

<b>Institution:</b> University of Oxford		
<b>Unit of Assessment:</b> 18 – Law		
<b>Title of case study:</b> Clarifying the Jurisdiction of the International Criminal Court		
<b>Period when the underpinning research was undertaken:</b> 1 September 2004 – December 2020		
<b>Details of staff conducting the underpinning research from the submitting unit:</b>		
<b>Name(s):</b> Professor Dapo Akande	<b>Role(s) (e.g. job title):</b> Professor of Public International Law	<b>Period(s) employed by submitting HEI:</b> 01 September 2004 – present
<b>Period when the claimed impact occurred:</b> August 2013 – September 2019		
<b>Is this case study continued from a case study submitted in 2014?</b> N		
<p><b>1. Summary of the impact</b> (indicative maximum 100 words) The International Criminal Court (ICC) is the only permanent international criminal tribunal to date. It has jurisdiction over the most serious international crimes, namely genocide, crimes against humanity, war crimes and the crime of aggression. Akande's research on the various ramifications of state consent within the ICC's legal framework has brought significant change to the Court's judicial and prosecutorial activities and decisions regarding 1) the immunity of senior state officials; 2) bringing into force the crime of aggression and 3) the classification of armed conflict and the scope of war crimes. It has also directly shaped the work of ICC prosecutors and judges, courts in ICC party states, and a major international NGO (International Committee of the Red Cross).</p>		
<p><b>2. Underpinning research</b> (indicative maximum 500 words) Akande's research has sought to explain the basis on which the International Criminal Court exercises its jurisdiction and the legal limits to the exercise of such jurisdiction over the nationals of states that are not party to the Court's Statute. Akande's body of research at the University of Oxford has looked at how the principle of state consent informs several contentious aspects of the ICC Statute.</p> <p><b>Immunities of state officials:</b> Akande's work has focussed on the longstanding tension between securing accountability for international crimes and the immunities accorded to senior state officials which safeguard the independent exercise of state functions. He argued that the key to reconciling those two fundamental interests lies in the principle of state consent. In a series of articles [R1, R2], Akande asserted that while personal immunities conferred upon heads of state, heads of government and ministers of foreign affairs applies under customary international law even in respect of the most serious international crimes, those immunities could be lifted by the United Nations (UN) Security Council explicitly or by necessary implication when referring a 'situation' to the ICC for prosecution. Since virtually all states in the world have consented to the exercise by the Security Council of the power to create international criminal tribunals, and, significantly, to displace immunities, the ICC Statute's provisions on the non-applicability of immunities would apply, even to States that were not party to the Statute, on the basis of the state's consent to the UN Charter. This interpretation, disseminated in a 2009 article [R1], became commonly known as the 'Akande approach' or the 'Security Council route' to immunities and was adopted in a series of ICC decisions relating to the prosecution of the Sudanese President.</p> <p><b>Crime of aggression:</b> After the drafting of amendments to the ICC Statute concerning the crime of aggression, controversy remained as to who could be subject to prosecution for this crime. In a seminal working paper [R3] and a subsequent journal article co-authored with Professor Antonios Tzanakopoulos (Faculty of Law, University of Oxford) [R4], Akande argued that, even</p>		

when activated, the crime could *not* be applied to acts committed on the territory of or by nationals of non-ratifying states parties, to the extent that these had *not* consented to the amendments. Nevertheless, a referral of the situation to the Court by the UN Security Council would supply the necessary consensual basis to prosecute crimes of aggression committed by nationals of non-ratifying states.

**War crimes and the classification of armed conflict:** Under the law of armed conflict, conflicts may either be international or non-international and this determines which body of law applies to that conflict, including which war crimes are applicable in that conflict. In **R5**, Akande argued that central to classifying armed conflicts marked by foreign military intervention is the consent of the state on whose territory the hostilities occur. He concluded that if the territorial state does *not* consent to the foreign intervention, the conflict must be classified as international because there is an attack *against* the territorial state.

### 3. References to the research (indicative maximum of six references)

[R1] (Journal article) Akande D, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333, <http://doi.org/10.1093/jicj/mqp034>

[R2] (Journal article) Akande D and Shah S, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (2010) 21 *European Journal of International Law* 815, <http://doi.org/10.1093/ejil/chq080>

[R3] (Working paper) Akande D, 'Prosecuting Aggression: The Consent Problem and the Role of the Security Council' (2011) *Oxford Legal Studies Research Paper* No 10/2011, DOI <http://dx.doi.org/10.2139/ssrn.1762806>

[R4] (Journal article) Akande D and Tzanakopoulos A, 'Treaty Law and ICC Jurisdiction over the Crime of Aggression' (2018) 29 *European Journal of International Law* 939 <http://doi.org/10.1093/ejil/chy059>

