

**ASSESSING THE AU/ICC RELATIONSHIP TOWARDS GREATER  
COLLABORATIONS IN PROMOTING PEACE AND SECURITY IN AFRICA: A  
CASE STUDY OF SUDAN**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS OF THE DEGREE LL.M (HUMAN RIGHTS AND  
DEMOCRATISATION IN AFRICA)**

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## Plagiarism Declaration

I OBIAGELI ORAKA do hereby declare that the dissertation '**Assessing AU/ICC relationship towards greater collaborations in promoting peace and security in Africa: a case study of ICC's intervention in Sudan**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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## **Dedication**

This dissertation is dedicated to God Almighty and His only son Jesus Christ for being my strength in my times of weaknesses and my confidence at my lowest moments.

### **You are my Rock forevermore!**

To my mum Mrs. Calister Oraka, who did not have much but it gave all. Your love and your support are favours that I can never repay. And to my brother Emeka Oraka who stood in as a father when our daddy departed too soon. God bless you all abundantly.

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## Acronyms

Unless the context requires otherwise, the abbreviations stand for these:

African Commission	African Commission Human and Peoples Rights
African Court	(Proposed) African Court of Justice and Human Rights
AIDS	Acquired Immune Deficiency Syndrome
AMIS	African Union Mission in Sudan
AU	African Union
AUPD	African Union High-Panel on Darfur
ASP	Assembly of State Parties
CICC	Coalition for the International Criminal Court
COMESA	Common Market for East and Southern Africa
CPA	Comprehensive Peace Agreement
CSO	Civil Society Organisation
DPA	Darfur Peace Agreement
DRC	Democratic Republic of Congo
EU	European Union
HIV	Human Immune Deficiency Syndrome
HRW	Human Rights Watch
ICC	International Criminal Court
ICL	International Criminal Laws
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of Yougoslovia
IDP	Internally Displaced Persons
IGAD	Inter-Governmental Authority on Development
IHL	International Human Rights Laws
IHRL	International Humanitarian Laws
ILC	International Law Commission

ISS	Institute for Security Studies
JEM	Justice and Equality Movement
OSF	Open Society Foundations
OSI	Open Society justice Initiative
OTP	Office of The Prosecutor
PSC	Peace and Security Council
SALC	Southern African Litigation Center
SCCED	Special Criminal Court on the Events in Darfur
SC-SL	Special Court for Sierra Leone
SPLM/A	Sudan People's Liberation Movement Army
UN	United Nations
UNAMIS	United Nations Advance Mission in the Sudan
UNGA	United Nations General Assembly
UNMISS	United Nations Mission in South Sudan
UNSC	United Nations Security Council

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## Chapter one: Introduction

### 1.1 Background

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime...<sup>1</sup>

Africa has a checkered history of simmering conflicts and impunity with devastating consequences on victims and the continent. From the horrors of the impunity occasioned by apartheid regime in South Africa, the civil war in Sierra Leone, the Rwandan genocide, the Burundi civil war, the Kenya post-election violence, the Sudanese civil war, the Libyan revolution, the situation in Cote d'Ivoire, the conflict in the Central African Republic, in Egypt, Mali, Nigeria, Niger, and the Congo DRC conflict that has defied all interventions. Added to this history is the rising wave of terrorism that has claimed thousands of lives. Millions of Africans have either died, are internally displaced, refugees, became disabled and or are living below poverty line due to conflicts. The high rate of HIV/AIDS prevalence in Africa is also one of the incidences of violent conflicts. Africa has indeed played home to Impunity and poses security threats to world peace and security.<sup>2</sup>

The African Union ('AU' or 'the Union') is an important political body in Africa with the responsibility to combat impunity among other mandates. This responsibility is enshrined in Articles 3(h), 4(m) and 4(o) of the AU Constitutive Act which reiterates the AU's commitment to combating impunity, to uphold the rule of law and to promote respect for human rights. However notwithstanding the AU's efforts to maintain peace and security in in the continent, Africa has continued to witness violent conflicts due largely to complicities of political leaders in these conflicts.

Prosecuting international crimes at domestic levels in Africa have been hampered by several factors ranging from lack of strong legal frameworks, weak judicial systems, lack of political will, lack of funds, and lack of technical capacity to investigate and prosecute. Therefore the task of ensuring accountability for international crimes in Africa is very difficult. Thus Africa needs a strong and capable international criminal court to prosecute the most serious perpetrators of impunity and ensure that they are made to account for their atrocities; and also guarantee some form of

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<sup>1</sup>P Mochochoko 'Africa and international criminal court' in E Ankumah and E Kwakwa (eds) *African perspectives on international criminal justice Ghana* (2005) 249.

<sup>2</sup> K Anan 'The causes of conflict and the promotion of durable peace and sustainable development in Africa' in Heyns & Stefiszyn (eds) *Peace and Justice in Africa: A Reader* (2006) 239.

reparations for victims. This will complement the AU's efforts in promoting peace and security in the continent.

The United Nations (UN) had in the past supported prosecution of international crimes in Africa through establishment of special courts and tribunals in post conflict states such as the Special Court for Sierra Leone (SC-SL) and the International Criminal Tribunal of Rwanda (ICTR). The European Union (EU) has also been very instrumental in supporting Africa in fighting impunity especially with funding and with strengthening technical capacity. In 2007 EU entered a formal Strategic Partnership Agreement with the AU in Lisbon for the purposes of combating impunity in Africa.<sup>3</sup> The EU is currently supporting the government of Senegal in the ongoing prosecution of Hissene Habre, the former Chad dictator who is being tried for the impunity he committed during the civil war in Chad.<sup>4</sup>

The continent's historical endurance of atrocities contributed to Africa's strong support for the establishment of the International Criminal Court ('ICC' or 'the Court').<sup>5</sup> Africa today constitutes the largest regional block to the Rome Statute and<sup>6</sup> African CSOs have continued in advocating for an effective ICC because justice and accountability are prerequisites to peace and security.<sup>7</sup>

The ICC was established to prosecute the most serious crimes of international crimes thereby creating a culture of deterrence for impunity.<sup>8</sup> The Rome Statute acknowledges that impunity is a threat to world peace and security<sup>9</sup> and by ensuring accountability for mass atrocities the Court has become an important judicial institution with the responsibility to end impunity and thereby promoting peace and security.<sup>10</sup> Paragraph 5 of the Statute stated that the world was 'determined to put an end to impunity...and thus to contribute to the prevention of such crimes'.<sup>11</sup> But the Court

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<sup>3</sup> Africa-European Union Strategic Partnership (May 2011) 58, 79-86; [http://www.consilium.europa.eu/uedocs/cms\\_data/librairie/PDF/QC3111092ENC.pdf](http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC3111092ENC.pdf) (Accessed 24 October 2013).

<sup>4</sup> Senegal is prosecuting Hissene Habre on behalf of the African Union.

<sup>5</sup> 'Call for AU and ICC to engage in honest dialogue' *Business day live* (15 October 2013). Available at <http://www.bdlive.co.za/africa/africanews/2013/10/15/call-for-au-and-icc-to-engage-in-honest-dialogue> (Accessed 22 October, 2013);

<sup>6</sup> Out of 122 state parties to the Rome Statute, 34 are African States; [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/OR/ICC-ASP-11-20-VolII-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/OR/ICC-ASP-11-20-VolII-ENG.pdf) (Accessed on 22 October, 2013).

<sup>7</sup> H Jallow & F Bensouda 'international Criminal Law' in M du Plessis (eds) *African Guides to International Criminal justice* (2008) 43.

<sup>8</sup> See paragraph 5 of preamble to the ICC.

<sup>9</sup> Open Society Justice Initiative 'International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers' Open Society Foundations (2011) 22; <http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf> (Accessed 22 October 2013).

<sup>10</sup> UNGA 60th session, items 48 and 121 of the provisional agenda. A/60/L.1, 40; [http://www.un.org/depts/dhl/resguide/r60\\_en.shtml](http://www.un.org/depts/dhl/resguide/r60_en.shtml) (Accessed on 22 October 2013).

<sup>11</sup> See Paragraph 5 of the Preamble to the Rome Statute.

functions under the principle of complementarity to assist states who are primarily responsible to prosecute international crimes and intervenes where a state is unable or unwilling to prosecute.<sup>12</sup>

Meanwhile the AU/ICC relationship has become very frosty. This tension was triggered when the UNSC rejected AU's formal request for deferral of the ICC's case against the president of Sudan, Omar Al Bashir whom the court in 2008 charged for his complicity in the Sudanese conflict.<sup>13</sup> Since then the AU have leveled a number of accusations against the ICC including referring to the Court as neo-colonialist and biased against Africans. The Union has issued a resolution asking its members not to cooperate with the court's arrest warrant against Al Bashir.<sup>14</sup> This resolution has created conflicting obligations for African state parties to the ICC and has also caused disunity among the AU member states. The climax of this tension was the AU Summit on the 13th October, 2013 AU in Ethiopia where the AU asked heads of states who are indicted by the ICC to shun their trial.<sup>15</sup> The AU furthermore reiterated its call to members not to cooperate with Al Bashir's arrest warrant. This situation is threatening to the court's continued relevance in Africa.

## 1.2 Problem statement

The ICC is a treaty based institution that requires cooperation of state parties to fulfill its mandates to assist the Court with the arrest and surrender of indicted persons without which there will be no international justice.<sup>16</sup> The resolution by the AU for non-cooperation of member states with the ICC's arrest warrants against Al Bashir and the consequent hosting of Al Bashir by some African state parties to the Rome Statute threatens to undermine the potentials of the Court for Africa and Africa's victims of impunity. Some African leaders who referred cases to the court are also at the forefront of the campaign against the court.<sup>17</sup> There is therefore an urgent need to resolve this tension so as to continue to maximize the ICC's potentials in combating impunity in Africa. There is no present alternative to the court at the present, 'the ICC remains an imperative for Africa in

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<sup>12</sup> Article 17 of the Rome Statute; see also Southern African Litigation Center 'Positive Reinforcement: Advocating for International Criminal Justice in Africa' SALC (2013) 26.

<sup>13</sup> The Prosecutor v. Omar Hassan Ahmad Al Bashir (2009) ICC-02/05-01/09

<sup>14</sup> Assembly/AU/Dec.245(XIII) Rev.1(2009) Paragraph 10

<sup>15</sup> Ext/Assembly/AU/Dec.1-2(Oct.2013); Ext/Assembly/AU/Decl.1-4(Oct.2013);

[http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20\\_E\\_0.pdf](http://summits.au.int/en/sites/default/files/Ext%20Assembly%20AU%20Dec%20&%20Decl%20_E_0.pdf) (Accessed 30 October 2013)

<sup>16</sup> G Ruxton 'Present and Future Record of Arrest War Criminals: the View of the Public Prosecutor of the ICTY' in W Dijk & J Hovens (eds) *Arresting War Criminals* (2001) 19.

<sup>17</sup> President Museveni of Uganda referred Lord's Resistance Army a rebel group that have committed mass atrocities in Uganda to the ICC. The Court has since issued an arrest warrant against Joseph Kony, the leader of the group.

the absence of any other credible and independent international Court with mandate to prosecute international crimes in the continent'.<sup>18</sup>

Several issues are to be interrogated: firstly are the Union's antagonism against the court mere rhetoric or reasonably justified; what are the implications of this trend for impunity in Africa in the light of numerous security challenges and gross human rights violations in the continent; how may the AU/ICC tension be resolved in order to harness the advantages that the ICC holds for promotion of peace and security in Africa; should Africa's demand for immunity for heads of states be granted and how fundamental is the prosecution of leaders to combating impunity in the continent. And lastly how has the peace and security debates impacted on the court's intervention in Africa especially in Sudan.

### **1.3 Significance of research and choice of Sudan as a case study**

The ICC and the AU are key players in promoting peace and security in Africa; the ICC does so by ensuring accountability while the AU through political interventions. Cooperation between these two institutions will definitely promote the much needed peace and security in Africa. This this research by analysing the current feud between these institutions would proffer solutions and make proposals for stronger cooperation so as to harness the potentials that ICC holds for Africa.

The choice of Sudan as a case study is informed by the controversies surrounding the court's intervention in Sudan and the acrimony that Al Bashir's indictment has generated at the AU. There is yet an end to this dilemma and the issue is now compounded by the on-going trial of Kenya's President and his deputy and with the union insisting that serving heads of states should be granted immunity from prosecution by the ICC. Sudan is very significant to the work of the ICC in Africa because the outcome of the Court's intervention in Sudan is critical to its continued relevance in the continent; also how this situation is resolved will continue to play out in the course of the Court's work.

### **1.4 Research objectives**

The objectives of this research are:

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<sup>18</sup> 'International Criminal Court an Imperative for all African Nations' *Punch Newspapers* (July 2010); <http://news2.onlinenigeria.com/news/general/47692-international-criminal-court-an-imperative-for-all-african-nations.html> (Accessed 22 October, 2013)

- To examine the imperativeness of the ICC for peace and security in Africa as a global actor in responding to mass atrocities and serious human rights violations;
- To examine the on-going AU/ICC tensions to determine the justification or otherwise of the AU's antagonism for possible resolution;
- The ultimate objective is to seek ways to resolve the AU/ICC and to uphold the commitment of the AU and all Africans to the Court.

### **1.5 Research questions:**

- Why is prosecuting international crimes an essential part of peace and security initiatives in Africa and how may the ICC complement states in achieving this objective?
- Should the demands for peace override the demands for justice and using lessons from Sudan how may the ICC balance the demands for justice and the demands for peace to avoid one undermining the other?
- Are the AU's agitations against the ICC mere rhetoric or reasonably justified?
- And finally how can the AU/ICC relationship be advanced for an enhanced collaboration in promotion of peace and security in Africa?

### **1.6 Research methodology**

This research will rely mainly on literature review. Methodology will be in-depth analysis of qualitative data collected from Primary and secondary sources mainly through desktop research. Primary data sources would include the Rome Statute, UNSC and AU resolutions, case laws, regional and international human rights Laws et al. Secondary sources will include books, journals, articles, newspaper publications and internet sources from on line research.

### **1.7 Expected challenges and solutions forwarded**

The main challenge would be the 'evolving nature' of the issues being researched. As a result this it is anticipated that some of the perspectives and situations presented may have changed before the conclusion of the research. To remedy this situation, future projections would be made so that the research will still be relevant even after some of the situations may have changed.

### **1.8 Literature review**

The main literatures for this paper are 'Prosecuting International Crimes in Africa' published by the Pretoria University Law Press,<sup>19</sup> and 'African Guide to International Criminal Justice' by the Institute for Security Studies (ISS). They are both collections of articles relating to transitional justice and international crimes prosecution in Africa. These books discussed the ICC in details including the history, the mandates and the Court's interventions so far and also the roles that the court has played in combating impunity in Africa. These books explained why ICC is an imperative for Africa in the face of numerous challenges that hamper international crimes prosecution at domestic level.

But beyond building a strong case for the ICC, these books did an objective analysis of the AU and the ICC relationship in order to address the root cause of the tension between them and to chart ways forward. The books are very relevant as a guide for actors in the field of international criminal law. Specifically the African Guide to International Criminal Justice was prepared by the ISS as a guide to international criminal law (ICL) from African perspective and experiences for the purposes of practice and advocacies. This book offers great insights on avenues for cooperation between the AU and the ICC;<sup>20</sup> its recommendations are very resourceful for this research.

Prosecuting international crimes in Africa looked at the issues of conflicts in Africa and the consequent impunity. The book is gave detailed information on international crimes prosecution both at national and international courts. The book draws largely from the experiences at the SC-SL and the ICTR to and the implications for international crimes prosecution in the African context. The book also treated the issue of complementarity remarkably. Its expositions on the usual complementarity in the ordinarily sense and the positive aspect of complementarity is very enlightening, portraying the need to strengthen the domestic jurisdictions to prosecute international crimes. Complementarity and state cooperation are the bedrocks of the ICC's works and a clear understanding of these principles would positively impact on approaches to issues related to the court and its interventions. The issues of immunity for heads of states are also dealt with exhaustively in this book to serve as a guide in the analysis of some of the AU's criticisms against the ICC, to ascertain whether they are justified or not.

Other sources will also be consulted.

## 1.9 Chapters outline

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<sup>19</sup> C Murungu & J Biegon 'Introduction' in C Murungu & J Biegon '*Prosecuting international crimes in Africa*' (2011)1.

<sup>20</sup> Southern African Litigation Centre '*positive reinforcement "advocating for international criminal justice in Africa"*' SALC (2013) 2.

This dissertation is divided into six chapters. It will commence with an introductory background which will be followed by the main body of the research. Chapter one will provide a broad outline for the dissertation; it starts with background information to the research including the problem questions and the objectives the research intends to achieve. Chapter two will introduce the ICC and at the same time respond to the first problem question. Chapter three will give background to the ICC's intervention in Sudan thereby responding to second problem question. Chapter four will examine AU/ICC tension and respond to the third problem question. Chapter five makes proposals for cooperation between AU and the ICC and thus responds to the fourth problem question. Chapter six will be conclusion and recommendations.

## **Chapter two**

# The ICC: History, mandates and basic concepts

## 2.1 Introduction

From now on, all potential warlords must know that, depending on how a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law. . . . Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defence that the suspects were not aware of the law will not be permissible.<sup>21</sup>

This chapter provides background to the establishment and mandates of the ICC. It defines basic concepts to the Court to also enhance a deeper appreciation of the Court's intervention in Sudan and explains why the Court is crucial for peace and security in Africa. Background knowledge of the principle of complementarity and the doctrine of state cooperation is crucial because they are key principles that will reflect throughout this research.

