the BIAs. Kenya acceded to the Rome Statute on 15 March 2005, which created an obligation to ensure implementation of the Statute in Kenyan national legislation. The International Crimes Bill was published by Attorney-General Amos Wako on 24 March 2005, and states in its Preamble that its objective is to provide for the punishment of international crimes, specifically genocide, crimes against humanity and war crimes, and to enable Kenya to cooperate with the ICC. In July 2005, the Commission organised a workshop attended by government representatives, civil society, both Kenyan and international, and Kenyan and foreign legal experts. Workshop participants reviewed the draft International Crimes Bill and adopted recommendations that would contribute to the development of a final draft that effectively implements the Rome Statute.⁶⁶

The media has also had a great influence in educating and mobilising public opinion on the BIA issue. According to Dako, '[a]mong other activities in Benin, a televised debate was organised to increase awareness of this issue among the public'.⁶⁷ Also, numerous US and African government officials have taken to the newspapers to express their views. In this respect, William Bellamy, the former US Ambassador to Kenya, and Godfrey Odongo, a legal commentator, have been at the forefront of the debate of the BIA in Kenya and in the African region as a whole. Their numerous commentaries have led to a robust debate on both sides of the issues and have invited comments from dignitaries and the public alike in addressing support for countries to remain steadfast in their decision to not sign a BIA.

In sum, numerous influences contribute to a country's stance on the BIA issue: internal and external. Thus, there is not only the pressure to sign a BIA, which a government must consider, but also the enormous pressure not to sign. In this respect, it could be that some governments face a Catch-22 situation: anger the US and appease civil society or *vice versa*. This is very true for those young democracies such as Benin, which had refused to sign a BIA for some time, and Mali, which still faces increased pressure to maintain the status quo. This is where civil society and local NGOs are helpful in that they may assuage the concerns of both parties through education and support, not to mention

⁶⁶ Kenyan National Commission on Human Rights (2005) Report of the Stakeholders Workshop to analyse the International Crimes Bill, March 2005, held in Mombasa, Kenya 14-26 July 2005.

⁶⁷ As above. F Dako Interview with Deborah Cotton, 7 June 2005.

developing stronger ties with government officials, thus influencing decisions concerning foreign policy issues.

The third issue rests within the legal realm of domestic decision-making processes.

Hypothesis 3: Based upon domestic jurisprudence, the countries refuse to sign a BIA because they believe it would violate their obligations as state parties to the Rome Statute and the Vienna Convention on the Law of Treaties.

All of the seven countries have worked vociferously to draft domestic legislation in order for laws to be consistent with the Rome Statute. They have also covered all of the legal aspects of the BIA issue when needed with NGOs, legal scholars and government officials. For example, Benin has been a model when it comes to enacting legislation to cover the Rome Treaty and its model had been followed by various countries in the region. Additionally, Benin sent the BIA to its Supreme Court for a legal analysis and *per* the Court, the violation of obligations under the Rome Statute initially prevented Benin from signing a BIA along with its obligations as a state party to the Vienna Convention on the Law of Treaties (VCLT). The issue of legality seems to be an overriding issue concerning some states' decisions to sign a BIA. For example, according to Dako:⁶⁸

Obviously, certain domestic issues, legal obligations, and alternate aides have obliged some of these countries from signing the BIA. To illustrate this point, we can take the case of Benin. In this country, the primacy of law obliges the Head of State to seek legal opinions prior to acceding to any international agreement. And from the legal opinion issued by the Supreme Court, the government of Benin cannot sign the bilateral agreement proposed by the American government without compromising its obligations under the Rome Statute establishing the ICC. A common stance is that Benin, Mali and Niger are state parties to the Rome Statute and have common domestic legislation that deters them from signing any international agreement that will compromise their commitment to the ICC.

The Supreme Court opinion stipulated that Benin could not sign an agreement which would violate its obligations to the spirit and letter of the Rome Statute because:⁶⁹

(1) General Principles Governing the Implementation of Treaties

It should be recalled that the rule *pacta sunt servanda* affirmed in the Vienna Convention of 23 May 1969, to which Benin is also a party, determines that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith' (article 26). The corollary of this provision can be found in article 18 of the

⁶⁸ As above.

⁶⁹ Benin Supreme Court legal opinion on a bilateral agreement between the United States and the government of the Republic of Benin relative to art 98 of the Rome Statute Establishing the International Criminal Court 3. Note: Thank you to Francis Dako for information concerning Benin.

