

**THE CONFLICT BETWEEN THE AU AND THE ICC ABOUT THE
IMPUNITY OF AFRICAN LEADERS: UNDERSTANDING THE ROOTS
AND PROPOSING THE POSSIBILITIES OF A WAY OUT**

**Submitted in partial fulfilment of the requirements of the degree LLM (Human Rights and
Democratisation in Africa)**

By

Khamis Juma Khamis: 15395686

Prepared under the supervision of

Mr Emmanuel Yaw Benneh

At the

School of Law, University of Ghana Legon

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DECLARATION

I, Student No 15395686 declare as follows:

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. This dissertation is my own, original work. Where someone else's work has been used due acknowledgment has been given and reference made according to the requirement of the Faculty of law.
3. I did not make use of another student's work and submit it as my own.
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Signature: KJ Khamis

Date: 31 October 2015

To my late beloved grandfather, Khamis Juma Mjombo who passed away on 13 July 2015 while I was in Pretoria pursuing this programme. May Allah (S.W) make his grave among the very places of *Jannat Firdausi*, Amin!

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LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court of Human and Peoples' Rights
AU	African Union
CAR	Central African Republic
CCIC	Coalition for an International Criminal Court
CIPEV	Commission of Inquiry on Post-election Violence
DRC	Democratic Republic of Congo
EU	European Union
ICC	International Criminal Court
ICGLR	International Conference on the Great Lakes Region
ICJ	International Court of Justice
ICJ	International Commission of Jurists
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
NGOs	Non-governmental organisations
OAU	Organisation of African Unity
PSC	Peace and Security Council of the African Union
PTC	Pre-Trial Chamber of the International Criminal Court
PTC I/II	Pre-Trial Chamber of the International Criminal Court I or II
SADC	Southern African Development Community

VLCT	Vienna Convention on the Law of Treaties
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

CHAPTER I

RESEARCH DESIGN

1.1 Background of the study

A long-term necessity of the international community to have an international judicial body with the mandate to prosecute and penalise individuals most accountable for crimes which affect the ‘conscience of humanity’ eventually was realised on 17 July 1998.¹ This followed an adoption of the Rome Statute of the International Criminal Court (ICC Statute) which envisaged an establishment of the International Criminal Court (ICC).² The ICC is a court with jurisdiction over individuals who commit international crimes notably war crimes, crimes against humanity, the crime of genocide, and the crime of aggression.³

The adoption of the ICC Statute was a process as it normally is under international law. States and all other stakeholders had to deliberate during the negotiations of creating the ICC Statute in Rome, Italy. African states were among the stakeholders who participated in the negotiations for the creation of the ICC Statute.⁴ Since coming into operation in 2002, the ICC got co-operation from state parties in executing its mandate.⁵ Ambassador Maope has stated that African states were the most co-operative with the ICC in view of the fact that all situations before the ICC came from Africa, and ‘the majority of which are self-referrals’.⁶ However, Murithi has noted that the trend of co-operation among African states with the ICC started to deteriorate from 2008 to date.⁷ Instead of a co-operation, it turned into contention.

The ICC state parties have obligations to co-operate fully with the ICC by virtue of part IX of the ICC Statute. However, the African Union (AU) which is an African regional organisation has adopted

¹ GM Pikes *The Rome Statute for the International Criminal Court: analysis of the Statute, the rules of procedure and evidence, the regulations of the Court and supplementary instruments* (2010) 1.

² Rome Statute of the International Criminal Court UN. Doc. A/CONF.183.9, art 1.

³ ICC Statute, art 5.

⁴ Statement by H.E Mr Kelebone A Maope Ambassador and Permanent Representative of Lesotho to the United Nations on behalf of African state parties to the Rome Statute at the 13th session of the Assembly of states parties to Rome Statute of the International Criminal Court, New York, 8 December 2014, available at <http://www.icc-cpi.int/iccdocs/asp_docs/ASP13/GenDeba/ICC-ASP13-GenDeba-Lesotho-AfricanStatesParties-ENG.pdf> (accessed 18 August 2015).

⁵ IT Sampson ‘Africa in dilemma the implication of the warrant of arrest against the Sudanese President on Africa’s Solidarity’ (2011) 41 *Africa Insight* (3) 137.j

⁶ Statement by H.E Mr Kelebone A Maope Ambassador (n 4 above) & Coalition for the International Criminal Court (CICC) ‘Cases & situations’ available at <<http://www.iccnw.org/?mod=casessituations>> (accessed 18 August 2015).