## 2.2 History of establishment

The impunities of the First and Second World War spurred the international community's desire to combat impunity through the creation of an international penal court. The impunities by German officers in the Second World War which saw the emergence of Nuremberg and Tokyo Charters that established the International Military Tribunal at Nuremberg and Tokyo respectively made this need even more urgent. Thus in 1948 the UN General Assembly (UNGA) meeting passed a resolution requesting the International Law Commission (ILC) to come up with a draft for an international penal court.<sup>22</sup> The process to establish the ICC was however expedited after the violent conflicts in Yugoslavia, the Rwanda Genocide and the civil war in Sierra Leone to which the UN established the ICTY, ICTR and SC-SL respectively to address issues of accountability.<sup>23</sup>

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<sup>21</sup>Hans Corell, UN Under-Secretary-General for Legal Affairs. See Overview of the Rome Statute of the international Criminal Court' by United Nations (1998)1; <http://legal.un.org/icc/general/overview.htm> (Accessed 16th September, 2013).

<sup>22</sup> UNGA Resolution 260 (9 December 1948) <http://daccess-ods.un.org/TMP/5407865.64350128.html> (Accessed 20 October 2013).

<sup>23</sup> ICTR was established by the UNSC resolution 955 (8 November 1994); SC-SL was established by UNSC [Resolution 1315](http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=70). (16 January 2002); <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=70> (accessed on 16 September 2013).

The UN would thereafter constitute a preparatory Committee for the establishment of the ICC; this Committee worked between 1996 and 1998 for a draft ICC statute.<sup>24</sup> A conference was organised in Rome in 1998 to discuss this draft statute and thereafter adopt it. Despite strong objections from the USA, Russia and China to the Court's establishment during the conference, the world voted overwhelmingly for the adoption of the Rome Statute which came into force on the 17<sup>th</sup> July 2002 upon ratification by 60 countries.<sup>25</sup>

The ICC was established to address gross human rights violations which the Statute described as a major threat to world peace and security.<sup>26</sup> The Court was hailed as 'a gift of hope to future generations, and a giant step forward in the march towards universal human rights and rule of law'.<sup>27</sup> The ICC is a court of last resort; it aims to compliment national courts in prosecuting international crimes. The Court however can prosecute where states are unwilling or unable to prosecute international crimes committed within its territory.

### 2.3 Aim of establishment

'Even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power ... Political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow ... The vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of an easy escape or future political rehabilitation.'<sup>28</sup>

The aim of establishing the ICC is to end impunity using prosecution to deter future perpetrators and for victims' reparation. The preamble to the Rome Statute defined international crimes as 'impunity that deeply shocked the conscience of humanity'.<sup>29</sup> The Court is meant to prosecute the most serious perpetrators where domestic systems are incapable or unwilling to prosecute and where the removal of perpetrator from the domestic arena would increase the chances of peace and security in post conflict or conflict zones. Justice is meted equally at the ICC and official

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<sup>24</sup> The Preparatory Committee, met from 1996 to 1998, and held their final session in March and April of 1998; <http://untreaty.un.org/cod/icc/general/overview.htm> accessed 16th September, 2013.

<sup>25</sup> See the Rome Statute of the International Criminal Court (amended in 2010), 17 July 1998.

<sup>26</sup> Para 3 Preamble Rome Statute.

<sup>27</sup> UN Press Release No. 19980720 'Secretary-General says establishment of international criminal court is major step in march towards universal human rights, rule of law' (18 July 1998); <http://www.un.org/News/Press/docs/1998/19980720.J2890.html> (Accessed 22 October, 2013)

<sup>28</sup> F Jessberger 'International v National Prosecutions of International Crimes' in A Cassese *The Oxford Companion to International Criminal Justice* (2009) 208.

<sup>29</sup> Paragraph 2 of the Preamble to the Rome Statute.

capacity is not a bar to prosecution; this is needed to restore the peoples' confidence in justice mechanisms especially in post conflict states.<sup>30</sup> A big contribution of the ICC is the codification of the principles of ICL thereby making ICL more predictable, more certain and much more standardized.

## 2.4 Jurisdiction

Under the Rome Statute the ICC has jurisdiction over the crimes of genocide, crime against humanity, war crimes, and crime of aggression.<sup>31</sup> These crimes are described in details in the statute<sup>32</sup> except the crime of aggression which was later agreed on.<sup>33</sup> The ICC has jurisdiction over crimes committed after the coming into force of the Rome Statute<sup>34</sup> and perpetrators must be 18 years and above.<sup>35</sup> For states that ratified the Statute after it came into force, the Court may only exercise jurisdiction for crimes committed after the state became party to the Statute, article 12(3) however allows states to enter a special agreement with the Court to allow the Court to prosecute crimes committed before the state became party to the statute; but the crime must have been committed after the coming into force of the Rome Statute.<sup>36</sup>

The ICC trials must be done in the interest of justice,<sup>37</sup> and nature, gravity and impact of crimes are also determinant factors.<sup>38</sup> Prosecution must primarily be done in accordance with the objectives of the statute.<sup>39</sup> The ICC may only prosecute crimes committed within the territories of member states,<sup>40</sup> or by a citizen of a member state<sup>41</sup> except where a non-state party enters into a special agreement allowing the court jurisdiction over specific situations.<sup>42</sup> The UNSC can also refer situations occurring within territories of non-state parties.<sup>43</sup>

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<sup>30</sup> SACL (n 20 above)10.

<sup>31</sup> Article 5 Rome Statute.

<sup>32</sup> Articles 6, 7, and 8 of the Rome Statute describing crimes of Genocide, War crimes and Crimes against humanity respectively.

<sup>33</sup> Article 5(2) Rome Statute. During the ICC Review Conference in Kampala Uganda in 2010, state parties adopted a definition for the crime of aggression.

<sup>34</sup>Article 11(1) of the Rome Statute.

<sup>35</sup>Article 26 of the Rome Statute.

<sup>36</sup>Article 11(2) of the Rome Statute.

<sup>37</sup> Article 17(1)(d) of the Rome Statute.

<sup>38</sup> See ICC prosecutorial strategy ; [http://www.icc-cpi.int/otp/otp\\_docs.html](http://www.icc-cpi.int/otp/otp_docs.html)( Accessed 25 October 2013).

<sup>39</sup> L Gentile 'Understanding the international criminal justice' M du Plessis (eds) *African Guide to international criminal* (2008)102.

<sup>40</sup> Article 12 Rome Statute.

<sup>41</sup> Article 12(2)(b)of the Rome Statute.

<sup>42</sup> Article 4(2) Rome Statute.

<sup>43</sup> Article 13(b) Rome Statute.

The ICC jurisdiction can be triggered in 3 specific ways: when a state party refers a situation to the Court,<sup>44</sup> when the ICC prosecutor initiates an investigation proprio motu upon receiving information that ICC crimes have been committed,<sup>45</sup> and through UNSC referral<sup>46</sup> in exercising its mandate under chapter 7 of UN Charter i.e. in the interest of international peace and security.<sup>47</sup>

## 2.5 Principle of complementarity and doctrine of state cooperation

Complementarity connotes primacy of responsibility by states to prosecute international crimes committed within their territories.<sup>48</sup> The ICC is a court of last resort and can only prosecute where the national courts are incapable or unwilling to prosecute.<sup>49</sup> States are deemed capable to prosecute international crimes on behalf of the international community, and are encouraged to strengthen the capacity of domestic judicial mechanisms by domesticating the Rome statute; states are furthermore obliged under this principle to establish mechanisms for arrest and surrender of persons indicted by the ICC.<sup>50</sup> State parties are also obliged to punish acts that impede the administration of the court under article 70(4).<sup>51</sup> And finally complementarity mandates state parties to cooperate with ICC with intelligence, investigation and information gathering in relation to a situation before the Court. This principle is intertwined with the doctrine of state cooperation.

“The Rome Statute creates a system that is not only about the ICC-it is about national systems. It is important that we have almost one hundred states committed to preventing and punishing crimes against humanity, genocide, and war crimes. I believe that the most important work is not what has happened in The Hague; the most important work is what has happened in these one hundred states. This is a way in which we can really succeed and use the Court to help change the world.

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<sup>44</sup> Article 14 of the Rome Statute

<sup>45</sup> Article 15(1) of the Rome Statute.

<sup>46</sup> Article 13(b) of the Rome Statute.

<sup>47</sup> M Du Plessis 'Introduction' in M du Plessis (eds) *African Guide to international criminal justice* SALC (2008)8.

<sup>48</sup> Para 6 and 10 of the Preamble of the Rome Statute; article 17 of the Rome Statute.

<sup>49</sup> Article 17(b) Rome statute.

<sup>50</sup> See section 2(6) of Kenya's new Constitution and Article 32 Kenya's International Crimes Act makes it mandatory for the government to ensure cooperation with the ICC. It was based on these legal backgrounds that ICJ-Kenya a local NGO in Kenya succeeded in obtaining an arrest warrant for Al Bashir Kenya. On 28 November, 2011 the High Court of Kenya granted this application. Request by the Attorney General to suspend the order pending his appeal was rejected by the Court of Appeal; <http://allafrica.com/stories/201202171165.html> (Accessed on 12 August 2013).

<sup>51</sup> The ICC issued an arrest warrant for the Kenya journalist Walter Osapiri who violated witness privacy in the on-going trial of the vice president of Kenya, Kenya is under obligation to arrest and surrender him to the ICC. See Case no ICC-01/09-01/13 (2013) 'The Prosecutor v. Walter Osapiri Barasa'; [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/ICC-0109-0113/Pages/default.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/ICC-0109-0113/Pages/default.aspx) (Accessed 23 October 2013)

We have to investigate and to prosecute, but the issue is how we can have an impact on national systems”.<sup>52</sup>

The Doctrine of State Cooperation requires states to mandatorily cooperate with the Court.<sup>53</sup> State cooperation is an extension of the principle of complementarity which acknowledges that the ICC alone cannot combat impunity; states remain the primary actors in the fight against impunity.<sup>54</sup> The extents of states’ obligations are discussed in details under Article 86 of the Rome Statute. They are the obligation to assist the ICC with arrest, investigation and prosecution of suspects. States are required to set up national mechanisms and procedures that would ensure this cooperation.<sup>55</sup> This mechanism should be able to complement the Court with investigation.<sup>56</sup> States are furthermore obliged to provide witnesses protection,<sup>57</sup> and to implement all ICC decisions.<sup>58</sup>

In conclusion it should be stated that cases before the ICC are mostly symbolic to serve as a warning threat that impunity can longer go unpunished irrespective of the position of perpetrators, this symbolism is the reasons the Court prosecutes only the gravest human rights violations and perpetrators.

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<sup>52</sup> L Moreno-Ocampo ‘Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives’ 21 *American University International Law Review* (2006) 497.

<sup>53</sup> Article 86 of Rome Statute.

<sup>54</sup> L Ocampo (n 52 above).

<sup>55</sup> Article 89 of Rome Statute.

<sup>56</sup> Article 93 of Rome Statute.

<sup>57</sup> Article 93(j) Rome Statute.

<sup>58</sup> Article 103 of Rome Statute

## Chapter three

### ICC intervention in Sudan and the peace and justice debates

#### 3.1 Introduction

This chapter discusses the ICC's intervention in Sudan and the consequent backlash it generated at the AU. The peace and justice debates surrounding the Court's intervention in Sudan will also be re-visited to reassess the appropriateness or otherwise of this intervention. This chapter interrogates this peace and justice debates to ascertain if the peace debates in Sudan would have justified suspension of ICC's intervention in Sudan.

#### 3.2 Background to the case against Al Bashir

The Sudan conflict dates back to the colonial era when Arab Sudanese in the North and Black Sudanese from the South were lumped together in the same territory. Religious and ethnic differences coupled with agitations of marginalization and quest for control of natural resources by the people of the South of Sudan would result in protracted conflicts.<sup>59</sup> A full blown civil war began in 1983 and would continue for two decades.<sup>60</sup> Several efforts were made by the international community to restore peace to Sudan to no avail. In 1993 the Inter-Governmental Authority on Development (IGAD) led a regional peace initiative in Sudan for a peace talk;<sup>61</sup> the UN Secretary-General's also visited Sudan in July 2002. Even the 20 July 2002 Government/rebels agreement 'The Machakos Protocol' whereby they agreed to a broad framework including governance and transitional processes and right to self-determination of the people of South Sudan, all failed to yield desired peace.<sup>62</sup>

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<sup>59</sup> See generally UNMISS Background 'UN Mission in the Republic of South Sudan' UN (2011) <http://www.un.org/en/peacekeeping/missions/unmis/background.shtml> (Accessed 8 October 2013).

<sup>60</sup> UNMISS Background (N 59 above).

<sup>61</sup> J Young 'Sudan IGAD peace process: an evaluation' Institute of Governance Studies, Simon Fraser University, Vancouver (2007); [http://www.sudantribune.com/IMG/pdf/Igad\\_in\\_Sudan\\_Peace\\_Process.pdf](http://www.sudantribune.com/IMG/pdf/Igad_in_Sudan_Peace_Process.pdf) (Accessed on 25 October 2013). Also 'The Sudan IGAD peace process: Signposts for the way forward' *Sudan Tribune* (13 February 2004); <http://www.sudantribune.com/spip.php?article1796> (Accessed 25 October 2013).

<sup>62</sup> UNMISS Background (n 60 above).

The conflict escalated in 2003 led by two South Sudanese rebel groups: the Sudan People's Liberation Movement Army (SPLM/A) and the Justice and Equality Movement (JEM).<sup>63</sup> Al Bashir led government formed alliances with notorious militia groups namely the Arab Militia and Janjaweed in order to crush the Sudanese rebel groups. These Al Bashir supported militia committed crimes against humanity, war crimes and genocide against the people of Darfur region.<sup>64</sup> More than two million people died in these conflicts, four million people were internally displaced, and about 600,000 became refugees in neighbouring countries.<sup>65</sup>

The AU also played a major role to end the Sudan conflict.<sup>66</sup> In July 2004, the AU launched peace negotiations 'the Abuja talks' on Sudan and deployed 60 AU military observers and 310 protection troops to monitor Darfur Ceasefire Agreement.<sup>67</sup> The UN and the AU worked together under the UNAMIS project.<sup>68</sup> In January 2005 the Government and SPLM/A signed a Comprehensive Peace Agreement (CPA) in Nairobi Kenya to finalise existing agreements on resource and power-sharing and to grant autonomy to the people of the South. Over 10,000 UN personnel including civilians, military and police officers were deployed by the UN to Sudan. In May 2006 the AU presided over the signing of the Darfur Peace Agreement (DPA).<sup>69</sup>

In January 2004 upon recommendation by the UN Secretary General, the UNSC established UN Advance Mission in the Sudan' (UNAMIS) to facilitate peace operations in Sudan.<sup>70</sup> Also in 2004, the UNSC constituted an international commission of inquiry to investigate the Darfur crises,<sup>71</sup> the commission's report indicted Al Bashir and two others for international crimes.<sup>72</sup> Based on this report the UNSC referred the Darfur situation to the ICC in 2005.<sup>73</sup> This was the groundbreaking decision but marked the beginning of the AU/ICC contentions. Benin and Tanzania were non-

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<sup>63</sup> Report of the International Commission of Inquiry on Darfur (2004) 22

<sup>64</sup> A McFerran 'The Curse of the Janjaweed' *Sunday Times* London (23 September 2007); Available at <http://www.timesonline.co.uk/tol/news/world/africa/article2489206.ece> (Accessed 23 September 2010)

<sup>65</sup> UNMISS Background (n 60 above).

<sup>66</sup> K Sansculotte-Greenidge 'The PSC in Darfur: A Sudan solution for an African problem' in T Murithi & H Lulie (eds) *The African Union Peace and Security Council: five-year appraisal* (2012)120.

<sup>67</sup> This agreement was signed in N'Djamena on 8 April 2004 by the Government of the Sudan, South Sudan rebel groups SLM/A and JEM.

<sup>68</sup> AUPD Report (2008) para 14; <http://www.peaceau.org/en/article/report-of-the-african-union-high-level-implementation-panel-for-sudan-and-south-sudan-353rd-meeting-of-the-peace-and-security-council> (Accessed 20 October 2013).

<sup>69</sup> UNMISS Background (n 65 above).

<sup>70</sup> UN Resolution 1547 (2004) & UN Resolution 1556 (2004).

<sup>71</sup> UNSC Resolution '1564 S/RES/1564' (8 September 2004) 3-4

<sup>72</sup> Report of UN International Commission of Inquiry in Darfur. Available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) (Accessed 2 October 2013).

<sup>73</sup> In exercise of its peace and security mandates under chapter VII of the UN Charter and under 13(b) of the Rome Statute. See UNSC Resolution 1593 (2005).

permanent members of the UNSC at that time and voted in favour of the referral.<sup>74</sup> Eleven members of the UNSC voted in favour while four members abstained. Algeria, Brazil, China, and United States abstained.<sup>75</sup> In 2008 the AU set up a High Level Panel of enquiry on Darfur led by Thabo Mbeki the former president of South Africa to recommend peace and justice initiatives for Sudan.<sup>76</sup> In October 2009 the Union recommended that the transitional processes in Sudan should also include accountability for atrocities.<sup>77</sup> Paragraph 16 of the said AU Report stated as follows:

“Justice and Reconciliation for Darfur cannot be separated. They are inextricably linked and should therefore be approached, conceptually and procedurally, in an integrated manner, in order to contribute to peace and stability in Sudan...”<sup>78</sup>

The ICC prosecutor after a prolonged independent investigation confirmed that international crimes have been committed in Darfur. In 2009 the court charged the Sudanese President, Omar al-Bashir for war crimes, crimes against humanity, and genocide.<sup>79</sup> Two arrest warrants were later issued against Al Bashir for genocide, crime against humanity and war crimes. Other five high ranking Sudanese government officials were also indicted.<sup>80</sup> Some of the indicted persons Abu Garda appeared voluntarily before the ICC but Al-Bashir declined resulting in the issuance of an arrest warrant by the Court against him and the four others.<sup>81</sup>

The Darfur situation is unique in three ways; firstly it is the first case involving a non-state party, secondly it was the first situation referred to the Court by UNSC and thirdly it is the first time the ICC would issue an arrest warrant for a sitting head of state.

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<sup>74</sup>E Keppler 'The United States and the International Criminal Court: The Bush Administration's Approach and a Way Forward Under the Obama Adm' Human Rights Watch (2 August 2009); <http://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administration-s-approach-and-wa> (Accessed 20 October, 2013).