Vienna Convention which provides that 'a state is obliged to refrain from acts which would defeat the object and purpose of a treaty'.⁷⁰

(2) Specific obligations of Benin to the Rome Statute

Benin ratified the Rome Statute, which imposes obligations such as co-operation with the International Criminal Court; the reach of such obligation would be limited by the draft agreement submitted for signature. Benin cannot go against the Rome Statute by basing itself on the examples of article 98 of the Statute. In the absence of reservations, which article 120 formally prescribes, any agreement which would come into effect following [the ratification of] the Rome Statute can only be interpreted as violating the good execution of its obligations.⁷¹

(3) Regarding the internal order

The Benin Constitution of 11 December 1990 defines the principles of defence of human values as indefeasible; it therefore cannot admit through bilateral agreements provisions that hamper the prosecution of crimes against humanity. Benin cannot sign the bilateral agreement, especially given the fact that it failed to emit any reservations during the ratification of the Rome Statute, pursuant to the provisions of article 124 which stipulate that 'a state which becomes party to the statute can declare, for a period of seven years from its entry into force of the statute, that it will not accept jurisdiction of the Court over the crimes defined in article 8 when it is alleged that such crime was committed on its territory or by one of its nationals'. Furthermore, if the motivations of Benin at the time of ratification have changed in light of new circumstances by virtue of the *rebus sic stantibus* rule, according to which a state can invoke fundamental change of a circumstance to modify the content of its obligations, the government of Benin could then foresee, prior to the signature of the said draft bilateral agreement, an amendment, revision or withdrawal provided for respectively in articles 121, 123 and 127 of the Rome Statute.⁷²

In spite of Benin's strong stance against the BIA, according to Citizens for Global Solutions, 'Benin signed a BIA as it risked losing up to \$250 000 IMET funds for fiscal 2005 and up to \$50 000 IMET funds for fiscal 2006'. In fact, US military aid to Benin is estimated around US \$5 million annually, mostly going to the maintenance and equipment of the regular armed forces of Benin. This constitutes a significant part of the Beninese military budget, estimated to be at US \$27 million

⁷⁰ n 69 above, 3.

⁷¹ n 69 above, 4.

⁷² As above.

annually,⁷³ thus, there was a huge amount of pressure for Benin to sign a BIA. Additionally, in an interview by Deborah Cotton with Ambassador Théodore Comlanvi Loko of Benin in June 2006, Ambassador Loko stated:⁷⁴

Although Benin believed that the US position on the BIA was out of line with the Rome Treaty, a BIA was signed without the knowledge of the Constitutional Court . . . The government of Benin also made an agreement with the US that if a soldier from the US is arrested for war crimes and sent back to the US, then Benin wants evidence of the prosecution.

In lieu of this, the fact remains that Benin is seen as a model for the region, despite the fact that they bowed to US pressure to sign a BIA.

Niger has also determined that its Constitution does not allow it to sign a BIA.⁷⁵ Considering the common domestic legislation between Benin, Mali and Niger, it remains to be seen how long Mali and Niger will hold out. Also, although Nigeria has already signed a BIA, it is now threatening to rescind its signature. For example, after putting pressure on President Olusegun Obasanjo to rescind Nigeria's BIA with the US, the Nigerian senate passed a resolution declaring the BIA null and void. The senate reasoned that⁷⁶

[b]ecause the National Assembly was not consulted when the BIA was signed, it was in contradiction to section 12 of the Nigerian Constitution and therefore null and void.

The implications of Benin signing a BIA without the knowledge of the Constitutional Court and of Nigeria signing a BIA in contradiction of its Constitution is unknown, but does open an avenue for further research.

Alternately, a feeling of legal obligation towards the ICC is discernible in South Africa. If one were to look at the general African record, a feeling of legal obligation towards the ICC is a premise that one can say has shaped Africa's perception towards the ICC. This is motivated by a number of factors: First, Africa, more than any other continent, remains the bloody continent of wars in which atrocities abound. It is to be applauded that many initiatives at different levels are now in place to negotiate peace, forestall or prevent war, and so on. However, the fact is, these wars have had a big influence on the conscience of African governments, which have moved with remarkable speed to be party to the ICC by ratifying the Rome Statute. The motivating factor seems to

⁷³ 'US suspends military aid to Benin' *AFROL News* 4 July 2006.

⁷⁴ Interview by Deborah Cotton with Ambassador Théodore Comlanvi Loko of Benin at the Senior Leader Seminar, Africa Centre for Strategic Studies, Atlanta, Georgia, 11-23 June 2006.