⁷ T Murithi ‘International criminal justice, the African Union and the International Criminal Court’ (2012) 1 *Journal of African Union Studies* 2 & 3 9.

decisions calling upon its member states not to co-operate with the ICC in arresting and eventually surrendering Omar Hassan Ahmad Al Bashir (President Al Bashir) to the ICC in The Hague, the Netherlands.⁸ President Al Bashir is a sitting AU Head of State and Government of Sudan. Aside from non-co-operation calls, the AU rejected the ICC to open liaison office in the AU's office in Addis Ababa, Ethiopia.⁹ That office would undoubtedly be co-ordinating the mutual relations between these two institutions.

The AU's decisions that explicitly advocated non-co-operation of its member states with the ICC include the 2009 Sirte decision¹⁰ and the 2010 Kampala decision.¹¹ The extent of the contention between the AU and the ICC seems to currently be at its peak. Some African states, even those parties to the ICC, have been blatantly blindfolding their obligations under the ICC Statute by not co-operating with the ICC. One may possibly infer that perhaps they are implementing the AU's call. Kenya, Malawi, Chad, Nigeria and most recently South Africa, among others, are state parties to the ICC Statute;¹² nevertheless they did not apprehend President Al Bashir when he went there at the time his arrest warrants were outstanding.¹³

On 12 October 2013, the supreme decision making organ of the AU, the Assembly,¹⁴ in its Addis Ababa extraordinary session made a special 'Decision on Africa's Relationship with the International Criminal Court'.¹⁵ The decision records that 'no charges shall be commenced or continued before any international court... against any serving AU Head of State or Government or anybody acting... in such capacity during their term of office'.¹⁶ Such a decision seems to have followed an AU's request for a withdrawal of the cases of Uhuru Kenyatta, Kenyan President and William Ruto, Deputy President, from the ICC. In turn, the ICC 'refused' the request.¹⁷ In its letter to the ICC, the AU required the cases of President Kenyatta and his Deputy to be referred to Kenyan domestic courts in order to be dealt with

⁸ E Keppler 'Managing setbacks for the International Criminal Court in Africa' (2011) *Journal of African Law* 2.

⁹ Assembly of the 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 International Criminal Court (ICC) Doc. Assembly/AU/10(XV)', Assembly/AU/Dec.296(XV), adopted by the fifteenth ordinary session of the Assembly of the Union on 27 July 2010 in Kampala, Uganda, para 8.

¹⁰ Assembly of the AU 'Decision on the meeting of African states parties to the Rome Statute of the International Criminal Court (ICC)' Doc. Assembly/AU/13(XIII)' Assembly/AU/Dec.245(XIII) adopted by the thirteenth ordinary session of the Assembly of the Union on 1-3 JULY 2009, in Sirte, Libya, para 10.

¹¹ Assembly of the AU (n 9 above) para 5.

¹² ICC 'African states' available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx> (accessed 9 August 2015).

¹³ ICC Assembly of States Parties, Report of the Bureau on non-cooperation, ICC-ASP/13/40, thirteenth session, New York, 8-17 December 2014, 5 December 2014.

¹⁴ Constitutive Act, art 6(2) & Assembly of the AU 'Rules of Procedure of the Assembly of the Union', ASS/AU/2(I) – a, first ordinary session 9 – 10 July 2002 Durban, South Africa, rule 2.

¹⁵ Assembly of the AU 'Decision on Africa's Relationship with the International Criminal Court (ICC)' Ext/Assembly/AU/Dec.1 (Oct.2013), extraordinary session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia.

¹⁶ Assembly of the AU (n 15 above) para 10(I).