<sup>75</sup> E Keppler (N 74 above).

<sup>76</sup> K Sansculotte (N66 above)120.

<sup>77</sup> AUPD (n 67) para 21. The report noted that Justice and Reconciliation are mutually reinforcing values and both are needed in Darfur.

<sup>78</sup> AUPD Report (n 77 above) para 16.

<sup>79</sup> Text available at

<http://www.icccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/icc02050109?lan=en-GB> 99 (Accessed 1<sup>st</sup> October, 2013); also see generally G Prunier 'Darfur: A 21<sup>st</sup> Century Genocide,' Cornell University Press (9 October 2008).

<sup>80</sup> Ahmad Haroun, Kosheib, Abu Garda, Banda and Jerbo, Hussein. Of these six, three were subject to summons but warrants of arrest were issued in 2007 against Ahmad Haroun, leader of Janjaweed & Ali Muhammad Ali abd-Al-Rahman, minister for Humanitarian Affairs in Sudan; summons were issued against Abu Garda, chairman of military operations of the United Resistance Front in May 2009; in August 2009 summons were issued for Abdallah Banda, commander in chief of JEM and Mohammed Jerbo, former Chief of Staff of SLA-Unity and integrated into JEM.

<sup>81</sup> Text available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (Accessed 20 October 2013).

The appropriateness or otherwise of this arrest warrant generated a lot of debates. It was argued that the timing of the arrest warrant was prejudicial to on-going peace processes in Sudan at that time.<sup>82</sup> Three ethnic leaders in the Darfur also expressed concerns about this timing.<sup>83</sup> The Arab league, the AU and China opposed the warrant including some security analysts working with Darfur.<sup>84</sup> The Union reasoned that this warrant would impede peace processes because Al Bashir was key to peace mediations, the Union requested the Court to suspend the case by one year to enable it conclude the peace negotiations in the country.<sup>85</sup> The court rejected this request resulting in AU's further request to the UNSC for a one year deferral of the case under article 16 of the Statute.<sup>86</sup> Article 16 of the Statute provides as follows:

'No investigation or prosecution may be commenced or proceeded with under this statute for a period of 12 months after the Security Council, in resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'<sup>87</sup>

The following peace initiatives were on going with active participation of the AU: CPA, the RoadMap for Return of IDPs, the Implementation of Abyei Protocol and the 2008 Electoral Law to be play out in the quest for peace in Sudan.<sup>88</sup> The UNSC rejected this request.<sup>89</sup> In 2009 during AU Summit in Libya the Union asked all members to withhold cooperation with the ICC's arrest warrant against Al Bashir.<sup>90</sup> The Union would later claim that Al Bashir is under immunity from criminal prosecution. But it is an established principle of ICL dating back to the trial of Nuremberg, that immunity is not a defence where international crimes have been committed.<sup>91</sup> Article 27(2) of the Rome Statute states that:

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<sup>82</sup>'Sudan opposition warn ICC Bashir warrant threatens peace,' *Reuters* (14 July 2008) available at <http://africa.reuters.com/wire/news/usnMCD436982.html> (Accessed 18 September 2013). See generally M Kevan & E Cauley 'The International Criminal Court and the Darfur Conflict: Prepared for Understanding Sudan,' Forum Magazine by the Uganda Coalition for ICC (24 October 2012); <http://www.ucicc.org/attachments/article/22/The%20Forum%20Magazine%20Issue%20No.%203,%202012%20%20Final%20Copy.pdf> (Accessed 18 September 2013).

<sup>83</sup>Sudanese activists collected one million signatures requesting that the court should suspend intervention due to peace processes.

<sup>84</sup> N Bakr & E Shafi 'ARAB official positions towards president Al Bashir's indictment' Fride (March 2010); [http://www.fride.org/download/OP\\_Darfur\\_President\\_alBashir2\\_ENG\\_mar10.pdf](http://www.fride.org/download/OP_Darfur_President_alBashir2_ENG_mar10.pdf) (Accessed 25 October 2013).

<sup>85</sup> AU PSC Communiqué of the 142nd meeting of the PSC, Paras. 3, 4, 8, 9 and 11(i) and (ii); Also AU PSC, communiqué of the 175th meeting of the PSC, Paras. 2, 3 and 4; and AU Assembly Decision on the Indictment of the President of Sudan, Assembly/AU/Dec.221XII) Paras.2 and 3.

<sup>86</sup> See letter dated 18 June 2005 addressed to the President of UNSC S/2005/403, 22 June 2005; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/395/89/PDF/N0539589.pdf?OpenElement> (accessed 11 September 2010).

<sup>87</sup>Article 16, Rome Statute.

<sup>88</sup>See AU PSC, communiqué (n 85 above) Para 8.

<sup>89</sup>UNSC 5947th meeting S/PV.5947 (31 July, 2008).

<sup>90</sup> Assembly/AU/Dec.245(XIII) Rev.1(2009) Paragraph 10

<sup>91</sup> As noted earlier immunity is not a defence in international criminal law, see [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf). (Accessed on 16th September, 2013).

“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”<sup>92</sup>

The Union had in July 2008 set up a panel to investigate the Darfur situation and recommend transitional justice mechanism for Darfur. According to the report the government of Sudan committed atrocities against the people of Darfur and recommended prosecution as one of the peace initiatives.<sup>93</sup> Paragraph 21 of the Report stated that ‘Justice and Reconciliation are mutually reinforcing values and both are needed in Darfur’. The Panel recommended a hybrid court made up of Sudanese and non-Sudanese judges to try suspects. It should be pointed out that Al Bashir’s complicity in these crimes was not in issue, what was in issue however was the claim that his arrest would impede on-going peace processes and that he enjoys immunity as a serving head of state. The Court therefore was faced with how to balance demands for Justice and demands for peace so as not to aggravate the conflict situation.<sup>94</sup>

### 3.3 Peace vs justice debates in Sudan

“But there can be no peace without justice, no justice without law and no meaningful law without a court to decide what is just and lawful under any given circumstance”.<sup>95</sup>

Sudan’s case is a typical example of when demand for peace clashes with demand for justice. The peace and security debates in Sudan generated a lot of attention and created divisions even among African. CSOs supported Al Bashir’s arrest but African leaders vehemently opposed to the Court’s intervention in Sudan.<sup>96</sup> HRW agrees that Al Bashir is relevant to the peace process but nevertheless opined that his being key to the peace negotiations should not justify his escaping justice. According to HRW:

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<sup>92</sup> Article 27(2) of the Rome Statute.

<sup>93</sup> COHRE v. Sudan (2009) 279/03-296/05 Communication 296/2005.

<sup>94</sup> AUPD Report (n 78 above).

<sup>95</sup> B. Ferencz ‘The Road to World War, in An International Criminal Court: A Step Towards World Peace: A Documentary History and Analysis, Part 1 Vol.1 (1980)1.

<sup>96</sup> CICC ‘African Civil Society Stand Up for Justice’ *Africa Update* (October 2010) available at [http://www.iccnw.org/documents/AfricaUpdate14\\_\\_eng.pdf](http://www.iccnw.org/documents/AfricaUpdate14__eng.pdf) (Accessed 8 October 2013).

'it is often the case that individuals and leaders who are accused of planning, financing, instigating and executing atrocities in the guise of civil wars are also engaged in peace processes that will lead to signing of peace agreements.'<sup>97</sup>

The Convenor for the NGO Coalition for the ICC (CICC), William Pace warned that Justice is an indispensable component of peace and that the government of Sudan must demonstrate its readiness to hold perpetrators of impunity accountable.<sup>98</sup>

Peace and justice initiatives in post conflict states should not be viewed from oppositionist angle; the two should be designed to complement each other. Justice through accountability is necessary to restore peoples' faith in the state without which the people would continue to express their agitations through violent means. This situation would lead to endless conflicts and more impunity. Also to exempt a political leader from prosecution is unjust and a catalyst for abuse of powers.

"When it comes to peace and justice, we are living in a new world. Those who contemplate committing horrific acts that shock the conscience of humankind can no longer be confident that their heinous crimes will go unpunished. Rulers and warlords who perpetrate atrocities can no longer trade their power for an amnesty and then slip away, unpunished, in some safe haven".<sup>99</sup>

The AU PSC issued a communiqué on 21 July 2008 reiterating AU's commitment to fighting impunity but stated though perpetrators of those atrocities in Darfur should be made to account for their crimes,<sup>100</sup>the quest for justice in Darfur should not jeopardize efforts aimed at promoting lasting peace.<sup>101</sup>

But were there other options for accountability for the Darfur atrocities? As the president the possibility of domestic prosecution is almost non-existent. The argument that prosecuting Al Bashir would jeopardize peace initiatives is indisputably a strong one, but also greatly persuasive is the argument that justice need not be maligned for peace. The report of the AUPD reiterated this need for accountability and further recommended removal of immunities for state actors

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<sup>97</sup> E Keppler 'AU back Mbeki Panel call on Darfur Prosecutions' Human Rights Watch (29 October 2009); <http://www.hrw.org/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions> (Accessed October 8 2013).

<sup>98</sup>William R. Pace is the Convenor of the Coalition for the ICC, <http://www.iccnw.org/?mod=newsdetail&news=3517> (Accessed 08 October 2013).

<sup>99</sup>B Ki-moon 'Open debate on Peace and Justice with a Special Focus on the Role of the International Criminal Court' UNSC (17 October 2012) ; <http://www.un.org/sg/statements/index.asp?nid=6373> (Accessed on 5 October 2013).

<sup>100</sup> AU PSC Communique PSC/Min/ Comm/(CXLII) (21 July 2008)para10.

<sup>101</sup> (n 94 above) para 4&11.

indicted for crimes in Darfur. The hybrid court is yet to be established and its chances of success were doubtful; Sudan has been 'stonewalling on justice for years'.<sup>102</sup>

"The debate about peace versus justice or peace over justice is a patently false choice. Peace and justice are two sides of the same coin. The road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously."<sup>103</sup>

ICC is not bound to decline jurisdiction merely in the interest of peace; the OTP 2007 Policy document stated that 'interests of justice' is broader than accountability, but 'should not be conceived so broadly as to embrace all issues related to peace and security'. It states also that 'the difference between interest of justice and efforts to secure peace must be consistent with the legal requirements of the Rome Statute to hold perpetrators accountable'.<sup>104</sup> The former ICC prosecutor was accused of being rash in securing an arrest warrant for Al Bashir, but could he have declined a case referred by the UNSC; and after confirming that ICC crimes have been committed, would the Court have allowed peace debates to malign justice? According to the UN General Secretary:

"But, the Court is not simply an autonomous international organization. It is also a judicial body — independent and impartial. Once set in motion, justice takes its own inexorable course, un-swayed by politics. That is its strength, its distinctive virtue. But, it also, frankly, presents challenges to those who have to navigate the new environment that is created when justice enters the scene..."<sup>105</sup>

Also the ICC is a court of last resort acting where states are unable or unwilling to; Sudan had shown serious willingness to prosecute the atrocities in Sudan, the request for the suspension of the ICC's intervention would have been somewhat justified, but the Sudanese government only made a white washed efforts to prosecute crimes committed in Darfur. On 7 June, 2005 a day after the ICC announced an intention to conduct investigations in Darfur, the government of Sudan established 'the Special Criminal Court on the Events in Darfur (SCCED)' to investigate crimes committed in Darfur.<sup>106</sup> By July 2006 the state had brought only 13 cases involving very low

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<sup>102</sup> CICC "African Civil Society Stand Up for Justice" Africa Update (October 2010); [http://www.iccnw.org/documents/AfricaUpdate14\\_\\_eng.pdf](http://www.iccnw.org/documents/AfricaUpdate14__eng.pdf) (Accessed on 8 October 2013).

<sup>103</sup> F Besouda 'International Justice and Diplomacy' *Newyork times* (April 2, 2013); <http://justiceinconflict.org/2013/04/02/icc-prosecutor-enters-the-peace-versus-justice-sweepstakes/> (Accessed 25 October 2013).

<sup>104</sup> R Slye 'Immunities and Amnesties' in M du Plessis (eds) *African Guide to International Criminal Justice* (2008) 189.

<sup>105</sup> Ban Ki Moon (n 99 above)

<sup>106</sup> Letter dated 18 June 2005 to the head of the UN Mission in the Sudan UNSC S/2005/40; <http://daccessddsny.un.org/doc/UNDOC/GEN/N05/395/89/PDF/N0539589.pdf?OpenElement> (Accessed 11 September 2010).

ranking individuals who were accused of minor offences.<sup>107</sup> In August 2008, the justice minister appointed a special prosecutor and legal advisers to investigate crimes committed in Darfur from 2003. These justice officers indicted Ali Kosheib, a militia commander also charged by the ICC for war crimes and crimes against humanity.<sup>108</sup> Ali was not arrested neither was he tried till date.

In conclusion the ICC is a court of justice and should ensure that justice is done without fear or favour. And as noted by Steve Odero 'law is sacrosanct and the reality on the ground ought to conform to it.'<sup>109</sup> But in the meantime state parties to the Rome Statute are reminded of their obligation to cooperate with the ICC under articles 86 and 98(1) of the statute and article under 26 of the Vienna Convention.

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<sup>107</sup> HRW 'The Mbeki Panel Report One Year On' (29 October 2009); <http://www.hrw.org/news/2010/10/27/mbeki-panel-report-one-year> (Accessed 1 October, 2013).

<sup>108</sup>HRW (n 107 above).

<sup>109</sup> S Odero, 'Politics of International Criminal Justice: The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis' in C Murungu & J Biegon *Prosecuting International Crimes in Africa* (2011)145.

## Chapter four

### AU/ICC tension: Justified or not

#### 4.1 Introduction

This chapter discusses the AU/ICC tension. It starts with a historical background to Africa's contribution to the creation of the ICC and demonstrates Africa's faith in the court. The chapter draws from the Sudan experiences addressed in the preceding chapter and its implication on the AU/ICC relations. The chapter then assesses the credibility, justification or otherwise of the AU's backlash against the court. The AU's criticisms against the court are analysed accordingly. The voices of ordinary Africans are also kept alive in these debates and equally the need for victims' justice.

#### 4.2 Africa and the ICC: History revisited

“Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.”<sup>110</sup>

Africa's desires to end impunity influenced its strong support for the ICC.<sup>111</sup> Africa contributed immensely to the establishment of the court. 14 African states actively participated in the ILC draft negotiations.<sup>112</sup> Before the Rome Conference, there were two separate expert meetings in Dakar Senegal and South Africa<sup>113</sup> to brainstorm on common principles that would guide the continent at the conference.<sup>114</sup> The Dakar meeting was organized by the AU Council of Ministers and a continental declaration on the ICC was adopted afterwards.<sup>115</sup> Also CSOs and the media created

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<sup>110</sup> P Mochochoko “Africa and the International Criminal Court” in E Ankumah & E Kwakwa (eds) *African Perspectives on International Criminal Justice* (2005), 243;

<sup>111</sup> H Jallow & F Besouda ‘International Criminal Law in an African Context’ in M du Plessis (eds) *African guide to international criminal justice* (2008) 41.

<sup>112</sup> Jallow & Besouda (n 108 above) 41.

<sup>113</sup> September, 1997 in Pretoria South Africa.

<sup>114</sup> P Mochochoko (n110 above) 43.

<sup>115</sup> P Mochochoko (N 114 above) 48.

a lot of awareness on the implication of the Rome conference for Africa.<sup>116</sup> The continent was well represented at the conference and also played prominent roles during negotiations being guided by the South African Principles and the Dakar Declaration.<sup>117</sup>

The first continent to ratify the Rome Statute was Africa (Senegal). Today, 34 states out of the 122 state parties to the Statute are from Africa. Six African states have domesticated the Rome Statute<sup>118</sup> and several others are at various stages of its domestication.<sup>119</sup> The recent expression by Egypt to join ICC buttresses Africa's unwavering commitment to the court.<sup>120</sup>

African also features prominently in the work force of the ICC. The current 1<sup>st</sup> Vice President of the court, Judge Sanji Monageng is from Botswana alongside three other African judges.<sup>121</sup> Fatou Besouda from The Gambia is the ICC prosecutor; she was the former deputy prosecutor during Ocampo's tenure.<sup>122</sup> Fatou actually received a formal endorsement of the African Union during the campaign for the OPT.<sup>123</sup> The head of the jurisdiction 'Complementarity and Cooperation', Phakiso Mochochoko is from Lesotho and a total number of 144 out of total 658 permanent staff of the ICC are Africans.<sup>124</sup>

All cases and situations before the ICC are in Africa. There are precisely 18 cases involving war lords, high profile individuals such as political leaders, and sitting heads of states, deputy prime minister and former president.<sup>125</sup> Most of these cases were referred to the court by states involved.<sup>126</sup> The OPT initiated investigations proprio motu in Kenya and Cote D'Ivoire, while 2 cases were referred to the court by the UNSC.<sup>127</sup> The court has opened 7 preliminary investigations and two of these countries are also from Africa.<sup>128</sup> The ICC handed down its first

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<sup>116</sup> Mochochoko (N 115 above) 249.

<sup>117</sup> Jallow & Besouda (N 114 above) 43. Lesotho delegate was the vice –chairperson of the Rome conference and coordinated the part 9 of Rome Statute; South African delegate was a member of the drafting committee and coordinated the drafting of part 4 while Zambian delegate was a member of credential committee.

<sup>118</sup> Seychelles, Mauritius, Tunisia, Cape Verde, Uganda, Kenya, DRC, South Africa.

<sup>119</sup> SALC (n 20 above) 15; Nigeria, Botswana and possibly Egypt, Namibia and Tanzania.

<sup>120</sup> UNdispatch "Egypt to Join the International Criminal Court" (April 20 2011) <http://www.undispatch.com/egypt-to-join-the-international-criminal-court>.

<sup>121</sup> SALC (n 119 above) 17; They are Akua Kuenyehia (Kenya) Joyce Aluoch (Kenya) and Chile Eboe-osuji (Nigeria).