⁷⁵ ND Kristof 'The US's schoolyard bully diplomacy' *The Daily Journal Caracas*, 15 February 2006 <http://www.thedailyjournalonline.com/article.asp?CategoryId=13303&ArticleId=200653> (accessed 15 May 2006).

⁷⁶ Citizens for Global Solutions 'Nigeria's senate wants BIA rescinded; Declares BIA null and void' 17 August 2005 http://www.globalsolutions.org/issues/bia_resource_center/learn/Nigeria (accessed 12 May 2007).

be a desire to say 'no' to crimes within the ICCs ambit (hence legal obligation). This desire to affirm a legal obligation may have filtered into the refusal by a number of African states to water down the ICC's purpose by being a party to the BIAs.

On the other hand, the South African government is very responsive to the influence of international treaties. This extends to their Constitution, as interpreted by an independent Constitutional Court. In effect, this means that the ICC rule of law framework falls into the scheme of a government of democracy, which is receptive to international ideas. There is in place a judiciary, which is ready to question and in some cases veto the executive and/or parliament, which have the hallmarks of independence. These are relevant factors for South Africa's approach to a number of issues. The influence of international law on a number of issues, such as women's rights and domestic legislation, children's rights, restorative justice, and so on, is directly observable in South Africa, even in court jurisprudence, more so than, say, Kenya, where international laws influence a number of issues.

There is also the significance of domestic legislation versus international law. In most anglophone African countries (with an English common law or Roman-Dutch law heritage in their legal system), a system of dualism applies in respect to the application of international law, hence, domesticating legislation is often needed to bring into force international treaties. This may even apply to francophone African countries (with a civil law system) and a monist system where a treaty is not self-executing, like a significant part of the Rome Statute. The record of domestication with regard to general UN treaties, for example the International Covenant on Cultural, Economic and Social Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination Against Women, and so on, has not been very good. However, the ICC treaty seems to be a different case. Domesticating legislation is in place or in the pipeline. What this tells us is that a number of African countries are taking their legal obligation under the ICC treaty seriously. This can be supported further by the premise that Africa had a prominent place in the drafting stage of the Rome Statute (unlike in many other treaties, for example, the Convention on the Rights of the Child that had only one sub-Saharan African state representing the continent). This way, Africa may feel as much a part of the ICC process as the rest of the world. Hence an active participation post-adoption of the ICC treaty as evidenced by ratification, nomination and the election of judges, other officials and ICC meetings.

Kenya also opposed signing a BIA in part because of legal issues. The Law Society of Kenya (LSK) believes that the BIA amounts to double standards. Former Chairperson Tom Ojienda said:⁷⁷

⁷⁷ As above.

The BIA is contrary to international law and would constitute a betrayal of the Kenyan people. The BIA also contravenes article 18 of the VCLT, which states that countries that have ratified a treaty are obliged to refrain from acts that defeat the object and purpose of the treaty.

Mutula Kilonzo, a then nominated Kanu member of parliament, argued:⁷⁸

Kenya should stand firm and only react to good laws given that the US has in the past two decades been perceived as the vanguard of human rights, rule of law, administration of justice and governance. For lawyers and the LSK, the key issue is that signing a BIA with the US could also mean the loss of EU support for any lawyer from Kenya ever getting a job at the ICC as a judge or prosecutor.

At a meeting for the formation of a South Africa-Kenya Bi-National Commission (BNC), both governments rejected what they called 'US intimidation and diplomatic arm-twisting' on the BIA issue.⁷⁹ Additionally, the South African cabinet announced its decision not to sign a BIA with the US, stating that 'South Africa's position in this regard is premised on its commitment to the humanitarian objectives of the ICC and the country's international obligations'.⁸⁰

A few African countries may have other reasons for not signing a BIA through special ties to the ICC. For example, the South African government nominated Judge Navanethem Pillay, President of the ICTR, for election as a judge at the ICC. Alternately, Mali nominated Judge Fatoumata Dembele Diarra, who served as *ad litem* judge in the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁸¹ It serves to reason that any country that is a state party to the ICC and has a judge on the ICC bench would not do anything to undermine the functions of the Court. Ghana, who also has a judge on the ICC bench, did not sign a BIA, but instead received a waiver from the US. This waiver means that Ghana is exempt from ratifying a BIA and its military aid would not be affected. It did, however, sign an executive agreement stating that it would not extradite US nationals to the jurisdiction of the ICC.⁸² In addition, at a meeting on the ICC and Africa in 2003, the Minister of Foreign Affairs of Ghana, the Honorable Nana Akufo-Addo stated:⁸³

⁷⁸ As above.