¹⁷ MW Martin & B Jurgen 'The proposed International Criminal Chamber Section of African Court of Justice and Human Rights' (2014) 1 *International Law Journal of London* 1 79.

under the principle of complementarity.¹⁸ Because of the refusal,¹⁹ some AU's top officials reported to have threatened withdrawal of the AU member states from the ICC;²⁰ and it was at this point where the ICC was considered a neo-colonial institution and a 'servant' of the Western states.²¹

On 27 June 2014, the Assembly of the AU adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol),²² which to some scholars it is an indicator of the strained relationship between the AU and the ICC. Upon coming into force, the Malabo Protocol will establish the African Court of Justice on Human and Peoples Rights that will have Chambers of the International Criminal Law Section with a mandate to try and punish the perpetrators of international and transnational crimes.²³ Some of those crimes are within the jurisdiction of the ICC.²⁴

1.2 Objectives and significance of the study

Noting the significant role of the AU and the ICC in fighting heinous crimes, which led 'millions of children, women and men' to be 'victims of unimaginable atrocities',²⁵ this study discusses the AU and the ICC contention, and suggests possible strategies to resolving the contention. The study will add value to the existing literature in this very important area of international criminal law. It will also be useful for both academic and professional purposes. The study will be a foundation for further studies in the future.

1.3 Hypothesis and research questions

This study is premised on a hypothesis that both the AU and the ICC are committed to fight impunity of individuals perpetrating greatly international crimes, and maintain peace and justice in the world. As a result, the study seeks to answer the following questions:

¹⁸ The AU filed an application to the ICC by a letter dated 10 September 2013.

¹⁹ A Alamuddin 'The role of the Security Council in starting and stopping cases at the International Criminal Court: problems of principle and practice' in A Zidar & O Bekou (eds) *Contemporary challenges for the International Criminal Court* (2014) 123.

²⁰ Mint Press News 'AU countries threaten to leave ICC' available at <http://www.mintpressnews.com/au-countries-threaten-to-leave-icc/170459/> (accessed 9 August 2015).

²¹ A Anangwe 'Kenya's case at the ICC re-ignites neo-colonial debate' (2013) *Nairobi Law Monthly* 13.

²² Assembly of the AU, the Protocol was adopted on the twenty-third ordinary session of the Assembly, held in Malabo, Equatorial Guinea on 27 June 2014.

²³ Art 28A of the Malabo Protocol empowers the Court to try persons for the crimes of genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression.

²⁴ ICC Statute, arts 6, 7 & 8.

²⁵ The ICC Statute, para 2 of the Preamble.

1. How is the AU related to the ICC to the extent of being in conflict?
2. What accounts for the conflict between the AU and the ICC?
3. What is the legal status of the AU's decisions in relation to the obligations of African states under the ICC Statute and international law generally?
4. How can the conflict between the AU and the ICC be resolved?

1.4 Literature survey

The contention between the AU and the ICC has been variously discussed in literature.²⁶ Imoedemhe asserts that, at present, the relationship between the AU and the ICC has degenerated into a conflict;²⁷ this followed the indictment of President Omar Al Bashir who is accused of committing international crimes in Darfur, Sudan.²⁸ She argues that the causal factor for such contentions is traceable to the immersion of the United Nations Security Council (UNSC) in referring the Darfur situation to the ICC and its refusal to defer the case after being requested to do so by the AU. She is of the strong view that in spite of the tensions, there is a chance for a settlement. Therefore, this study is siding with her in proposing the possibilities of way out.

According to Keppler, in 2010 the ICC has experienced remarkable challenges in Africa.²⁹ She asserts that the AU appealed to its member states not to co-operate with the ICC in the execution of the warrant of arrest for President Omar Al Bashir. She argues further that the African states are considerably supportive to the ICC but involvement of the UNSC in referring the situation to ICC triggered the existing tensions.

Marczynskir affirms that African states have significantly played a role in establishing the ICC.³⁰ However the 'relationship between the AU and the ICC in recent years has been far from satisfactory'. One of the tense areas is lack of co-operation of African states with the ICC in arresting President Al Bashir. Being aware of the proposal to mandate the prosecution of international crimes by the African Court on Human and Peoples' Rights, Marczynskir claims that the initiative is duplication. Hence it is ruinous to the jurisdiction of the ICC and obligations of African states parties to the ICC. On the contrary, this study disagrees with that argument, rather it is submitted that the initiative is relevant as it is going to be highlighted elsewhere in this study.

²⁶ R Pisillo-Mazzeschi 'International obligations to provide for reparation?' in A Randezlzhofner & C Tomuschul (eds) *State responsibility and the individual: reparation in instances of grave violations of human rights* (1999) 149.

²⁷ O Imoedemhe 'Unpacking the tension between the African Union and the International Criminal Court: The way forward' (2015) 23.1 *African Journal of International and Comparative Law* 74.