<sup>122</sup> Fatou was elected on 12 December 2011; information [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/theprosecutor2012.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/theprosecutor2012.aspx) (Accessed October 1 2013).

<sup>123</sup> 'All change at the ICC: Time to Focus on The Merits not connection' *Kenya Monitor* (20 September 2011) <http://www.icckenya.org/2011/09/all-change-at-the-icc-time-to-focus-on-merit-not-connections/> (Accesses October 1, 2013).

<sup>124</sup> SALC (n121 above) 17.

<sup>125</sup> Sudanese President Omar al-Bashir ; Kenyan leaders Uhuru Kenyatta and William Ruto; Libya's former intelligence chief Abdullah al-Senussi Saif al-Islam Gaddafi, and former Cote d'Ivoire president Laurent Gbagbo and his wife.

<sup>126</sup> Central African Republic, Uganda, Mali and Congo DRC referred the situations in their countries to the ICC

<sup>127</sup> Sudan and Libya.

<sup>128</sup> Afghanistan, Georgia, Guinea, Colombia, Honduras, the Republic of Korea and Nigeria; see <http://www.amicc.org/icc/cases> (Accessed 16 September, 2013).

judgment on the 14 March, 2012 when it successfully concluded the case of ICC v Thomas Lubanga Dyilo a warlord from DRC, whom the court found guilty of war crimes for his roles in recruiting and child soldiers to perpetuate atrocities in Uganda. He has been sentenced to 14 years imprisonment subject to appeal.<sup>129</sup> This judgment was lauded as a landmark achievement against impunity and victory for victims.<sup>130</sup> Geraldine Mattioli-Zeltner the director of international crimes department with Human Rights Watch described the judgment as follows:

“The verdict against Lubanga is a victory for the thousands of children forced to fight in Congo’s brutal wars and military commanders in Congo and elsewhere should take notice of the ICC’s powerful message: using children as a weapon of war is a serious crime that can lead them to the dock.”<sup>131</sup>

But the ICC/AU relationship has deteriorated to antagonism with the AU asking member states to withdraw cooperation from the Court.<sup>132</sup> The Union has described the ICC’s charges against sitting heads of states as an affront on Africa’s sovereignty and integrity.<sup>133</sup> Recently on 13 October 2013 the Union met in Addis Ababa Ethiopia, to deliberate on the ICC’s involvements in Africa and the future of the court in the continent.<sup>134</sup> This frosty relationship if not urgently resolved would impact negatively on accountability for impunities in Africa.

### 4.3 AU/ICC tension and the aftermaths

The ICC’s refusal to suspend its proceedings against Al Bashir and the UNSC refusal to defer the case for one year were the main cause of the AU/ICC rift. In July 2010 during 5<sup>th</sup> annual summit in Kampala Uganda the AU Assembly reiterated the decision not to arrest Al Bashir.<sup>135</sup> The Union asked members to balance their obligation to the AU with their obligation to the ICC.<sup>136</sup> The

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<sup>129</sup> Information available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx). (Accessed 16<sup>th</sup> July, 2013).

<sup>130</sup> ‘A landmark Decision for International Justice’ *Daily Report Legal Analysis* (14 March 2012).

<sup>131</sup> HRW “[ICC: Landmark Verdict a Warning to Rights Abusers](http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers)” (March 14, 2012). <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers> (Accesses October 2 2013).

<sup>132</sup> Doc Assembly/AU/13/ (XII), (July 2009) Parat 10. [http://www.africa-union.org/root/UA/Conferences/2009/july/Summit/decisions/ASSEMBLY%20AU%20DEC%20243%20%20267%20\(XI\)%20\\_E.PDF](http://www.africa-union.org/root/UA/Conferences/2009/july/Summit/decisions/ASSEMBLY%20AU%20DEC%20243%20%20267%20(XI)%20_E.PDF) (Accessed 28 October 2013).

<sup>133</sup> SALC (n 124 above) 28.

<sup>134</sup> ‘African Union summit on ICC pullout over Ruto trial’ BBC News (20 September, 2013); <http://www.bbc.co.uk/news/world-africa-24173557> (Accessed 2 October, 2013).

<sup>135</sup> The import of this instruction is that Member states should prioritise their Obligation to the AU decision. See Assembly/AU/Dec 270 (xiv) on the second ministerial meeting on the Rome Statute of the ICC Doc Assembly/AU/10(XV) para 4 and 5; [http://www.africa-union.org/root/UA/Conferences/2010/juillet/Summit\\_2010\\_b/doc/DECISIONS/Assembly%20AU%20Dec%20289-330%20\(XV\)%20\\_E.pdf](http://www.africa-union.org/root/UA/Conferences/2010/juillet/Summit_2010_b/doc/DECISIONS/Assembly%20AU%20Dec%20289-330%20(XV)%20_E.pdf) (Accessed 28 September 2013).

<sup>136</sup> Para 6 of AU decision on the progress Report of the Commission on the implementation of Decision Assembly/AU/Dec 270 (xiv) on the second ministerial meeting on the Rome Statute of the ICC Doc Assembly/AU/10(XV).

meeting furthermore rejected ICC's request for liaison office in Addis Ababa Ethiopia<sup>137</sup> and proposed a unanimous pursuit for amendment of Article 16 of the Rome Statute to allow the UNGA exercise the issues deferrals rather than the UNSC.<sup>138</sup> In January 2012 during the 18th summit of the AU head of states in Addis Ababa, the Union decided to seek advisory opinion of the ICJ on the issue of immunity for serving heads of states. At the May 2013 Summit the Union made further request to the UNSC for one year deferral of the cases against the President of Kenya and his deputy and to allow Kenya's domestic court to try their cases.<sup>139</sup> UNSC's rejection of both requests exacerbated the tension.<sup>140</sup> The AU has also started a process of setting up an African Court with jurisdiction to try international crimes. But it must be emphasized that the Unions decisions are usually arrived at through consensus and do not always reflect the general opinion or dissenting votes.

The current AU Commission Chairperson Zuma insists that the arrest warrant issued against Al-Bashir is not acceptable. This statement is a departure from her campaigns statements where she declared she would be guided by South African foreign policy. South Africa has been at the forefront of campaigns for an effective ICC and there is a standing arrest warrants against Al Bashir in the country.

Members of the Union are divided over this rift and African state parties to the ICC have been caught in the middle with possibility of sanctions by the Union. Article 23(b) of the Constitutive Act states that:

“Furthermore, any member state that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transportation and communication links with other member states, and other measures of a political and economic nature to be determined by the Assembly”<sup>141</sup>

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<sup>137</sup>AU decision (n 136 above) Para 8.

<sup>138</sup>AU decision (n 137 above) Para 7

<sup>139</sup>President Kenyatta and deputy president of Kenya were indicted by the ICC on the allegation of complicity in the Kenya 2007-2008 post-election violence. About 1,200 died in the violence; about 600,000 persons internally displaced and there were also about 900 documented cases of rape. The OPT was authorized by the Pre Trial Chamber 11 to initiate investigation proprio motu after Kenya authorities refused to act. See generally Human Rights Watch 'ICC: Judges Approve Kenyan Investigation' HRW (31 March 2010); <http://www.hrw.org/en/news/2010/03/31/icc-judges-approve-kenyan-investigation> (Accessed 18 September 2013).

<sup>140</sup> The ICC on July 15, 2013 denied Kenya's application to move the Kenya's trials to east Africa. But the court maintained that the trial must be held at The Hague due to the cost implications to the court, witness protection, impact on victims and the security of the proceedings.<sup>140</sup> Kenya parliament passed a vote in August 2013 to withdraw from the Rome Statute.

<sup>141</sup>Article 23(b) of the AU Constitutive Act.

#### 4.4.1 Records of cooperation with the ICC in Africa

The Foreign Minister of Botswana rejected the Union's call for non-cooperation with the ICC. He stated that the resolution was as a result of pressure from Muammar Gaddafi who was the AU Chairperson at the time.<sup>142</sup> In 2010 the Minister of State for Foreign Affairs in Uganda in stated that Uganda would arrest Al-Bashir if he attends the AU 2010 Summit in Kampala. Al Bashir did not attend. South Africa said it would arrest Al Bashir if he attended Zuma's inauguration as AU chairperson in 2009. Again in 2010, South Africa declared its readiness to arrest Al Bashir if attends the World Cup opening in South Africa. President Jacob Zuma stated that he respects international law and would cooperate with the ICC.

In October 2010 a high court in Kenya issued a provisional arrest warrant for Al Bashir,<sup>143</sup> this was upon an application by ICJ Kenya to forestall a second visit by Al Bashir's to Kenya since his arrest warrant by the ICC.<sup>144</sup> In 2011, the foreign minister of Zambia, Chishimba Kambwili announced that Al Bashir would be arrested if he steps into Zambia. According to him Zambia's obligation to the AU does not preclude it from disregarding its other international obligations. He noted that 'Zambia is a sovereign state and cannot be compelled against its conscience and convictions to grant a fugitive safe harbor within its territory'.<sup>145</sup>

In July 2012, the 19<sup>th</sup> Summit of the Union scheduled to hold in Malawi was moved to Ethiopia because the President of Malawi rejected AU's pressure to invite Al Bashir to participate in the Summit in Malawi. Malawi had expressed intentions to arrest Al Bashir if he came to Malawi.<sup>146</sup> Botswana expressed strong solidarity with Malawi on its decision and condemned the AU's relocation of the meeting to Ethiopia.

"Botswana therefore condemns this action as it is inconsistent with the very fundamental principles of democracy, human rights and good governance espoused by the AU, and which Malawi upholds. It is our

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<sup>142</sup> n 132 above.

<sup>143</sup> Al Bashir was scheduled to visit the Kenya to attend a summit organized by Inter-Governmental Authority on Development (IGAD).

<sup>144</sup> Kenya Section of The International Commission of Jurists v Attorney General & Another [2011] eKLR (ICJ-Kenya v Attorney General).

<sup>145</sup> 'Zambia ready to arrest Sudan's Al Bashir' (20 May 2012) RSS Feeds available at <http://www.borglobe.com/25.html?m7:post=zambia-ready-to-arrest-sudan-s-al-bashir> (Accessed 28 October 2013)

<sup>146</sup> ISS Special Report 'The AU Summit and Malawi' (13 June 2012) Aavailable at [www.issafrica.org](http://www.issafrica.org). "Malawi Cancels AU Summit over Sudan's Bashir" Al-Jazeera (9 June 2012).

<http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>.

considered view that Malawi as a sovereign state has the right to make decisions it may deem necessary, in fulfillment of her obligations under both the Rome Statute and the AU.<sup>147</sup>

African states cooperation with the ICC has been recorded in other instances; in 2007 and 2008 respectively Congo DRC arrested and surrendered Germain Katanga and Mathieu Ngudjolo Chui to the ICC. Ivory Coast in 2011 surrendered Laurent Gbagbo to be tried at the ICC. In 2010 three members of Sudan's JEM, Abu Garda, Abdallah Banda and Saleh Mohammed surrendered themselves voluntarily to the ICC.<sup>148</sup> They were charged by the ICC because of their involvement in an attack against AU peace keepers in Sudan in September 2007, 10 AU peace keepers were killed in that attack while several others were wounded.<sup>149</sup>

#### 4.4.2 Records of non-cooperation

Some states have complied with the Union's resolution and allowed Bashir into their territories. Chad was the first to host Al Bashir in July 2010<sup>150</sup> in a conference organized by the Community of Sahel-Saharan States.<sup>151</sup> Chad insisted that Al Bashir is under immunity as a head of state.<sup>152</sup> Again Al Bashir would visit Chad on August 2011 and in February 2013.<sup>153</sup> In August 2010, Kenya hosted Al Bashir at the inauguration of Kenya's new constitution<sup>154</sup> notwithstanding that section 27(1) of its International Crimes Act (2008) provides that official capacity will not preclude Kenya from cooperating the ICC with arrest, surrender or rendering other assistance to the court. In May 2011 Al Bashir attended the inauguration ceremony of Djibouti's President making the country the third African state party to the ICC to have declined obligation to cooperate with the ICC to arrest Al Bashir.<sup>155</sup> In October 2011 Malawi's late president hosted Al Bashir at COMESA Summit.

<sup>147</sup> Press Statement: Botswana Ministry of Foreign Affairs (13 June 2012) available at [http://www.mofaic.gov.bw/index.php?option=com\\_content&view=article&id=717:s1&catid=7&Itemid=95](http://www.mofaic.gov.bw/index.php?option=com_content&view=article&id=717:s1&catid=7&Itemid=95) (Accessed 28 October 2013).

<sup>148</sup> Bahar Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I on 18 May 2009, Abdallah Banda Abakaer Nourain while Saleh Mohammed Jerbo Jamus appeared voluntarily before the Court on 17 June 2010.

<sup>149</sup> The rest of the other summoned persons refused to appear before the court and are being protected by the government of Sudan.

<sup>150</sup> 'Human Rights Watch Calls on Chad to Arrest Sudan's President' *Globe and Mail* (21 July 2010) <http://www.theglobeandmail.com/> (Accessed 18 September 2013).

<http://www.theglobeandmail.com/news/world/human-rights-watch-calls-on-chad-to-arrest-sudanspresident/article1387444/>.

<sup>151</sup> 'Sudan's President Bashir Defies Arrest Warrant in Chad' *BBC News* (21 July 2010); [www.bbc.co.uk/news/world-africa-10718399](http://www.bbc.co.uk/news/world-africa-10718399). (Accessed 21 October 2013).

<sup>152</sup> 'Sudan's al-Bashir Defies ICC with Chad Trip' *Mail and Guardian* (22 July 2010) available at <http://mg.co.za/print/2010-07-22-sudans-albashir-defies-icc-with-chad-trip> (Accessed 12 September, 2013).

<sup>153</sup> S Lamony 'Chad Hosts Wanted Al-Bashir as Côte d'Ivoire Joins ICC' African Arguments (20 February 2013) <http://africanarguments.org/2013/02/20/chad-hosts-wanted-al-bashir-as-coted%E2%80%99ivoire-joins-icc-%E2%80%93-by-stephen-lamoney/>. (Accessed 18 September 2013).

<sup>154</sup> 'Omar al-Bashir Tamishes Kenya's Landmark Day' *The Guardian* (27 August 2010) <http://www.guardian.co.uk/world/2010/aug/27/omar-al-bashir-war-crimes-kenya> (Accessed 18 September 2013).

<sup>155</sup> 'Sudan's Bashir Attends Djibouti President's Inauguration' *VOA News* (7 May 2011); <http://www.voanews.com/content/sudans-bashirattends-djibouti-presidents-inauguration-121463729/139121.html> (Accessed 3 October, 2013).

Nigeria hosted Al Bashir in April 2013 during the AU summit.<sup>156</sup> Nigerian CSOs secured an order of the high court for Al Bashir's arrest but he left the country before the end of the summit.<sup>157</sup> With the exception of Nigeria,<sup>158</sup> the ICC pretrial chamber found these states to be in violation of their obligation to the ICC and referred them to the UNSC and the ASP in accordance with Article 87(7) of the Rome Statute which provides that:

“if state Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [ASP] or, where the Security Council referred the matter to the Court, to the Security Council.”<sup>159</sup>

## 4.5 AU/ICC agitations: Rhetoric or reasonably justified

AU's criticisms against the ICC are based on the following grounds:

### 4.5.1 ICC is unfairly targeting Africans

The AU accuses the ICC of unfairly targeting Africans. The Ethiopian Prime Minister Hailemariam said that 'the ICC is racist and unfairly targeting Africans'. President Museveni said that the court makes it seem like it is only Africans that are committing international crimes.<sup>160</sup> This is because all the ICC cases and situations are in Africa.

### 4.5.2 Bias in application of Justice

The AU accuses the UNSC of being partial with case referrals because they failed to refer other situations such as Lebanon, Syria, Iraq, Sri Lanka, Burma, Nepal, Yemen, Bahrain, Zimbabwe, USA, China, Russia, and Pakistan.<sup>161</sup> AU labeled the ICC's interventions in Africa as 'an organised hypocrisy,' 'orchestrated double standards', and 'refusal by the Western world to see

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<sup>156</sup> 'Al Bashir in Nigeria' *Vanguard Newspaper* (23 July, 2012); <http://www.vanguardngr.com/2013/07/al-bashir-in-nigeria/> Accessed 3 October, 2013)

<sup>157</sup> 'International Criminal Justice in Africa: Wanting More to Celebrate' *Global Observatory* (July 25, 2013); <http://reliefweb.int/report/world/international-criminal-justice-africa-wanting-more-celebrate> (Accessed 3 October, 2013)

<sup>158</sup> "Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court" *All Africa.com* <http://allafrica.com/stories/201309110777.html>; <http://www.icc-cpi.int/iccdocs/doc/doc1619414.pdf> (Accessed 3 October, 2013)

<sup>159</sup> Pre-trial Chamber decisions: on Al Bashir visit to Chad ICC-02/05-01/09 (27 August 2010); on Al Bashir's visit to Kenya ICC-02/05-01/09 (27 August 2010); on Al Bashir visit to Djibouti ICC-02/05-01/09 (12 May 2011); on Al Bashir visit to the Republic of Chad ICC-02/05-01/09 (13 December 2011); on Al Bashir visit to Malawi ICC-02/05-01/09 (11 December 2012); on Al-Bashir's Visit to the Republic of Chad ICC-02/05-01/09 (22 February 2013). <http://www.icc-cpi.int> (Accessed 3 October, 2013).

<sup>160</sup> "Uganda: ICC Targeting African Presidents-Museveni" *The Monitor* (17th December 2011) story available at <http://allafrica.com/stories/printable/201112180083.html> (Accessed 1 October, 2013).