⁷⁹ As above. Summary of information on Bilateral Immunity Agreements (BIAs) or so-called article 98 agreements as of 28 June 2005.

⁸⁰ D Pressly 'We'll go it alone, SA tells US' news24.com 24 July 2003 http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1392282,00.html (accessed 5 March 2005).

⁸¹ International Criminal Court homepage 'Judge Biographical Notes'.

⁸² Presidential Determination No 2003-27, Waiving prohibition on United States military assistance.

⁸³ Africa Legal Aid (AFLA) 'The International Criminal Court and Africa' Accra, Ghana 24-25 October 2003.

Despite the various conflicts that continue to bedevil the continent, the masses of people continue to support the rule of law. The signing of article 98 agreements with the United States is not a reflection of double standards but rather a continuation of the United States policy of not supporting the Court. The emphasis should be to make the rule of law effective at the national level.

It is safe to say that, although Ghana signed an executive agreement, it does not take away the concept of the rule of law inherent to the ICC.

Although we did not find any concrete evidence linking Tanzania's not signing the BIA to the ICTR, it stands to reason through common sense that it might have some effect on the government's decision to abide by its principles under the Rome Statute. If anything, the ICTR has shown that the presence of the Court raises the awareness of the importance and value of human rights and serves as a deterrent for the commission of war crimes. The government of Tanzania is frequently called upon to mediate between its neighbours. For example, it served a crucial political role, serving as the seat for the Arusha peace talks aimed at ending the ethnic bloodshed in Burundi.⁸⁴ In addition, Desire Assogbavi, an Outreach Liaison for the CICC, stated that 'Tanzania would not sign a BIA because it finds the views by the US towards the ICC confusing considering the US support for the ICTR'.⁸⁵ As for the ICTR, it is important to acknowledge that Rwanda is not a party to the ICC, although its 1994 genocide resulted in the creation of the ICTR. It is also common knowledge that the current Rwandan government has been very dissatisfied with the slow pace of trials and the bureaucracy involved in the ICTR and thus did not sign on as a party to the ICC. Thus, the Rwandan government signed a BIA.

In sum, the legal obligation that some countries in Africa feel towards the ICC is very strong and not surprising, considering the comments put forth by various experts and officials. It is possible that, although some countries signed a BIA because of aid, they still feel strongly towards the ICC. This can be seen by the countries that currently have situations pending before the court (Sudan excluded). It is pretty much a foregone conclusion that, if a country cannot handle its own legal affairs, then it will most likely refuse to give up aid that would benefit it. In conclusion, it is our opinion that a legal obligation to the ICC is a powerful factor for whether the seven countries in this study sign a BIA. The fourth and final factor concerns the issue of sovereignty.

Hypothesis 4: The countries refuse to sign a BIA because they believe that the request by the US to sign a BIA violates state sovereignty.

⁸⁴ As above. USDOS, Tanzania.

⁸⁵ D Assogbavi 'Outreach liaison for Africa and Europe' CICC headquarters, New York July 2004. Phone interview by Deborah Cotton. Please note that these are personal opinions and do not necessarily reflect the opinions of government officials.

According to Dako, sovereignty, more than other foreign policy issues, is of relevance when it comes to whether certain countries sign a BIA.⁸⁶

Regarding the issue of foreign policy differences between the US, Benin, Mali and Niger, they are infrequent: There have been no major disputes on record that would warrant such a strong anti-US stance as per the BIA issue. On the average, the US government has enjoyed good bilateral and multilateral co-operation with all three countries over decades. In our opinion, the government and people of Niger refuse to sign the BIA simply because they believe that any international agreement should serve her interest to the fullest, and also respect her sovereignty without bias.

In Kenya, government officials said that the US move showed a lack of respect for Kenya's sovereignty. Kenyan lawmaker Paul Muite reasoned:⁸⁷

The US can keep their dollars as long as they respect our dignity. It is not only Americans who can train our military personnel, and it is time we started looking at the European Union, China, South Africa or even Japan for such training.

According to then Director of Political Affairs, Thuita Mwangi:⁸⁸

Kenya does have some point of leverage with the US in that it is the site of the regional headquarters and has the largest US Embassy in East Africa, co-ordinating activities in nine other countries in the region.⁸⁹

David Musila, the Chairperson of the Liaising Committee of Parliament in Kenya, also stressed dissatisfaction with the US stance on the BIAs: Musila recalled the 1980s incident of a US soldier who killed a Kenyan woman but got off with a Sh500 fine and was repatriated back to the US.⁹⁰

We should not allow Kenya to be treated like that again. Let the Americans keep their money and we will protect our country's sovereignty.