[R5] (Book chapter) Akande D, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Wilmshurst (ed), *International Law and Classification of Conflicts* (2012), DOI <http://dx.doi.org/10.2139/ssrn.2132573>

### 4. Details of the impact (indicative maximum 750 words)

#### Reinforced the validity of ICC judgments relating to non-immunity of Omar al-Bashir

Akande's approach to the interpretation of the ICC Statute's provisions on immunities of state officials [R1, R2] has provided a key supporting rationale for the ICC decision that Sudan's (now-former) President, Omar al-Bashir was not entitled to immunity from arrest and prosecution. Al-Bashir is accused of committing genocide and crimes against humanity in the Darfur region, predominantly against three ethnic groups: Fur (approximately 894,000 people in Sudan), Masalit (approximately 440,000 people) and Zaghawa (approximately 2,370,000 people): the initial arrest warrant for al-Bashir was issued by the ICC in 2009, whilst he was still a sitting head of state. Sudan is not a state party to the ICC Statute so the legality and validity of his arrest was under significant scrutiny, and in some cases, disagreement from both party and non-party states. In April 2014, the ICC's Pre-Trial Chamber held, along the same lines as the arguments expounded in R1, that by referring the situation of Darfur (Sudan) to the ICC, the UN Security Council had necessarily applied the ICC Statute to Sudan [C1], meaning the Statute would operate to remove any immunities for al-Bashir. The foundational role of Akande's work on this issue was accepted by the Supreme Court of South Africa in a case following an official visit to South Africa by al-Bashir in June 2015. Finding that this visit was unlawful, the Court cited R1 when ordering the executive authorities of that country to cooperate with the ICC in arresting Bashir. The court's decision in March 2016 [C2] stated: 'The Government [of SA] called these principles [of state immunity] in aid in support of its position that President Al Bashir was immune from arrest and surrender in terms of the Implementation Act. It cited the authoritative

*statements by the International Court of Justice (ICJ)... the ICJ said (para 58) that it had examined State practice, including national legislation and decisions of higher national courts, but was unable to deduce that there existed under customary international law any exception to this rule where the individual concerned was suspected of having committed war crimes or crimes against humanity. This appears to be accepted by leading commentators such as Professor Akande [with footnote to R1]*'.

This legal reasoning was further elaborated by the ICC Pre-Trial Chamber in July 2017, when it held that, by reason of the application of the ICC Statute to Sudan and the displacement of Bashir's immunities, South Africa was also in breach of its obligation to arrest him during an official visit in June 2015 [C3]. Akande's work was not cited in the decisions but the ICC's reasoning mirrored the substance of Akande's argument in R1 which was publicly noted by two commentators from the blog of the European Journal of International Law i.e. "*The South Africa decision [by the ICC] is more sophisticated than the DRC decision by taking up the suggestion of Dapo Akande to treat Sudan like a state party*". [C4a-c]. ICC Pre-Trial Chamber II made yet another finding of non-cooperation in 2017 against ICC party state Jordan [C5] using the same approach proposed in [R1] and also citing the South African decision throughout as precedent. Following Jordan's appeal of that decision, several ICC hearings in The Hague, and heated academic debate, the ICC Appeals Chamber upheld the finding of Jordan's non-compliance. In doing so, it explicitly acknowledged Akande's research using his approach as one of the key grounds of its Appeal Judgment: with a footnote citing R1 as the basis, it found: '*Jordan could not rely on article 98(1) [referring to national prerogatives] as a basis to not cooperate with the Court*' [C6]. Akande's work [R1, R2] was also heavily cited in the Prosecutor's response to Jordan's appeal [C7], with 29 references throughout, and the majority reflecting the court's agreement with Akande's argument that the application of the ICC Statute was legally valid: '*As Dapo Akande points out, since "[t]he Court does not apply national law," this qualification "would be redundant unless it was directed at authorities who would otherwise be bound by national law—national authorities*'. On 11 February 2020, Sudan's ruling military council agreed to hand over the ousted al-Bashir to the ICC in The Hague to face charges of crimes against humanity in Darfur. Al-Bashir will in due course be forced to account for his actions – a historic moment in securing justice for the people of Sudan.

### **Supported the activation of a new crime of aggression**

Akande's research on the crime of aggression helped culminate in the activation of this crime at the ICC. Akande was invited to verbally brief the Assembly of State Parties' (ASP) – the ICC's management oversight and legislative body – on the issues raised in R4 (as evidenced in a subsequent report, C8). The report noted that these presentations were 'useful to expand their knowledge and to illustrate legal and policy arguments for various positions' and that 'texts of the expert presentations were circulated to all States Parties after the meetings' [C8]. This informed their ultimate decision to activate the crime of aggression on 17 December 2017, which noted '*with appreciation*' the earlier report [C9]. This decision, effective from 17<sup>th</sup> July 2018, endorsed Akande's interpretation of the aggression amendments (that the ICC was precluded from prosecuting aggression committed by nationals of states that have not accepted the relevant provisions, even when committed on the territory of states that have accepted ICC jurisdiction [C9]). Although not binding on ICC judges, this decision, as Akande argued in [R5], must be taken into account by ICC judges when interpreting the aggression amendments.