<sup>161</sup> W Schabas "the international Criminal Court" in D Black & P Williams (eds) *The international politics of mass atrocities: the case of Darfur* London: Routledge (2010) 147

and treat Africans as equals'.<sup>162</sup> The Union says the court should advocate for universal application of justice.<sup>163</sup> According to President Mugabe the ICC lacks credibility in Africa because the court seems to exist only for African offenders while leaders of the powerful nations who are also guilty of international crime, like Bush and Blair are not charged referred to the court. He called this 'selective justice'.<sup>164</sup> The Union stated as follows: 'We are not against international justice. It [just] seems that Africa has become a laboratory to test the new international law.'<sup>165</sup>

#### 4.5.3 Immunity of heads of states

AU argues that Al Bashir enjoys immunity because Sudan is not a party to the Rome Statute but as noted earlier ICL does not accept the defend of immunity.<sup>166</sup> Also article 27(2) of the Rome Statute provides that immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction. General Obasanjo, former President of Nigeria argued that Al Bashir cannot be held liable for the crimes of rebels in a state of civil war he went further to say that 'it would be immoral for Al-Bashir to abandon Janjaweed after it helped save Sudan from disintegration'.<sup>167</sup> This argument does not seem to favour Al Bashir but rather implicates him in the atrocities in Darfur and justifies ICC's charges against him. Regarding Al Bashir's arrest warrant, scholars have argued that 'as long as there is no immunity for state officials from prosecution there should be equally no immunity from subpoenas being issued against state officials'.<sup>168</sup>

#### 4.5.4 Judicial imperialism and neo colonialism

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<sup>162</sup>P Hammond 'The tyranny of 'international justice' a conference organised by the Royal United Services Institute and the Centre for Foreign Policy Analysis in London (30th March 2009); <http://www.spiked-online.com/newsite/article/6410#.UksNJT8kRo0> (Accessed 1 October, 2013)

<sup>163</sup> A Branch 'displacing Human Rights: War and Intervention in Northern Uganda' Oxford University Press (2011) 213.

<sup>164</sup> 'Mugabe Slams "Blind" International Criminal Court' *Zimbabwe Mail* (23rd September 2011); <http://www.thezimbabwemail.com/zimbabwe/9132-mugabe-slams-blind-international-criminal-court.html> (accessed on 1 October, 2013).

<sup>165</sup> 'As the World Dithers, Darfur Crisis Claims More Casualties' *The New Times* (4 October 2008); <http://allafrica.com/stories/200810040047.html> (Accessed 23 October 2013).

<sup>166</sup> P Gaeta "Does President Al Bashir enjoy immunity from arrest?" Oxford Journal of International Criminal Justice Oxford University Press (2009) Volume 7 Issue 2 at 315-332 <http://jicj.oxfordjournals.org/content/7/2/315.abstract>

<sup>167</sup> 'Obasanjo backs Bashir on Darfur war charges' *The East African Newspaper* (28th June 2010); <http://allafrica.com/stories/201006280042.html> (accessed 1 October 2013)

<sup>168</sup> C Murungu 'Immunity of State Officials and the Prosecution of International crimes' in C Murungu & J Biegon (eds) *Prosecuting international Crimes in Africa* (2011)33.

The AU referred to the ICC's focus on Africa as 'Judicial imperialism' and 'neo colonialism' it also called the arrest warrant against Al Bashir 'an encroachment into Sudan's sovereignty'.<sup>169</sup> 'Neocolonialism' is described as international level politics whereby more powerful governments control weaker nations however indirectly using military/political control, economic/financial or through legal policies so as to dominate them.<sup>170</sup> Such actions are similar to the traditional colonialism of 16th to 19th centuries to exercise defacto control over targeted nations.

President Kagame of Rwanda called the ICC a new form of 'imperialism' that seeks to 'undermine people from poor African countries by powerless countries'<sup>171</sup> and that the ICC is using vulnerable African states to gain popularity. The AU accuses the ICC's former prosecutor of being a puppet of more powerful states. The Union calls the ICC's cases against African heads of states 'smacks of imperialist arrogance'.<sup>172</sup>

But most cases before the ICC were self-referrals by the states in question,<sup>173</sup> and the prosecutor is presently analysing other situations outside Africa. It is agreed in principle that Africa should be concerned about ICC's disproportionate focus on Africa, but to call the court an instrument of neo-colonialism is an exaggeration.<sup>174</sup> Perhaps African leaders wish to manipulate international justice for self-interests.<sup>175</sup> HRW agrees that there could be other ICC situations outside Africa and that 'the application of international justice has been uneven, with officials from powerful states less vulnerable to prosecution' but argues that this should not become a ground for limiting accountability for impunity committed in Africa.<sup>176</sup> AU is advised therefore to commit more efforts towards combating impunity but the Union can also insist on the need to also extend the ICC's reach to nations outside of Africa.<sup>177</sup>

#### 4.5.5. ICC's intervention would undermine Peace processes in Sudan

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<sup>169</sup> 'Court Issues Bashir arrest warrant' *Al Jazeera* (5 March 2009);

<http://www.aljazeera.com/news/africa/2009/03/20093412473776936.html> (Accessed 1 October, 2013).

<sup>170</sup> I Gassama 'Africa and the politics of destruction: A critical re-examination of neocolonialism and its consequences' *10 Oregon Review of International Law* (2008) 338.

<sup>171</sup> 'Rwanda's Kagame says ICC Targeting Poor, African Countries' *AFP* (31 July 2008)

[http://www.google.com/hostednews/afp/article/ALeqM5ilwB\\_Zg00Jx3N9hSX-Wu8zEyQGig?hl=en&docId=080731164754.wis79px5](http://www.google.com/hostednews/afp/article/ALeqM5ilwB_Zg00Jx3N9hSX-Wu8zEyQGig?hl=en&docId=080731164754.wis79px5) (Accesses 23 October 2013).

<sup>172</sup> 'Africa and the International Criminal Court' *New York Times* (30 June, 2009)

<sup>173</sup> S Odero "Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis' in C Murungu & J Biegon (eds) *Prosecuting international crimes in Africa* (2013) 155- 156.

<sup>174</sup> 'The ICC is Only a Small Piece in the Justice Puzzle of Africa's Conflicts' *East African Story* (11 April 2011); <http://allafrica.com/stories/201104111502.html> (Accessed 1 October, 2013).

<sup>175</sup> (n 173 above).

<sup>176</sup> Human Rights Watch 'AU: Back Mbeki Panel Call for Darfur Prosecutions' (29 October 2009);

<http://www.hrw.org/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions>. (Accessed 1 October, 2-13).

<sup>177</sup> (n 176 above).

Everyone agreed that impunity was committed in Darfur; the AU PSC adopted a decision that condemned impunities in Darfur<sup>178</sup> but warned that the pursuit for justice cannot be at the detriment of peace.<sup>179</sup> The PSC Deputy Head of Mission-Consulate General in Uganda opined that Al Bashir's indictment is detrimental to the peace efforts and national reconciliation. This PSC Decision emphasized serious concerns for the misuse of indictments against African leaders.<sup>180</sup>

"The AU's position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace."<sup>181</sup>

The merits of these arguments are discussed below.

#### 4.6 Analysing the merits

It is true that all the ICC situations and cases are in Africa but four of these situations were self-referred to the ICC by African leaders and even the 2 situations that were referred by the UNSC received vote's affirmative votes by African states members of the council at the time.

To expatiate further, President Museveni referred the situation in Uganda to the OPT; President Kabila referred the situation in the DRC to the Office of the Prosecutor; President Bozize referred the situation in CAR; Benin and Tanzania voted in favor of UNSC resolution to refer the Darfur situation to the ICC; South Africa, Gabon and Nigeria voted in favour of the UNSC referral of the Libya situation. And finally both former and current presidents of Cote d'Ivoire Gbagbo and Ouattara accepted the jurisdiction of the ICC in Cote d'Ivoire.<sup>182</sup> It was only in Kenya that the OPT opened investigations proprio motu.

The ICC's focus on Africa could as well be due to preponderance of atrocities in the Africa. According to the former ICC prosecutor Ocampo, 'Africa has been the continent with the gravest

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<sup>178</sup> Peace and Security Council Communique '142nd Meeting' PSC/MIN/Comm (CXLII) (21 July 2008) <http://www.africa-union.org/root/au/organs/142-Communique-Eng.pdf> (Accessed 1 October, 2013).

<sup>179</sup>Avocats Sans Frontières "Africa and the ICC: Mending Fences" (July 2012) <http://www.au.int/en/sites/default/files/psc-387-final-rpt-sudan-s-sudan-29-07-2013-doc.pdf> (Accessed 1 October, 2013).

<sup>180</sup>Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction.

<sup>181</sup> 'World Reaction-Bashir Arrest' *BBC News* (4th March 2009) Available at <http://news.bbc.co.uk/2/hi/africa/7923797.stm> (Accessed 1 October 2013); "International Criminal Court has lost its impartiality" *Daily Monitor Newspaper* (Accessed 1 October 2013).

<sup>182</sup> F Bensouda 'International Media Conference on the Battle Against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?' *Gaborone Botswana* (6 July 2011); <http://www.wayamo.com/courses/botswana-07-2011.php> (Accessed on 28 September 2013).

human rights abuses' with the Darfur situation reported as the worst human rights crisis.<sup>183</sup> More than 5 million Africans are either internally displaced or are refugees, over 40 000 Africans are victims of impunity and thousands of children are being transformed into killers and rapists.<sup>184</sup> MO Ibrahim the chairman of Mo Ibrahim Foundation has lent his voice to this debate; he stated that the ICC's focus on Africa is because 'Africa has had its "fair share" of genocides and massacres'.<sup>185</sup> According to the ICC current prosecutor, Fatou Bensouda the Court's non-involvement in situations occurring in other continents is not the fault of the Court; ICC can only intervene in situations occurring in member states unless a non-state party enters an agreement allowing the Court's intervention or where the UNSC refers such situation to it under Article 13 of the Rome Statute.<sup>186</sup>

It appears also that there are inconsistencies with the manner in which African leaders approach the Court. It is worrisome that Presidents who referred cases to the ICC are suddenly opposing the Court because a fellow leader was charged by the Court. It means therefore that when persons perceived as enemies by African leaders are charged by the ICC, African leaders would have no problem with that or perhaps the leaders had a different conception of the ICC justice.<sup>187</sup> Nigeria voted for Libya's referral but has no problem hosting Al Bashir in Nigeria claiming obligation to AU's decision. Cote d'Ivoire's Lawrence Gbagbo accepted the Court's jurisdiction with an understanding that the Court would go after his opponents. He ended up being charged by the Court. Gbagbo's supporters now accuse the ICC of being a "White man's Court", "neo-colonialist" and an "imperialist agenda".<sup>188</sup> In July, 2012 six ECOWAS member states called on the ICC to open investigations into crimes committed in Mali?<sup>189</sup> How to reconcile these inconsistencies with the AU's stance on the Court becomes a formidable task.

Many Africans have supported ICC's interventions in Africa. They are of the opinion that their leaders are afraid of the ICC and are using the AU to shield themselves. Africans think that the AU is not fighting for ordinary Africans but is protecting the leaders. The fact that the AU is not demanding perpetual immunity for leaders makes no difference not only does delayed justice

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<sup>183</sup> L Moreno-Ocampo 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21 *American University International Law Review* no.4 (2006) 497-503.

<sup>184</sup> L Moreno-Ocampo (n 183 above)

<sup>185</sup> 'Call for AU and ICC to engage in 'honest dialogue' *Business day live* (October 15 2013)

<http://www.bdlive.co.za/africa/africannews/2013/10/15/call-for-au-and-icc-to-engage-in-honest-dialogue> (Accessed 23 October 2013).

<sup>186</sup>F Bensouda (n 182 above).

<sup>187</sup> Royal United Services Institute and Center for Foreign Policy Analysis 'Prosecuting Presidents' London.

<sup>188</sup> 'Is Africa on trial' *BBC NEWS*; <http://www.bbc.co.uk/news/world-africa-17513065> (Accessed 29 October 2013).

<sup>189</sup> S Lamony 'Is the International Criminal Court really picking on Africa?' *African Arguments* (16 April 2013); <http://africanarguments.org/2013/04/16/is-the-international-criminal-court-really-picking-on-africa-by-stephen-a-lamony/> (Accessed 24 October 2013)

amount to denial of justice but also the fact that African leaders are known for their penchants for perpetual stay in office. President Nguema of Equatorial Guinea has spent 32 years in office, President Santos of Angola served for 32 years as president, Robert Mugabe of Zimbabwe has just entered his 31 years as the president of Zimbabwe, Biya of Cameroon has been president for 29 years, late Muammar Gaddafi was president for 34 years before he was killed in the Libya's 2011 revolution, Museveni of Uganda is 25 years in office. Some of these leaders amend their constitutions to extend their stay in power

The fear therefore is that immunity will serve as an incentive for perpetual stay in office. Archbishop Desmond Tutu of South Africa warned that African leaders who main and kill Africans will never be made to account for their crimes if immunity is granted to the leaders.<sup>190</sup> Daniel Bekele the head of Africa at Human Rights Watch supported this opinion and stated that;

“The AU decision was “repugnant” given the kind of “disincentive it would create for anyone to leave power, as well as the incentive it creates for the unscrupulous to gain or maintain power at whatever cost – by murder, coup, or fraudulent elections”.<sup>191</sup>

African CSOs continue to receive arrest warrants against persons charged for impunity in the continent with joy. Abdul Tejan,-Cole, a former prosecutor at the SC-SL in an interview with BBC News said that ordinary Africans are not complaining about ICC's work in the continent, according to him Africa has so many victims of impunity and there is little chance of justice without international tribunals like the ICC.<sup>192</sup> African victims deserve justice and perpetrators should be made accountable.<sup>193</sup> Tijan Cole disagrees that the Court has put Africa on trial, 'it is farcical to equate the trial of 25 accused with the trial of an entire continent' he said.<sup>194</sup>

Chidi Odinkalu the Chairman of Human Rights Commission of Nigeria called most Africans children of war as himself and noted that most have suffered deprivations caused by bad governance. But he advised that a better alternative towards AU/ICC relationship is for the Union to seek more communication with the ICC and utilise the UN to address Africa's concern.<sup>195</sup> Another scholar puts it as follows:

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<sup>190</sup> 'African states seek immunity from prosecution for serving leaders' *Ft.com* (October 13, 2013); <http://www.ft.com/intl/cms/s/0/a2b672f6-341f-11e3-af0f-00144feab7de.html> (Accessed 4 August 2013).

<sup>191</sup> n 190 above.

<sup>192</sup> 'Is Africa on trial?' *BBC News* (27 March 2012) Available at <http://www.bbc.co.uk/news/world-africa-17513065> (Accessed 1 October 2013).

<sup>193</sup> n 192 above

<sup>194</sup> n 193 above.

<sup>195</sup> Africa Renewal "Pursuit of justice or Western plot?" (October 2009) <http://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> (Accessed 1 October 2013).

‘The African Union must translate its rhetoric against impunity into a programme of action, showing that African lives matter and that it will not issue a free pass to those — big or small — who violate Africans.’ “This is why most of us supported the establishment of the ICC. We believed the court would help to end high-level impunity for mass atrocities.”<sup>196</sup>

The character of persons charged by the Court is also worth discussing. The 28 individuals charged by the court may not be blameless. Joseph Kony was an unrepentant mercenary who recruited children using the brutal and abominable means turning them into killers and rapists same goes for Lubanga. The AUPD established Al Bashir’s government’s involvement in the Darfur atrocities;<sup>197</sup> they acknowledged that these men caused untold suffering to victims and should be brought to justice; they called for prosecution of these crimes to ensure accountability for the atrocities.

The weakness of most justice mechanisms in Africa may have also contributed to the strong ICC’s presence in Africa.<sup>198</sup> Most African states lack legal framework, financial capacity and an atmosphere of political freedom to effectively prosecute international crimes. This situation has been aptly captured as follows:

“It is an understatement to say that Africa has had its share of violence and impunity by its leaders. And it is also true that Africa does not have the machinery to tackle the issue of impunity. To be sincere, it will take quite a long time for such frameworks to be put in place. So, for now, the burden of ensuring justice for atrocities in Africa will often remain with the ICC”.<sup>199</sup>

‘Domesticating the Rome Statute is one solution’ said Solomon Dersso, senior researcher with the ISS, ‘because weak justice system makes it impossible to prosecute high ranking political officers’.<sup>200</sup> Rather than the infamous ‘African solution to Africa’s problems’ Africa should support efforts by the ICC to ensure that the continent is no longer a safe haven for perpetrator of impunity.<sup>201</sup> Africans especially the human rights lawyers and CSOs have been at the forefront of campaigns for a stronger cooperation with the Court; the judiciaries have also been very

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<sup>196</sup> M Kimani ‘International Criminal Court: Justice or Racial Double Standards?’ Global Policy Forum (16 December 2009); <http://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/48775.html> (Accessed 1 October, 2013).

<sup>197</sup> AUPD Report (n 94 above).

<sup>198</sup> C Jalloh ‘Regionalising international criminal law’ 9 *International Criminal Law Review* (2009) 445.

<sup>199</sup> ‘International Criminal Court, an imperative for all African nations’ *Punch newspaper* (19 August 2010) <http://news2.onlinenigeria.com/news/general/47692-international-criminal-court-an-imperative-for-all-african-nations.html> (Accessed 3 October, 2013)

<sup>200</sup> ‘Pursuit of justice or Western plot?’ *African Renewal* (October 2009) <http://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> (Accessed 23 October 2013).

<sup>201</sup> S Lamony “Is the International Criminal Court really picking on Africa” ( April 16, 2013); <http://africanarguments.org/2013/04/16/is-the-international-criminal-court-really-picking-on-africa-by-stephen-a-lamony/> (Accessed 1 October, 2013).

cooperative in Kenya, in South Africa and recently in Nigeria to issue arrest warrants for Al Bashir these countries.