Lesotho also cited sovereignty as an issue regarding the BIA. According to a statement made by His Excellency Professor Lebohng K Moleko:⁹¹

Lesotho favours an approach that would take into consideration the concerns of those who are still doubtful of the ICC, with a view to accomplishing

⁸⁶ As above. F Dako Interview with Deborah Cotton, 7 June 2005.

⁸⁷ 'Kenyans indignant over US pressure for immunity treaty' *Xinhua News* 31 May 2005 http://news.xinhuanet.com/english/2005-05/31/content_3028095.htm (accessed 19 June 2006).

⁸⁸ President Mwai Kibaki appointed Thuita Mwangi as new Permanent Secretary for Foreign Affairs of Kenya in 2006.

⁸⁹ As above.

⁹⁰ E Miring'uh 'MP's move to block state on ICC treaty' *The East African Standard* 4 June 2005.

⁹¹ His Excellency Professor Lebohng K Moleko Statement by Permanent Representative of Lesotho to the United Nations, at the first meeting of the Assembly of State Parties to the Rome Statute of the ICC 9 September 2002.

the universality of the Court. In a similar vein, Lesotho believes that the rights of states to sovereignty cannot be allowed to justify impunity and to compromise humanity's best hope for justice.

However, one problem with the sovereignty argument is that it does not explain why so many African countries have signed BIAs, while so few have not. Morgenthau adds a different dimension to the argument on sovereignty in that 'sovereignty is not freedom from legal restraint'. He explains:⁹²

The quantity of legal obligation by which the nation limits its freedom of action does not as such limit its sovereignty. The oft-heard argument that a certain treaty would impose upon a nation obligations as onerous as to destroy its sovereignty is, therefore, meaningless. It is not the quantity of legal restraints that affect sovereignty, but their quality. A nation can take upon itself any quantity of legal restraints and still remain sovereign, provided those legal restraints do not affect its quality as the supreme law-giving and law-enforcing authority.

Since so many African countries have signed BIAs, the sovereignty argument seems weak. After all, countries are free to reject any type of bilateral agreement. It seems more likely that the strategy used to get the BIAs signed could be of importance. It could be what some countries are referring to when they put forth the sovereignty argument. In other words, its not so much what you do but how you do it. For example, whom the US government sends to represent them and the diplomatic skills needed to persuade a country to acquiesce to a particular foreign policy issue is of relevance. For example, Colin Powell's powers of persuasion are different from John Bolton's (both have been responsible for the BIA issue at times). Later, Constance Newman, Head of African Affairs at USDOS, who is more familiar and sensitive to African politics, entered the fray. Currently, Robert G Loftis, a 26-year Foreign Service veteran and former ambassador to Lesotho, is currently the Senior Advisor for Security Negotiations and Agreements and is in charge of the BIAs.⁹³ Thus, whom the US sends diplomatically to make BIA arrangements is an important factor.

Of course, the other side to the sovereignty argument pertains to that argued by Kilby in that:⁹⁴

The duties of the aid donor appear to require aid conditionality that directly conflicts with respect for recipient state sovereignty in that it conflicts with the duty of the state to improve the welfare of its citizens, while at the same time preserving state sovereignty.

Kilby makes a crucial argument and one that may deserve closer attention provided there are no other factors than aid that would influence a

⁹² CJ Barker *International law and international relations* (2000) 42.

⁹³ US Department of State Office of Security Negotiations and Agreements (PM/SNA) <http://www.state.gov/t/pm/c17194.htm> (accessed 14 May 2007).

⁹⁴ As above. Kilby (n 40 above) 17.

country's decision to forego a BIA. In this respect, a government may feel that their duty to provide for citizens through aid is more powerful than the issue of state sovereignty.

Overall, the comments by government officials citing the sovereignty issue seem valid. However, the real question here is whether the issue is legal sovereignty, political sovereignty or both. We realised during the course of the research that sovereignty means different things to different people. No comment has been specific enough to conclude sufficiently that sovereignty is the most important factor concerning the BIA issue when so many other African countries have signed BIAs and not stressed the sovereignty factor. But it does seem so for the seven countries in this study, particularly Kenya and Lesotho. Perhaps, as reasoned by Kilby, improving the welfare of citizens is more important than the issue of sovereignty.