### **War crimes and the classification of armed conflict**

Akande's research [R5] was also used by Trial Chambers of the ICC when classifying the hostilities in the Democratic Republic of Congo (DRC)'s Ituri region. This armed conflict formed the factual matrix of the cases against Germain Katanga and Bosco Ntaganda, both leaders of different rebel armed groups operating in that province. The conflict took place between several non-state armed groups which initially made it a non-international armed conflict (as it was *not* a conflict between two or more states). However, with Uganda's occupation of parts of that region, along with its intervention in the conflict to fight against certain rebel groups, the classification of the conflict was rendered more complex. Relying on the criterion of consent, proposed by Akande in R5, the Chambers found that the presence of Uganda in the DRC's territory without

its consent, internationalised the conflict, as every Ugandan military attack on the territory was necessarily against the DRC. Akande's work was directly cited in the *Katanga* Judgment [C10], rendered in March 2017, and indirectly in the *Ntganda* Judgment (by cross-references to the relevant findings in *Katanga*), issued in July 2019 [C11]. This classification is crucial, as different rules apply to international and non-international armed conflicts. By adopting Akande's proposed criterion for classifying the hostilities, the ICC was able to identify the applicable war crimes and to hold perpetrators to account accordingly. Akande's approach to classifying armed conflicts on the basis of state consent [R5] was cited several times by the International Committee of the Red Cross in 2016 [C12], whose guidance on the rules of armed conflict is instrumental in securing compliance with international law and in reducing war casualties.

#### 5. Sources to corroborate the impact (indicative maximum of 10 references)

[C1] *Al Bashir Case*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court (ICC-02/05-01/09-195), Pre-Trial Chamber (PTC) II, 9 April 2014, paras 19-33

[C2] Supreme Court of Appeal, South Africa, *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (867/15) [2016] ZASCA 17 (15 March 2016), paras 1, 56, 60 and 67, footnotes 1, 28, 30, 33 and 45

[C3] ICC, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir (ICC-02/05-01/09-302), PTC II, 6 July 2017, paras 71–97

[C4] Public commentary on Akande's research informing the Court's reasoning:

- A) de Hoogh A and Knottnerus A, 'ICC Issues New Decision on Al-Bashir's Immunities – But Gets the Law Wrong ... Again' (*EJIL: Talk!*, 18 April 2014), <https://www.ejiltalk.org/icc-issues-new-decision-on-al-bashirs-immunities—but-gets-the-law-wrong-again/>
- B) Tladi D, 'Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga' (2016) 16 *African Human Rights Law Journal* 310, 337.
- C) Knottnerus A, 'The Immunity of al-Bashir: The Latest Turn in the Jurisprudence of the ICC' (*EJIL: Talk!*, 15 November 2017), <https://www.ejiltalk.org/the-immunity-of-al-bashir-the-latest-turn-in-the-jurisprudence-of-the-icc/>

[C5] *Al Bashir Case*, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir (ICC-02/05-01/09-309), PTC II, 11 December 2017, paras 33-40

[C6] *Al Bashir Case*, Judgment in the Jordan Referral re Al-Bashir Appeal (ICC-02/05-01/09-397), Appeals Chamber, 6 May 2019, paras 70, 122, 135–143, especially footnotes 176, 345

[C7] *Al Bashir Case*, 'Prosecution Response to the Hashemite Kingdom of Jordan's Appeal against the "Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for arrest and surrender [of] Omar Al-Bashir"' (ICC-02/05-01/09-331), Office of the Prosecutor, 3 April 2018, paras 49, 58, 69, 78, 82, especially footnotes 79, 96, 127, 150, 159,

[C8] Assembly of State Parties, ICC - Report on the facilitation on the activation of the jurisdiction of the International Criminal Court over the crime of aggression 27 Nov 2017 [on file] [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP16/ICC-ASP-16-24-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ICC-ASP-16-24-ENG.pdf)

[C9] Assembly of State Parties, ICC - 'Activation of the jurisdiction of the Court over the crime of aggression' (ICC-ASP/16/Res.5), 14 December 2017, para 2,

[C10] *Katanga Case*, Judgment pursuant to article 74 of the Statute (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, paras 1182, 1184, especially footnotes 2746 and 2748

**[C11]** *Ntaganda* Case, Judgment (ICC-01/04-02/06-2359), Trial Chamber VI, 8 July 2019, paras 726, 728

**[C12]** International Committee of the Red Cross, Commentary on the First Geneva Convention (2016), paras 257-262, especially footnote 100.