Over 140 African and international CSOs wrote to the AU commission chair on 17 January 2013 asking her make 'ending impunity' top of her agenda. The letter reminded her of Africa's role in the establishment of the ICC because of strong believe in the court's ability to address impunity in the continent and finally, the letter asks her to devise strategies to improve communication between the AU and the ICC.<sup>202</sup>

#### 4.7 Keeping victims in perspectives

"neither justice nor victim is served by making the perfect the enemy of the good...Denying justice to those who have suffered unspeakable crimes in Darfur would provide no comfort to victims in Gaza who are denied access to the ICC.'<sup>203</sup>

Justice for victims is central to the work of the ICC. According to the Bensouda the Court cannot ignore victims of impunity because it is also working them.<sup>204</sup> Kofi Anan noted that 'the Court's failure to answer the calls of victims outside of Africa is not a justification to also ignore the calls of African victims'.<sup>205</sup> The ICC president stated that more than 5,000 victims have participated in the Court's proceedings and the Victims Trust Fund has supported over 80,000 African victims. The Rome Statute gives the ICC's power to authorize forfeiture of perpetrator's assets in favour of victims, article 75(2) states that 'The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.<sup>206</sup>

In conclusion it is important to state that peace and justice is a continuous debate that calls for careful balancing so that one will not be tantamount to the other, nevertheless political interference with legal processes should not be allowed to undermine universal treatment under the law.

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<sup>202</sup>SALC (n 121 above) 33.

<sup>203</sup> Richard Dicker, director of HRW ; see 'A Flawed Court in Need of Credibility?' *Newyork Times*; [http://www.nytimes.com/2012/05/22/opinion/a-flawed-court-in-need-of-credibility.html?\\_r=2&ref=global](http://www.nytimes.com/2012/05/22/opinion/a-flawed-court-in-need-of-credibility.html?_r=2&ref=global) (Accessed 1 October, 2013).

<sup>204</sup> F Bensouda "International Media Conference on the Battle Against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?" (6 July 2011) *Gaborone, Botswana*; <http://www.wayamo.com/courses/botswana-07-2011.php>. Accessed on 28 September, 2013.

<sup>205</sup> SALC (124) above.

<sup>206</sup> Article 75(2) Rome Statute.

Selective application of law under the guise of 'official immunity' would vitiate universality. This is the spirit and intent behind article 27 of the Rome Statute.<sup>207</sup>

## Chapter Five

### Proposals for ICC/AU cooperation

#### 5.1 Reflections

Prosecuting international crimes at the level of international courts comes with inherent challenges arising from political complexities. In the case of the ICC, as a treaty based institution the Court requires cooperation of state parties because it lacks its own police and enforcement organs.<sup>208</sup> This issue of enforcement of the court's decisions is crucial to its work without which the court becomes a giant with artificial limbs.<sup>209</sup> So because states cooperation is positioned at the center of the Court's work, politics will continue to intertwine with the court's works.<sup>210</sup>

The AU as a regional body should be concerned about protecting regional integrity but the Union should also be mindful of its mandate to combat impunity under article 4(h) the Constitutive Act. The Union should therefore address its concerns against the ICC in a manner that would not undermine the efforts to end impunity. HRW warned that the inherent value behind prosecuting international crimes is to ensure that perpetrators are made to account for their crimes; this would more readily satisfy peoples' desire for justice and pave way for lasting stability.<sup>211</sup> The above

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<sup>207</sup> P Hammond 'The tyranny of 'international justice' a conference organised by the Royal United Services Institute and the Centre for Foreign Policy Analysis in London (30<sup>th</sup> March 2009); <http://www.spiked-online.com/newsite/article/6410#.UksNJT8kRoo> (Accessed 1 October, 2013).

<sup>208</sup> The enforcement gap: How the International Criminal Court failed in Darfur' *Muftah.org* (25 March 2013); <http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html> (Accessed 18 October 2013)

<sup>209</sup> 'Call for AU and ICC to engage in 'honest dialogue' *Business day live* (15 October 2013); <http://www.bdlive.co.za/africa/africanews/2013/10/15/call-for-au-and-icc-to-engage-in-honest-dialogue>.

<sup>210</sup> Article 86 of the Rome Statute.

<sup>211</sup> Human Rights Watch 'Selling justice short: Why accountability matters for peace' (July 2009); <http://www.hrw.org/node/84264/> (Accessed 30 September 2013).

statement is in agreement with the African Commission's resolution urging AU members to ratify the Rome Statute and incorporate it into national laws.<sup>212</sup>

There is no legal basis for the AU's decision for Africa's non-cooperation with the ICC because the obligation to cooperate with the ICC is binding on state parties and the AU is not a party to the Rome Statute. This notwithstanding, the Union's resolution cannot be dismissed in an offhand manner; firstly this decision poses a dilemma of conflicting obligations for AU member states who are also parties to the Rome Statute; and secondly the threat of invocation of Article 23 of the AU Constitutive Act for sanctions may have justified some of the disregards by African state parties to the Statute, of the ICC's decision against Al Bashir; and thirdly as the continental political body with mandates to promote peace and security in Africa the AU is relevant in the ICC's work in Africa.

Collaboration between the two institutions will work better to promote peace and security in the continent, and will serve the best interest of justice and victims. 'The ICC also needs Africa' said the former president of the court, Philippe Kirsch, 'the ICC is incomplete without the support of the African state parties' he concluded. The ICC is advised to acknowledge international politics related to its work and the fact that political reconciliation is now needed to restore its relationship with Africa. Ending this rift is important to both because they are working to achieve the same purpose; the AU is charged with combating impunity in the continent same as the ICC whose mandate is end impunity.<sup>213</sup> Africa has suffered from many conflicts and needs an atmosphere of peace and security necessary for investment and development. To undermine the ICC's works in Africa would only benefit perpetrators of mass atrocities.<sup>214</sup>

The meeting of the AU heads of states in Ethiopia on 13 October, 2013 and their resolution asking President Kenyatta not to attend his trial at the ICC is a warning signal that urgent but tactical steps should be adopted to redress this political animosity. It should be emphasised that the credibility of any international institution is the willingness of parties to support its mandate, whereby this willingness is withdrawn in mass, the subsistence of such an organization is improbable. The Kenya Ambassador alluded to this fact when he stated said that the League of Nations ceased to

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<sup>212</sup> ACHPR /Res 59 (XXXI) 02: Resolution on the Ratification of the Statute of on the International Criminal Court by OAU Member States (2002).

<sup>213</sup> Article 2(h) Constitutive Act and Preamble 5 of the Rome Statute.

<sup>214</sup> T Murithi 'African Union and the ICC: An Embattled Relationship' Institute for Justice and Reconciliation (March 2003) 7; <http://dspace.cigilibrary.org/jspui/bitstream/123456789/33636/1/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf?1> (Accessed 19 October 2013).

exist when member states succeeded in ignoring their obligations to it. This argument is not terribly credible but the ICC should not be allowed to suffer such fate.

The allegation that the Court is targeting only Africa but turns blind eyes to atrocities committed in other nations should be taken seriously. This is in line with the statement by the ICC president in his proposal for universality of justice:

“International criminal justice is not owned by any one culture, nor driven by any one people. It is an ideal which is intensely human; it is why the International Criminal Court has been embraced across all the world’s continents.”<sup>215</sup>

But this is not to justify the AU’s call for immunity for leaders; not to prosecute leaders when their complicity in international crimes is established would be morally wrong and vitiates the essence of the ICC as a court of justice. The AU should rather bring any perceived prejudice by the Court to the Court’s attention and may also seek other less negative means to correct any anomalous behavior by the Court.<sup>216</sup> The Union has expressed intention to approach the ICJ to seek advisory opinion on the issue of immunity for heads of states but at this stage, this impasse cannot be completely resolved by legal interpretation, it now requires more of political approach.<sup>217</sup>

It is therefore advised that whatever political approach to be adopted must not lend support to political manipulations and interferences with international justice mechanisms to personal advantages of leaders.<sup>218</sup> And most importantly it is warned that the manner in which this AU/ICC impasse is resolved will ultimately have a lasting implications for ICL, it is very important that all approaches for resolution should set positive precedent.

## 5.2 Proposals for cooperation

### 5.2.1 Dialogue between the AU and the ICC

Mo Ibrahim has called for honest dialogue between the African Union (AU) and the ICC, as this dialogue has become indispensable if their rift is to be resolved.<sup>219</sup> The essence of this dialogue

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<sup>215</sup>Judge Sang-Hyun Song President of the ICC ‘Marking international criminal justice day’ (July 17 2013) available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/statement-16-07-2013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-16-07-2013.aspx) (Accessed 3 October, 2013).

<sup>216</sup> ‘African leaders have a lot to gain from ICC’ *Times of Swaziland* (17 October, 2013); Burns Dlamini (Lobhonzela) <http://www.times.co.sz/features/92340-african-leaders-have-a-lot-to-gain-from-icc.html>

<sup>217</sup> Paola Gaeta is a Professor of Law at University of Geneva text available at <http://iccforum.com/darfur> (Accessed 23 October 2013).

<sup>218</sup> N Waddell & P Clark ‘Introduction’ in N Waddell & P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2009) 9.

<sup>219</sup> ‘Call for AU and ICC to engage in ‘honest dialogue’ *Business Day live* (October 15 2003); <http://www.bdlive.co.za/africa/africanews/2013/10/15/call-for-au-and-icc-to-engage-in-honest-dialogue>.

is to ensure that international crimes are not sidelined in Africa and that Africa's victims are not left without justice.<sup>220</sup> The OPT is advised to initiate this dialogue with the AU and should convey the objectives and mandates of the Court to the Union. The Court has in the recent times been more open to responding to AU directly, this is a very welcome approach but should be extended to correcting the Union's misunderstandings.

But the AU should shift from its rigid political posture and should become more understanding of the political intricacies involved in course of the court's works. The Union should appreciate that the ICC is the only existing international structure that can genuinely prosecute international crimes; and that the Rome Statue represents the international community's acceptance of the need to address impunity.<sup>221</sup> Perpetrators of impunity deserve to be punished and the AU should not shield them.

The Court on the other hand should not allow itself become enmeshed in political intricacies of international law. It should make more efforts towards ensuring Africans that it is working for the continent and not against it. This is why it has become necessary for the court to initiate these dialogues with AU; it should recruit the court's CSOs networks for this task.<sup>222</sup> Improved public relations with AU will increase knowledge of the court, enhance its credibility and spur greater respect and cooperation. African leaders should be made to understand that the ICC is not in competition with the AU nor is it trying to diminish the sovereignty of Africa states.

### 5.2.2 Dialogue with the UNSC

The ICC does not have powers to refer or to defer cases under the statute; it is the UNSC that has this mandate. The ICC is therefore not responsible to address complaints of referral and deferral of cases. Issues relating to Article 16 should therefore be directed at the UNSC. Thus the UNSC should be constructively engaged in these debates because it is directly implicated in this crisis. The Council's mandates in maintaining peace and security make it imperative that they do not preside over the collapse of the only international criminal justice mechanism. The Council's failure to engage directly in tension would be interpreted as not only an outright disdain for the continent but also as a failure to uphold its mandate. The UNSC's dismissive attitude should be reoriented. The Secretary-General of the Arab League Amr alluded to this when he called for

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<sup>220</sup> n 219 above

<sup>221</sup> Open Society Foundation "*International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers*" (2011) 22; <http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf>.

<sup>222</sup> NGO Coalition for ICC has International, Regional and National members; see the international coalition website at <http://www.iccnw.org/> (Accessed 19 October 2013).

dialogue between Sudan, the ICC, and the African Union to find a resolution.<sup>223</sup> A forum for dialogue is therefore recommended and the UN can play the lead role by organizing this forum.

President Hollande of France has taken hints; he stated that the UNSC would look into the AU's requests for deferral of the cases against President Kenyatta and his deputy Ruto. He stated this in a press conference with Jacob Zuma during his visit to South Africa on the 14<sup>th</sup> of October, 2013. Hollande reiterated France's commitment to the ICC and noted that France would never condone impunity; he however said that France would seek ways to achieve a balance between international justice and the right of states to be respected.<sup>224</sup> Although Hollande did not respond directly to the question whether France would support the AU's request for deferral of these trials by at least a year, he stated France's readiness for dialogues with the AU for a "simplification" of the procedures for trying the two Kenyan leaders.<sup>225</sup> The AU may consider leveraging on Hollande to obtain the UNSC's intervention.

Furthermore the ICC and the AU should come up with a modality for interaction with the UNSC with respect to case referrals and deferral when leaders are charged with international crimes especially in post conflict societies, and when to determine when deferral should be employed in the interest of peace and security. But the ICC must become smarter and more diplomatic in its relationship with UNSC so as not to allow the Council to drag it into political feuds.

### **5.2.3 Setting up the ICC liaison office in Addis Ababa Ethiopia to strength engagements with the AU**

The Court and the AU should reorient their stance and be willing to make compromises. Establishing the ICC liaison office in Addis Ababa Ethiopia is a very important step towards strengthening collaboration. The AU should allow the proposed ICC liaison office in Addis Ababa for use by the ICC prosecutor to regularly engage with the Union.<sup>226</sup> The ICC should also increase outreach programmes with the AU and at the same time improve its engagement with African civil society. The role of Aady Bar as the ICC's political advisor for political organisations such as the AU should be enhanced; however regular communication of efforts and achievements should be done.

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<sup>223</sup> 'Arab league sees possibility of solution to problems between Sudan and ICC' *African Press International* (9 September 2008); <http://africanpress.me/2008/09/09/arab-league-sees-possibility-of-solution-to-problems-between-sudan-and-icc-2/>

<sup>224</sup> 'France says African Union International Criminal Court plea could be looked into' *Standard Digital News* (15 October 2013); [http://www.standardmedia.co.ke/?articleID=2000095651&story\\_title=france-says-au-icc-plea-could-be-looked-into](http://www.standardmedia.co.ke/?articleID=2000095651&story_title=france-says-au-icc-plea-could-be-looked-into) (accessed 24 October 2013).

<sup>225</sup> n 224 above.

<sup>226</sup> (n 225 above)6.

## 5.2.4 Utilising the UN and ASP Sessions

The AU must respect the ICC's judicial independence and identity. In the events of discontentment with the court's work such as exists at the moment, the Union could utilize article 2 of the Rome Statute which deals with Special Relationship Agreement on cooperation between the UN and the ICC,<sup>227</sup> to seek the UN's involvement in the impasse. This agreement reiterates the independence of each institutions and their obligation to respect each other's mandate,<sup>228</sup> but specified areas of cooperation. Article 3 of the special agreement stated that UN and the ICC

“...shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.”

Article 22 provides that this agreement can be amended by an agreement between the United Nations and the Court subject to the approval of the UNGA.<sup>229</sup> The Union could lobby for amendment the UNSC/ICC relationship to remove the powers of deferral from the UNSC. This Special Agreement allows state parties to the ICC to register their grievances during ASP. The Union should demand for an appraisal of the Court's work and a re-assessment its interventions in Africa.

## 5.2.5 Complementarity in domestic prosecution of ICC crimes

Complementarity between the ICC and states is necessary to strengthen the capacity of domestic jurisdictions to prosecute ICC crimes; this is a viable area for collaboration. All African states are encouraged to ratify and domesticate the Rome Statute. Domestication of the Statute enhances chances of legal and technical capacity for domestic prosecution of ICC crimes and empowers the ICC to play greater roles in strengthening domestic capacity to prosecute. Domesticating the Statute also creates an additional obligation at the domestic level for compliance with the Court's requests to the advantage of the Court. The principle of complementarity embodies the ideal that states are able to prosecute. The ICC as a court of last resort should be left to deal with the most serious crimes when it is obvious that states are unable or unwilling to prosecute. The Court lacks

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<sup>227</sup> Relationship Agreement between the International Criminal Court and the United Nation; [http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aa9b6d1e96c/0/iccasp3res1_english.pdf) (Accessed 18, October, 2013).

<sup>228</sup> ( n 227 above) Article3.

<sup>229</sup> Article 2 of the Rome Statute; see also Article 22 Relationship Agreement (n 225 above).

the capacity to prosecute all international crimes occurring everywhere in the world.<sup>230</sup> The ICC should play the role of a watchdog under the complementarity principle.<sup>231</sup>

The Rome Statute is equally advantageous for non-state parties; they can borrow experiences from the court, the Rome Statute or from state parties that have domesticated the Statute. The AU may build on the principle of complementarity by adopting an African Model law for prosecuting international crimes to be guided by the principles enshrined in the Statute. This Model law can be adopted by all AU member states and will have similar effect as the Rome Statute. The ICC can assist the AU with technical expertise in drafting this Model law.

**5.2.6 Review of approaches to peace debates by the court:** The ICC should also review its approaches; prosecutorial fundamentalism may not be ideal where there are political intricacies surrounding a case such as in UNSC referrals. The Court must recognise when political reconciliation is appropriate and should not be afraid to make such proposition. The ICC is an independent judicial institution but clearing the misunderstandings surrounding its works in Africa will lend credence to its credibility;<sup>232</sup> the OTP may adopt issuing of policy paper to communicate her works and intensions in Africa.<sup>233</sup>

### 5.3 The proposed criminal jurisdiction for the African Court and Human Rights

Africa lacks alternative to the ICC and the continent is in no position to administer own international criminal mechanism due to inherent weaknesses in the domestic justice mechanisms as discussed earlier. The demand for immunity of leaders charged for masterminding impunity speaks volume about the kind of justice that will be obtained at the proposed African international crimes court. Africa Legal Aid, an African regional NGO, expressed its reservations about the continent's penchant in adopting impressive instruments with no intention to translate same into practice.<sup>234</sup> Besides the African Court on Human and Peoples Rights whose mandate the AU seeks to expand struggled to obtain only 26 ratifications. It is also under utilised because states

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<sup>230</sup> Open Society Foundations "Putting Complementarity into Practice" (January, 2010)5;  
<http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf>.  
(Accessed October 18, 2013)

<sup>231</sup> For instance Libya had amnesty clauses for suspects of international crimes during 2011 revolution. Under the principle of universal jurisdiction in international law immunity under domestic law will not bar prosecution.

<sup>232</sup>A Osson 'An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC' (2 Dec 2011); <http://www.vjil.org/articles/an-african-solution-to-an-african-problem-how-an-african-prosecutor-could-strengthen-the-icc> (Accessed 23 October 2013)

<sup>233</sup> Institute for justice and reconciliation "African Union and the ICC: An Embattled Relationship" Policy Brief No8 (March 2013) 6

<sup>234</sup> Africa Legal Aid 'The Proposed Criminal Law Regime for Africa' (23 April 2012);  
<http://www.africalegalaid.com/IManager/MailingWeb/7279/bM7LCqKndcnt/488998/2332080> (Accessed 26 October 2013).

are not willing to refer cases to it and individuals lack access to it except the six states that has made declaration allowing its citizens individual access to the court.