5 Conclusion

The degree of co-operation with respect to signing a BIA has been charted within the constraints imposed by regional organisations, NGOs, civil society, the media, a legal obligation to the ICC and state sovereignty. They remain important explanations of the ability of these states to refuse to give in to signing a BIA. Our findings sustain an approach very sensitive to the role of regional organisations.

Institutions are important within the African region. They create an atmosphere of co-operation whereby common interests are realised and whereby groups may mobilise in order to promote their agendas. This is evident regarding NGOs and civil society, citizen involvement in ICC meetings and workshops designed to facilitate the implementation of the Rome Statute, individual governments' work involving domestic legislation, and educating the governments of countries on the BIA issue. The legal obligations that all of the countries stress concerning the ICC is very relevant in that governments have used domestic legal institutions to examine the legality of the BIA in relation to their obligations under the Rome Statute and the VCLT. In the example of Benin early on, and in South Africa, this move had an effect on their decision regarding the BIA. A legal obligation also falls in line with and is indicative of how African governments weigh their decisions accordingly and analyse what benefits they may obtain by the strategic decisions they make.

The stance that South Africa and Kenya have taken is of relevance in the authors' view. Both governments have remained strongly committed to the ICC through the implementation of domestic legislation and their vocal opposition to the BIA issue via outreach programmes to all countries in Africa. Their goal and payoff have been to enforce their obligations under the Rome Statute regardless of the pressure from the US. In this respect, Kenya and Lesotho's governments have also

remained vocal and strengthened their ability to keep the US at arm's length through opposition to the BIA in the name of state sovereignty.

Individually, the most important variable that allows these seven countries to withstand pressure from signing a BIA seems to be a strong belief towards a legal obligation to the ICC. Although other countries that have signed the BIAs feel strongly about the ICC, there are obviously other mitigating factors such as aid and US involvement in the region, which would explain why they signed a BIA while at the same time supporting the ICC and its mission. The variables of judges and the ICTR alone may present a weaker argument, but when taking into account the statement of the government of Ghana on aid and the relevance of Rwanda's view toward the ICTR, the legal factor is strengthened concerning Mali, South Africa and Tanzania.

In addition, the regional organisations of ECOWAS and the SADC concerning mandates relative to the ICC and BIAs are powerful, yet do not explain why most of the countries in these organisations signed a BIA. The argument of sovereignty is a little elusive at best, as certain aspects of sovereignty are bound to be relinquished with any type of agreement between countries. In our opinion, the main issue lies within the coercive pressures put on a government and their ability or decision to stand up or back down on certain issues. However, the ability to remain firm in the face of pressure from the US is strengthened by the support of external allies, such as the ICC, human rights NGOs, law groups and the media. Moreover, there has always been a debate concerning sovereignty and legal issues, which may be useful for another study. A further study might also examine the political and legal implications of signing a BIA without the knowledge of the Constitutional Court, in contradiction of the constitution or by the executive without permission from parliament.

This research set out to explain the contributing factors that enable seven African countries to withstand pressure from the US by not signing a BIA. The ability of strong states to coerce weaker states into certain foreign policy objectives is nothing new. Moreover, the foreign policy decisions of weaker states concerning the BIA issue are interesting and relevant, not to mention overlooked in the literature. Although there is existing literature concerning the legality of the BIAs, there has been little attempt to analyse the behaviour of certain regions in response to the BIA issue, with the exception of Wylie's study on the Caribbean states and Boduszyński and Balalovsk's study on Croatia and Macedonia.⁹⁵ Thus,

⁹⁵ L Wylie 'Prestige versus pressure over the International Criminal Court: Response of the Caribbean states' Paper presented to the Annual Meeting of the Canadian Political Science Association University of Manitoba, Winnipeg, Manitoba, 2-5 June 2004; MP Boduszyński & K Balalovska 'Between a rock and a hard place: How the US-EU battle over article 98 played out in Croatia and Macedonia' Occasional Paper published by East European Studies at the Woodrow Wilson International Center for Scholars in Washington DC, No 71 September 2003.

this study contributes to the literature concerning Africa's response to the BIA issue. The interest in countries that do not sign a BIA is of importance as it helps to understand why and how weaker countries refuse to give into pressure from a stronger power. Although theories may provide explanatory power towards the understanding of state behaviour, specific variables are more instructive when examining why and how states behave as they do. The strong commitment of the seven countries in this study reinforce how co-operation and facilitation may be enhanced by taking advantage of institutional structures and mechanisms through regional and external state power relations.