The continent also has a notorious history of poor implementation of decisions from regional courts including decisions of the African Commission. ECOWAS Court has human rights mandate but member states rarely comply with its decisions. The SADC Tribunal was dissolved when it gave unfavourable judgment against Zimbabwe. The East African Community Court is still struggling to gain credibility. There is nothing to point to the contrary that the proposed African Court would not suffer the same fate. The ICC would often remain an imperative for the continent.

There is also the issue of funding. The AU lacks the capacity to sufficiently fund the proposed African Court for effective investigation, prosecution and reparation for victims. Prosecuting international crimes is very expensive because of the high cost of investigations. African Court on Human and People's Rights operated with a budget of \$6m in 2011 compare this with the ICTR that operated with a budget of \$240 for two years; the ICC has an annual budget of \$140m. The proposed court would therefore depend heavily on donor funding to operate effectively and it is doubted that donors would be willing to fund a court that is merely duplicating roles that the ICC is effectively discharging. This issue of lack of funds was the reason the AU heads of states during the July 2012 and May 2013 summits stalled on the establishment of the court because they know that AU is not able to afford it.

But is determination to establish the Africa Court. During the 13 October 2013 summit in Addis Ababa the AU Commission was asked to harmonise the process of setting up the Africa Court. At this stage there are chances that Africa would one day establish a regional international crimes court.<sup>235</sup> The AU and the ICC could explore avenues of collaboration to enhance the effectiveness of the proposed court. The ICC could complement this court with strengthening its technical capacity and it is necessary at this nascent stage to define the ICC's relationship with this court. Though they are both supranational institutions it is important to avoid complications that would result from clash of jurisdictions within territories of states that are parties to both courts.

In conclusion it is reiterated that communication is the most vital tool for clearing controversies around the court's work in Africa. The ICC should take steps to openly address claims about political involvements and bias in its works in Africa. The Court should create a mechanism for judicial review of UNSC referrals to assist it in considering issues of jurisdictional propriety so that

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<sup>235</sup> S Allison 'Is there an African alternative to the International Criminal Court?' Rhodes University; <http://www.ru.ac.za/perspective/perspectivearticles/name,98420,en.html> (Accessed 23 August 2013)

in the future UNSC referrals should be subjected to legal scrutiny and oversight using this proposed mechanism. The Court should take all necessary steps possible to reassert itself as an independent judicial institution.<sup>236</sup>

## Chapter SIX

### Conclusion and recommendations

#### 6.1. Conclusion

The main aim for establishing the ICC is captured in paragraph 5 of the Preamble to the Statute i.e. the determination by state parties 'to end impunity by prosecuting perpetrators so as to prevent future commission of such crimes'.<sup>237</sup> The Court is a huge step towards ending impunity and has brought certainty of definition to international crimes. The Court ensures that the most serious perpetrators of international crimes no matter the official capacity are made to account for their atrocities where domestic jurisdiction is incapable or unwilling to prosecute. The ICC has contributed immensely to the debates on accountability for mass atrocities. Africa has become more sensitive to impunity due to the awareness that the ICC interventions have generated in the continent.

The ICC is young and yet to perfect its procedures; the Court came into existence in July, 2002 but took up its first case in 2005. State parties and the international community should be willing to give it all the support it needs to stabilise. No international organisation including the UN can be said to have achieved perfection and in such a short time. International institutions would usually wobble at early stages but improve with time and experiences.

The AU's rift with the ICC is a part of the processes that will shape the course of the Court's works. By identifying flaws and openly opposing perceived misgivings of the Court, the AU is also contributing positively to strengthening the Court's work. But efforts should be channeled towards identifying and resolving imperfections attributable to the Court in a manner that would not threaten its very existence and potentials.

The ICC must be open and receptive of constructive criticisms and should not shy away from acknowledging its shortcomings when necessary. The Court is positioned within international

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<sup>236</sup> 'The enforcement gap: How the International Criminal Court failed in Darfur' *Aljezeera* (25 March, 2013); <http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html> (Accessed 24 October 2013)

<sup>237</sup> Paragraph 5 of the Preamble to the Rome Statute.

politics in an imperfect global community with competing political demands; it is not hard to understand that it would ultimately face challenges but it should devise tactical diplomatic and political strategies to deal with these challenges taking into cognizance the political, socio-economic and cultural context to each situation. ICC's decision exempt Uhuru Kenyetta and his deputy from attending all their trial sessions is a positive step in the right direction.<sup>238</sup> By so doing the Court has indirectly acknowledged political intricacies involved in its work in Kenya; and also a tactical appeasement of the AU's concerns.

Africa matters to the ICC because African constitutes the largest continental membership to the Rome Statute and all the Court's situations in Africa. But AU's resolutions on non-cooperation with the Court lack legal effect and the Union's demand for immunity for political leaders under Article 27(2) of the Rome Statute is unrealistic. Justice is universal and there is nothing like 'African justice', this notion must be dispensed with. African states should rather aspire for independent and effective national, regional and international accountability mechanisms. The draft protocol for the proposed African Court and the AU Constitutive Act agree that in combating impunity states may encroach on state sovereignty and that official capacity shall not constitute a bar to prosecution of suspects. The request for the amendment of article 27 deprives of the AU the moral authority to criticise the ICC. It gives an impression that African leaders wish to have unrestricted authority to oppress Africans without any prospects of accountability.

The AU should not be seen to be playing double standard which it is accusing the ICC of and the UNSC of. The Union is accepts UN interventions and peace keeping operations in conflicts situations in Africa,<sup>239</sup> and has not threatened to withdraw from the UN because Africa has not been given a permanent seat within the UNSC. It should not become agitated at the ICC's efforts to prosecute perpetrators of impunity. There is no alternative to the ICC in Africa, and until Africa strengthens its domestic criminal justice mechanisms, the ICC would ultimately continue to bear the responsibility to prosecute most serious perpetrators of impunity in Africa including warlords and terrorists.

The AU is encouraged to reinforce its commitment to promote peace and security by collaborating with the ICC to curb atrocities in Africa by deterring future perpetrators and ensure justice for victims.<sup>240</sup> Africa's growth and development has been stunted by wars and conflicts which have

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<sup>238</sup> ICC-CPI-20131022-MA143;

[http://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/ma143.aspx](http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ma143.aspx) (Accessed 20 October 2013) President Kenyetta and his deputy Ruto may not attend all their trials but must attend the opening and the closing sessions.

<sup>239</sup> Africa accounts for highest percentage of the UN global peacekeeping operations.

<sup>240</sup> Security Council Resolution 159 S/RES/ 1593 ( March 2005)

occasioned unquantifiable hardship to Africans. This is why the ICC is critical for Africa to combat impunity and to complement domestic legal mechanisms in ensuring accountability.

Politics should not be allowed to undercut justice for millions of African victims of impunity. Victims' justice should reflect in all dialogues related to international criminal justice in the Africa. Whatever structure the AU seeks to establish should not only reflect a genuine commitment to prosecute perpetrators but should also reflect victims' right to justice and reparations. Transitional justice measures should be comprehensive with peace and reconciliation pursued alongside justice measures to ensure that peace becomes long lasting.<sup>241</sup>

The ICC should however expand its interventions to situations occurring outside Africa to counter the perception that it is unfairly targeting Africans. The AU should impress on the UNSC to also refer other situations occurring outside of Africa to the ICC where necessary.

## 6.2 Recommendations

1. **Formal response by the UNSC to AU's requests:** There is a dilemma of lack of easy solutions to the AU/ICC rift. However it is recommended that the UNSC should become more involved in addressing the AU's concerns. By not paying adequate attention to this rift, the Council is indirectly contributing to the powers of the court being undermined in Africa. The Council should make decisive efforts to address the AU's request.<sup>242</sup> Merely acknowledging the AU's request for deferral of Al Bashir's case is inadequate attention.<sup>243</sup> The Council should revisit that request and communicate its decisions formally to the AU.<sup>244</sup>
2. **Addressing the reasons behind AU criticisms:** Both the ICC and the UNSC should pay more attention to the underlying factors that has contributed to the Court's sour relations with the AU. An honest evaluation of the causes would yield positive ideas towards resolution of the rift. Such attention may ultimately exonerate the court from the bulk of

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<sup>241</sup> ASF 'Africa and the international criminal court: mending fences'

<sup>242</sup> AU Assembly "Decision on the progress report of the Commission", note 3 at paras 4 and 5; AU Peace and Security Council "Communiqué of the 142<sup>nd</sup> meeting of the Peace and Security Council": PSC/MIN/Comm (CXLII) (21 July 2008); <<http://www.africa-union.org/root/ua/actualites/2008/juillet/psc/142-communique-eng.pdf>> (Accessed 30 September 2011).

<sup>243</sup> UN Security Council res 1828 (2008): S/RES/1828 (2008) "Taking note of the African Union (AU) communiqué of the 142<sup>nd</sup> PSC"

<sup>244</sup> There was a brief deliberation on the request at the UNSC 5947<sup>th</sup> meeting, see S/PV.5947 (31 July 2008).

the accusations when it is clear that the Unions aggression is due to its discontent with the UNSC inaction to the Unions' requests.

- 3. Addressing non-compliance with ICC decisions:** Lack of state cooperation in complying with the ICC's arrest warrants against Al Bashir remains one of the greatest challenges before the court. The UNSC should play a greater role in breaking this deadlock. African state parties to the ICC are under obligation to respect and cooperate with the Court. The Council's 'merely urging states to cooperate' with the Court should be reinforced by the UNSC taking more forceful positions on the matter especially in cases that it referred to the court such as Sudan.<sup>245</sup> Urgent steps to deter state parties from hosting Al Bashir should be taken and where necessary the UN should impose sanctions. This has become pertinent because it is evident that securing Al Bashir's arrest through normal state cooperation procedures may not be possible. Article 87(7) of the Rome Statute provides as follows:

"Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [ASP] or, where the Security Council referred the matter to the Court, to the Security Council."<sup>246</sup>

- 4. Proactive intervention by the ASP:** Where the ICC refers a situation of non-cooperation to the ASP.<sup>247</sup> The ASP is required to take appropriate steps to address this issue. The Rome Statute unfortunately is silent on what constitutes 'appropriate measure' the ASP may take in addressing non-cooperation. This lack of definition has contributed to the inaction by the ASP when the ICC referred cases of non-cooperation with its decisions by Chad, Kenya and Malawi. The ASP should play greater role by also formal and proactive interventions such as establishing modalities for coopting states' cooperation. This will be important at these early stages of the Court's existence because as long as the question

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<sup>245</sup> Paragraph 2 of resolution 1593, referring the situation in Darfur to the Prosecutor, provides in part that 'the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. The government of Sudan is not a State Party to the Rome Statute.

<sup>246</sup> Article 87(7) Rome Statute.

<sup>247</sup> (n 246 above).

of lack of enforcement and non-cooperation with ICC's decision are not addressed, the Court's powers and authorities would continue to be undermined.

5. **Increased awareness on the court's activities:** The Court should employ every necessary means towards sensitizing Africans about its works. This awareness should include information about the Court's role in promoting peace, stability and the rule of law in Africa. To achieve this, the court should target policy makers, CSOs, the media, justice officials, policy makers and political leaders. Securing the support of these sectors will definitely improve cooperation with the Court.<sup>248</sup>
6. **Domestication of the Rome Statute:** As noted in the concluding section, African state parties should take steps to domesticate the Rome Statute. CSOs should play active roles to secure domestication of the Rome statute by impressing on policy makers the need to domesticate the statute. The Court's potential in building and strengthening the domestic mechanism incorporated within the principle of complementarity will not be effectively utilized at the level of domestic prosecution unless the Statute is domesticated.
7. **Strategic litigation to compel state cooperation:** Strategic litigation is a vital tool to create precedents and jurisprudence for future advocacies. This strategy will assist in generating substantive, practical and binding obligation of states to the ICC. Such precedents will contribute in creating conducive legal environment for advocacies on cooperation. Strategic litigation was tactfully applied in by South African CSOs to secure warrant of arrest for Al Bashir and deterred him from stepping into the country. This was replicated in Kenya and in Nigeria. CSOs and public interest lawyers should borrow from these experiences and may even become more proactive by securing warrants for his arrest before any prospects of Al Bashir's visits to their territory.
8. **The ICC should support domestic mechanism:** The ICC should devise a master plan for supporting domestic jurisdictions under the complementarity principles. This could be in form of annual or bi annual workshop to build the capacity of domestic actors in ICL. The Court may collaborate with the AU in hosting these workshops and may also extend this support to strengthening Africa's regional mechanisms against impunity. The proposed criminal chamber of the African Court readily comes to mind. The Court should work to enhance these domestic and regional architectures through capacity building for

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<sup>248</sup> SALC (n 205 above) 43.

investigators, prosecutors and judges and should also support legislative competences of the local jurisdiction with drafting their implementing legislation.

9. **Domestic prosecution of ICC crimes:** states that already have the ICC implementing legislation should strengthen its capacity with developing other institutional frameworks for prosecuting international crimes. Here again the civil societies have a huge role to play to ensure that states are compelled to take its responsibility to prosecute seriously. States should be compelled to prosecute international crimes where it is established that such crimes have been committed. Capacity building for prosecutors and judges should be prioritized by states and funders are also implored to support such domestic prosecutions.
  
10. **Support the ICC prosecutor efforts to improve relations with African states:** the AU should utilize the opportunity of having an ICC prosecutor who is also African.<sup>249</sup> The ICC prosecutor should leverage on her African identity to redeem the ICC/AU relationship, she should also re-evaluating the court's position on Sudan and Kenya for a constructive ways forward. But the AU must support her outreach efforts; the AU chairperson should support the prosecutor in creating formal cooperation agreements and for an amicable resolution of the rift. The CSOs can support with practical ideas for stronger cooperation. Allowing the establishment of the ICC Africa's liaison office in Addis will remain a good starting point.
  
11. **CSOs active mediation:** CSOs efforts at resolving this tension and in supporting the ICC are commendable. The CSO have been at the forefront of campaigns to improve the AU/ICC relations. But they should take further steps by acting in advisory capacity to the AU especially on the issue of immunity for Heads of States. It appears that the Union has misconceived Article 27 (2) and the concept of immunity in ICL. The CSO should lobby for a forum to engage the AU in open dialogue on this issue, the ECOSOC Council of the AU could be utilized to organise this forum. CSOs should continue to issue policy statements, letters, and other forms of campaigns on the implication of removal of immunity for leaders and how such action would lend support to perpetuation of mass atrocities by leaders.

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<sup>249</sup> A Ossom ' [An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC](http://www.vjil.org/articles/an-african-solution-to-an-african-problem-how-an-african-prosecutor-could-st-rengthen-the-icc) ' (Dec 02, 2011) <http://www.vjil.org/articles/an-african-solution-to-an-african-problem-how-an-african-prosecutor-could-st-rengthen-the-icc> (Accessed 24 October 2013).

12. **Support for victims' justice and reparation:** It is important also that in analysing the ICC's interventions in Africa that the Court's roles for victims reparation is highlighted. The ICC by ensuring accountability becomes a vehicle that promotes justice for victims. Victims of impunity in Africa are also Africans and deserve Africa's considerations.
  
13. **Ratification of the Rome Statute by all African states:** The AU should refrain from pursuing policies that would diminish the ICC. Such action will send wrong signal about Africa's commitment to combating impunity and encourage perpetrators. It is reiterated that there should be no short in the pursuit for justice and accountability for grave crimes. So rather than encourage withdrawal of members from the court, the AU should encourage members who are yet to ratify the Rome Statute to do so urgently. This is the key to strengthening accountability and a clear message that no one is above the law.
  
14. **Utilizing Article 121(1) to seek amendments of the Rome Statute:** The AU should also explore the option of invoking article 121(1) of the Rome Statute to seek amendments of provisions which they find offensive. This is a more acceptable option rather than antagonistic resolutions for non-cooperation and insinuations of mass withdrawal of member states from the Rome Statute.
  
15. **Deeper reflections on the proposed criminal jurisdiction for the African Court:** The AU should not be in a haste to expand the jurisdiction of the African Court to try international crimes; it should weigh the financial implications seriously. The AU should furthermore define the relationship the ICC with the proposed court. The Union should also ensure genuine demonstration of political will by leaders to ensure that this court would function freely and effectively without undue political interferences. In the event of the African Court's establishment, the Union should appoint experienced judges in the fields of international criminal justice and human rights as judges of the court. There should also be clarity of mechanisms for victim's reparation and credible structures for dispensation of the victims' funds.

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## Bibliography

### Books and articles in books

- Anan K 'The causes of conflict and the promotion of durable peace and sustainable development in Africa' in Heyns & Steffens (eds) (2006) *Peace and Justice in Africa: A Reader* Pretoria University Press: South Africa
- Branch A '*displacing Human Rights: War and Intervention in Northern Uganda*' (2011) Oxford University Press: New York
- Du Plessis M 'introduction' in Du Plessis M (eds) (2008) *African Guide to international criminal justice* Southern African litigation Centre: South Africa
- Gentile L 'Understanding the international criminal justice' Du Plessis M (eds) (2008) *African Guide to international criminal* Southern African litigation Centre: South Africa
- International Criminal Court (2010) *ICC prosecutorial strategy (2009–2012)* International Criminal Court: The Hague
- Jallow H & Bensouda F 'international Criminal Law' in M du Plessis (eds) (2008) *African Guide to International Criminal justice* Institute for Security Studies: South Africa.
- Jessberger F 'International v National Prosecutions of International Crimes' in A (2009) Cassese *The Oxford Companion to International Criminal Justice* Oxford University Press: New York
- Mochochoko P '*Africa and international criminal court*' in E Ankumah and E Kwakwa (eds) (2005) *African perspectives on international criminal justice* African Legal Aid: Ghana
- Murungu C & Biegon J 'Introduction' in Murungu C & Biegon J (eds) (2011) *Prosecuting international crimes in Africa* Pretoria University Law Press: South Africa
- Murungu C 'Immunity of State Officials and the Prosecution of International crimes' in Murungu C & Biegon J (eds) (2011) *Prosecuting international Crimes in Africa* Pretoria University Law Press: South Africa
- Odero S, 'Politics of International Criminal Justice: The ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis' in C Murungu & J Biegon (2011) *Prosecuting International Crimes in Africa* Pretoria University law Press: South Africa
- Open Society Foundation (2011) '*International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers*' Open Society Foundation: New York
- Open Society Foundations (2010) '*Putting Complementarity into Practice*' Open Society Foundation: New York
- Open Society justice Initiative (2011) '*International Crimes, Local Justice: A Handbook for Rule-of Law Policymakers, Donors and Implementers*' Open Society Foundations: New York

Ruxton G 'Present and Future Record of Arrest War Criminals: the View of the Public Prosecutor of the ICTY' in Dijk W & Hovens J (eds) (2001) *Arresting War Criminals* Wolf Legal Publishers: Cambridge

Southern African Litigation Center (2013) '*Positive Reinforcement: Advocating for International Criminal Justice in Africa*' Southern African Litigation Centre: South Africa

Sansculotte-Greenidge K 'The PSC in Darfur: A Sudan solution for an African problem' in T Murithi & H Lulie (eds) (2012) *The African Union Peace and Security Council: A five-year appraisal* Institute for Security Studies: South Africa

Slye R 'Immunities and Amnesties' in M du Plessis (eds) (2008) *African Guide to International Criminal Justice* Institute for Security Studies: South Africa

Schabas W 'the international Criminal Court' in D Black & P Williams (eds) (2010) *The international politics of mass atrocities: the case of Darfur* Routledge: London

Waddell N & Clark P 'Introduction' in N Waddell & P Clark (eds) (2009) *Courting Conflict? Justice, Peace and the ICC in Africa* Institute for Security Studies: South Africa

### **Journals and other articles**

Africa Legal Aid 'The Proposed Criminal Law Regime for Africa' ALA (23 April 2012)

Avocats Sans Frontières "Africa and the ICC: Mending Fences" (July 2012) *Avocat Sans Frontieres* available at [http://www.asf.be/wp-content/uploads/2012/08/ASF\\_UG\\_Africa-and-the-ICC.pdf](http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf) (Accessed 27 October 2013)

Bakr N & Shafi E 'ARAB official positions towards President Al Bashir's indictment' (March 2010) Fride; [http://www.fride.org/download/OP\\_Darfur\\_President\\_alBashir2\\_ENG\\_mar10.pdf](http://www.fride.org/download/OP_Darfur_President_alBashir2_ENG_mar10.pdf) (Accessed October 2013)

Corell H UN Under-Secretary-General for Legal Affairs 'The Rome Statute of the international Criminal Court: Overview' *United Nations*

Ferencz B 'The Road to World War, in An International Criminal Court: A Step Towards World Peace: A Documentary History and Analysis, Part 1 Vol.1 (1980)1

Gaeta P 'Does President Al Bashir enjoy immunity from arrest?' (2009) 7 (2) *Oxford Journal of International Criminal Justice* 315

Gassama I 'Africa and the politics of destruction: A critical re-examination of neocolonialism and its consequences' 10 *Oregon Review of International Law* 338

Hammond P 'The tyranny of 'international justice' a conference organised by the Royal United Services (30 March 2009) *Institute and the Centre for Foreign Policy Analysis*; also published by *Spiked* Available at <http://www.spiked-online.com/newsite/article/6410#.UnDzXhAUbos> (Accessed 24 October 2013)

- Human Rights Watch 'AU: Back Mbeki Panel Call for Darfur Prosecutions' (29 October 2009) *Human Rights Watch*: Available at <http://www.hrw.org/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions> (Accessed 23 October 2013)
- Human Rights Watch 'ICC: Landmark Verdict a Warning to Rights Abusers' (March 14, 2012) *Human Rights Watch*: Available at <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers> (Available at 12 October 2013)
- Human Rights Watch 'ICC: Judges Approve Kenyan Investigation' (31 March 2010) *Human Rights Watch*: Available at <http://www.hrw.org/news/2010/03/31/icc-judges-approve-kenyan-investigation> (Accessed 10 August 2013)
- Human Rights Watch 'Selling justice short: Why accountability matters for peace' (July 2009) *Human Rights Watch*: available at [http://www.hrw.org/sites/default/files/reports/ij0709webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/ij0709webwcover_1.pdf) (Accessed 15 August 2013)
- Jalloh C 'Regionalising international criminal law' (2009) 9 *International Criminal Law Review* 445
- Jamshidi M 'The enforcement gap: How the International Criminal Court failed in Darfur' (25 March 2013) *Muftah.org*: available at <http://news.yahoo.com/enforcement-gap-international-criminal-court-failed-darfur-093657957.html> (Accessed 29 October 2013)
- Kepler E 'Managing Setbacks for the International Criminal Court in Africa. (2012) *Journal of African Law*, 56, pp 1-14. doi:10.1017/S0021855311000209
- Kimani M 'International Criminal Court: Justice or Racial Double Standards?' (16 December 2010) *Global Policy Forum*
- Kepler E 'AU back Mbeki Panel call on Darfur Prosecutions' (2009) *Human Rights Watch* Available at: <http://www.hrw.org/news/2009/10/28/au-back-mbeki-panel-call-darfur-prosecutions> ( Accessed 1 October 2013)
- Kepler E 'The United States and the International Criminal Court: The Bush administration's approach and a way forward under the Obama adm' (2 August 2009) *Human Rights Watch*: Available at <http://www.hrw.org/news/2009/08/02/united-states-and-international-criminal-court-bush-administration-s-approach-and-wa> (Accessed 23 October 2013)
- Moreno-Ocampo L 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21 *American University International Law Review* 497
- Murithi T 'African Union and the ICC: An Embattled Relationship' (March 2003) Institute for justice and reconciliation available at <http://www.ijr.org.za/publications/pb10.php> (Accessed 14 September 2013)

Ossom A 'An African Solution to an African Problem? How an African Prosecutor Could Strengthen the ICC' (2 December 2013) *Virginia journal of international law*;  
[www.vjil.org/articles/2011/12](http://www.vjil.org/articles/2011/12) (Accessed 3 August 2013)

Young J 'Sudan IGAD peace process: an evaluation' (2007) *Institute of Governance Studies, Simon Fraser University*; Also published by Sudan Tribune: Available at  
[http://sudantribune.com/IMG/pdf/Igad\\_in\\_Sudan\\_Peace\\_Process.pdf](http://sudantribune.com/IMG/pdf/Igad_in_Sudan_Peace_Process.pdf) (Accessed 29 October 2013)

## Reports

Institute for Security Studies Special Report 'The AU Summit and Malawi' (13 June 2012)

International Criminal Court 'Marking international criminal justice day' (July 17 2013) *International Criminal Court*

Peace and Security Council Communique '142nd Meeting' PSC/MIN/Comm (CXLII) (21 July 2008) *Peace and Security Council*

Report of the African Union High Panel on Darfur (2008)

Report of the United Nations International Commission of Inquiry on Darfur: Report to the Secretary General' (2004)

Report of the conference organized by the Royal United Services Institute & Center for Foreign Policy Analysis 'Prosecuting Presidents' (27 March 2009)

UNMISS Background 'UN Mission in the Republic of South Sudan' UN (2011)

## Newspapers

A Flawed Court in Need of Credibility?' (21 May 2012) *Newyork Times*

'African Commission issues Scathing Decision against Government for atrocities in Darfur', (29 July 2010) *allAfrica.com*

'African Union summit on ICC pullout over Ruto trial' (20 September 2013) *BBC News*

'Africa and the International Criminal Court' (30 June, 2009) *New York Times*

'African states seek immunity from prosecution for serving leaders' (October 13, 2013) *Ft.com*

'African leaders have a lot to gain from ICC' (17 October 2013) *Times of Swaziland*

'Al Bashir in Nigeria' (23 July 2012) *Vanguard*

'All change at the ICC: Time to Focus on The Merits not connection' (20 September 2011) *Kenya Monitor*

'Arab league sees possibility of solution to problems between Sudan and ICC' (9 September 2008) *African Press International*

'As the World Dithers, Darfur Crisis Claims More Casualties' (4 October 2008) *The New Times*

Fatou Besouda 'International Justice and Diplomacy' (April 2, 2013) *Newyork times*

Fatou Bensouda 'International Media Conference on the Battle Against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?' (6 July 2011) *Gaborone, Botswana.*

Clark P 'The ICC is Only a Small Piece in the Justice Puzzle of Africa's Conflicts' (11 April 2011) *East African Story*

'Court Issues Bashir arrest warrant' (5 March 2009) *Al Jazeera*

'Coalition for the International Criminal Court 'African Civil Society Stand Up for Justice' (October 2010) *Africa Update*

'Decision on the Cooperation of the Federal Republic of Nigeria Regarding Omar Al-Bashir's Arrest and Surrender to the Court' *All Africa.com*

'Egypt to Join the International Criminal Court' (20 April 2011) *UNdispatch*

'France says African Union International Criminal Court plea could be looked into' (15 October 2013) *Standard Digital News*

'Government of Sudan Letter dated 18 June 2005 to the UN addressed to the President of the Security Council S/2005/403

'Human Rights Watch Calls on Chad to Arrest Sudan's President' (21 July 2010) *Globe and Mail*

'International Criminal Court an Imperative for all African Nations' (19 August July 2010) *Punch Newspaper*

Fatou Bensouda 'International Media Conference on the Battle Against Impunity: Chinks in the Armor – Does the ICC Target Africa: Is the ICC Selectively Prosecuting Cases?' (6 July 2011) *Gaborone Botswana*

'Malawi Cancels AU Summit over Sudan's Bashir' (9 June 2012). *Al-Jazeera*

Mo Ibrahim 'Call for AU and ICC to engage in 'honest dialogue' (15 October 2013) *Business day live*

'Mugabe Slams "Blind" International Criminal Court' (23rd September 2011) *Zimbabwe Mail*

Obasanjo backs Bashir on Darfur war charges' (28th June 2010) *The East African Newspaper*

'Omar al-Bashir Tarnishes Kenya's Landmark Day' (27 August 2010) *The Guardian*

'Rwanda's Kagame says ICC Targeting Poor, African Countries' (31 July 2008) *AFP*

'Secretary-General says establishment of international criminal court is major step in March towards universal human rights, rule of law' (18 July 199) *UN Press Release No. 19980720*

Sudan's al-Bashir Defies ICC with Chad *Trip*' (22 July 2010) *Mail and Guardian*

'Sudan's Bashir Attends Djibouti President's Inauguration' (7 May 2011) VOA News Newspaper

'Sudan opposition warns ICC Bashir warrant threatens peace,' (14 July 2008) *Reuters*

'Sudan's President Bashir Defies Arrest Warrant in Chad' (21 July 2010) *BBC News*

'The Curse of the Janjaweed' (23 September 2007) *Sunday Times London*

'The Sudan IGAD peace process: Signposts for the way forward' (13 February 2004) *Sudan Tribune*

Tijan Cole 'Is Africa on trial?' (27 March 2012) *BBC News*'

'Uganda: ICC Targeting African Presidents-Museveni' (17 December 2011) *The Monitor*

'World Reaction-Bashir Arrest' ( 4 March 2009) *BBC News*

### **Internet sources**

Affa'a-Mindzie M 'International Criminal Justice in Africa: Wanting More to Celebrate' (July 25, 2013) *Global Observatory* Available at <http://theglobalobservatory.org/analysis/547-international-criminal-justice-in-africa-wanting-more-to-celebrate.html> (Accessed 12 September 2013)

Allison S 'Is there an African alternative to the International Criminal Court?' (16 October 2013) *Rhodes University*; Available at <http://www.ru.ac.za/perspective/perspectivearticles/name,98420,en.html> (Accessed 12 September 2013)

Allison Cole 'A landmark Decision for International Justice' (14 March 2012) *Daily Report Legal Analysis*: Available at <http://www.lubangatrial.org/2012/03/14/a-landmark-decision-for-international-justice/> (Accessed 30 October 2013)

Coalition for the International Criminal Court 'African Civil Society Stand Up for Justice' (2010) CICC available at [http://www.iccnw.org/documents/Africa\\_and\\_the\\_ICC.pdf](http://www.iccnw.org/documents/Africa_and_the_ICC.pdf) (Accessed 20 October 2013)

Kimani M 'Pursuit of justice or Western plot?' (October 2009) *Africa Renewal* available at <http://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot> (Accessed 2 October 2013)

Ki-moon B 'Open debate on Peace and Justice with a Special Focus on the Role of the International Criminal Court' Available at: [http://www.un.org/apps/news/infocus/sqspeeches/statments\\_full.asp?statID=1689#.UnluqRAUboos](http://www.un.org/apps/news/infocus/sqspeeches/statments_full.asp?statID=1689#.UnluqRAUboos) (17 October 2012) UNSC (Accessed 30 October 2013)

Lamony S 'Chad Hosts Wanted Al-Bashir as Côte d'Ivoire Joins ICC' (20 February 2013) *African Arguments*: Available at <http://africanarguments.org/2013/02/20/chad-hosts-wanted-al-bashir-as-cote-d%E2%80%99ivoire-joins-icc-%E2%80%93-by-stephen-lamoney/> (Accessed 20 October 2013)

Lamony S 'Is the International Criminal Court really picking on Africa?' (2013) *African Arguments* available at <http://africanarguments.org/2013/04/16/is-the-international-criminal-court-really-picking-on-africa-by-stephen-a-lamony/> (Accessed 20 October 2013)

## **Legal instruments**

### **National**

Comprehensive Peace Agreement

Electoral Law of Sudan (2008)

Special Criminal Court on Darfur Act

The RoadMap for Return of IDPs in Darfur

The Kenyan Constitution

The Kenya International Crimes Act

### **Regional**

Abyei Protocol

African Union Constitutive Act

Africa-European Union Strategic Partnership (May 2011)

### **International**

Nuremberg Charter

Relationship Agreement between the International Criminal Court and the United Nations'

Rome Statute of the International criminal Court

Tokyo Charter

United Nations Charter

Vienna Convention on Law of Treaties

### **Resolutions**

#### **Africa**

African Commission on Human and Peoples Rights /Res 59 (XXXI) (February 2002) Resolution on the Ratification of the Statute of on the International Criminal Court by OAU Member States

Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction.

AU Assembly Decision on the application by the ICC Prosecutor for the Indictment of the President of Sudan, Assembly/AU/Dec.221XII) Paras.2 and 3.

Assembly/AU/Dec.245 (XIII) Rev.1 (2009) on non-cooperation with Al Bashir's arrest warrant

Assembly/AU/Dec 270 (xiv) on the second ministerial meeting on the Rome Statute of the ICC  
Doc Assembly/AU/10(XV)

## **International**

UN Resolution 1547 (2004) & UN Resolution 1556 (2004) establishing UNAMIS

UNGA 60th session, items 48 and 121 of the provisional agenda. A/60/L.1, 40

UNGA Resolution 260 (9 December 1948) on Genocide

UNSC resolution 955 (8 November 1994) establishing the International Criminal Court for Yugoslavia

UNSC Resolution 1315 establishing the Special Court for Sierra Leone

UNSC Resolution '1564 S/RES/1564' (8 September 2004) establishing the International Commission of Inquiry into Darfur Situation

UNSC Resolution 1593 (2005) referring Darfur situation to the ICC

UNSC 5947th meeting S/PV.5947 (31 July, 2008) on the AU's request for one year deferral of the ICC/Sudan intervention

## **Table of cases**

### **ICC**

The Prosecutor v. Thomas Lubanga Dyilo (2006) ICC-01/04-01/06

The Prosecutor v. Bosco Ntaganda (2006) ICC-01/04-02/06

The Prosecutor v. Germain Katanga (2007) ICC-01/04-01/07

The Prosecutor v. Mathieu Ngudjolo Chui (2012) ICC-01/04-02/12

The Prosecutor v. Joseph Kony (2005) ICC-02/04-01/05

The Prosecutor v. Ahmad Muhammad Harun (2007) ICC-02/05-01/07

The Prosecutor v. Ali Muhammad Ali Bad-AI-Rahman (2007) ICC-02/05-01/07

The Prosecutor v. Omar Hassan Ahmad Al Bashir (2009) ICC-02/05-01/09

The Prosecutor v. Bahar Idriss Abu Garda (2009) ICC-02/05-02/09

The Prosecutor v. Abdallah Banda Abakaer Nourain (2009) ICC-02/05-03/09

The Prosecutor v. Abdel Raheem Muhammad Hussein (2012) ICC-02/05-01/12

The Prosecutor v. William Samoei Ruto (2011) ICC-01/09-01/11

The Prosecutor v. Uhuru Muigai Kenyatta (2011) ICC-01/09-02/11

The Prosecutor v. Walter Osapiri Barasa (2013) ICC-01/09-01/13

The Prosecutor v. Laurent Gbagbo (2011) ICC-02/11-01/11

#### **Other cases**

COHRE v. Sudan (2009) 279/03-296/05 Communication 296/2005

ICJ-Kenya v. Attorney General & Another (2011) eKLR

#### **ICC's Decisions on Al Bashir's visits to state parties to ICC**

Pre-trial Chamber decision on Al Bashir visit to Chad ICC-02/05-01/09 (27 August 2010)

Pre-trial Chamber decision on Al Bashir's visit to Kenya (27 August 2010) ICC-02/05-01/09

Pre-trial Chamber decision on Al Bashir visit to Djibouti (12 May 2011) ICC-02/05-01/09

Pre-trial Chamber decision on Al Bashir visit to Chad (13 December 2011) ICC-02/05-01/09

Pre-trial Chamber decision on Al Bashir visit to Malawi (11 December 2012) ICC-02/05-01/09

Pre-trial Chamber decision on Al-Bashir's Visit to Chad (22 February 2013) ICC-02/05-01/09