²⁸ ICC-02/05-01/09.

²⁹ Keppler (n 8 above) 1.

³⁰ M Marczynskir 'The International Criminal Court: where do we stand for 10 years? A perspective from civil society' in Zidar & Bekou (n 19 above) 237-238.

It is commented by Lee that the decisions of the AU to call upon its member states not to co-operate with the ICC fall within the confines of law.³¹ He grounds his argument in respect of article 9(g) of the Constitutive Act of African Union of 2000³² (Constitutive Act). The article lays down the powers and functions of the Assembly of the AU which include the power to ‘give directives... on the management of conflicts, war and other emergency situations and the restoration of peace’. Reading together the provisions of article 9(g) and article 23(2) of the Constitutive Act, Lee reasons that non-cooperation of the AU member states with the ICC is not invalid, as failure ‘to comply with the decisions and policies of the AU may result in sanctions’ to the non-adherents. However Lee argues that, under no circumstances, African state parties to the ICC are exonerated from their obligations to arrest and surrender an individual accused of international crimes, imposed on them in article 89 of the ICC Statute. Based on this line of argument, the study discusses a legal status of the AU’s policies and decisions in relation to the obligations of African states under the ICC Statute and international law generally.

The call of the AU upon its member states not to co-operate with the ICC has been related to the immunities provision of article 98 of the ICC Statute.³³ In view of immunity clause, Njiti avers firmly that the ICC Statute ‘cannot be fully implemented’ in ending impunity.³⁴ He urges therefore the United Nations (UN), the UNSC, AU, ICC or state parties to the ICC Statute to seek advisory opinion from the International Court of Justice (ICJ) for a settlement. This argument is valid as article 27 and article 98 of the ICC Statute seem to be in contradiction in their application especially when it comes to the issue of obligations of state under international law with respect to an individual’s immunities from a third state.

In support of this view, the International Bar Association expresses its great regret at the decision handed down by the Pre-Trial Chamber of the ICC (PTC), in the case of President Al Bashir, for failure to expressly speak on the relationship between the provisions of articles 27 and 98 of the ICC Statute regarding the concern of immunities.³⁵ The International Bar Association holds that ‘in our view, a judicial reasoning by the Chamber on this issue could have allayed the confusion of some states regarding perceived conflicts between their obligations under international law and the Statute’.

³¹ D Lee ‘Comment on the Darfur Question’ available at <<http://iccforum.com/forum/permalink/61/889>> (accessed 30 June 15).

³² Adopted on 11 July 2000, and came into force on 26 May 2001.

³³ Assembly of the AU (n 10 above).

³⁴ LB Njiti ‘The relationship between the Protocol establishing the criminal jurisdiction of the African Court on Human and People’s Rights and the Rome Statute establishing the International Criminal Court: A critical analysis of treatment of the question of immunity from prosecution’ unpublished LLM mini-dissertation, University of Pretoria, 2014 15.

³⁵ International Bar Association ‘First challenges: an examination of recent landmark developments at the International Criminal Court’ An International Bar Association Human Rights Institute Report (2009) available at <<http://www.iccnw.org/documents/ICCMonitoringReportJune20091.pdf> IBA/ICC> (accessed 18 August 2015) 12. *See also* D Akande ‘The legal nature of Security Council referrals to the ICC and its impact on Al Bashir’s immunities’ (2009) 7 *Journal of International Criminal Justice* 337.

Contrary to the argument made by Lee, Langer notes that the adoption of resolutions by the AU was in the interest of African leaders towards continuing to act with impunity and without being held accountable for their mischievous actions.³⁶ He stresses that it is necessary for non-governmental organisations (NGOs) from all over Africa to organise opposition that will remind the elites that the committers of heinous crimes should face justice. This is not to postulate that to organise opposition within the respective states in Africa will help to resolve the contention. This is basically because the conflict involves several issues including legal concerns which cannot, in any way, be settled by organising mere opposition, but by critical approaches which this study seeks to expound consequently.

The surveyed literature demonstrates that indictment of the sitting AU heads of state resulted in the adoption of decisions by the AU. However, the scholars did not extensively point out the legal nature and implications of those decisions in respect of the outstanding obligations of African states under various international treaties. This study therefore attempts to examine this issue and propose the possibilities of resolving the conflict which threatens the prosperity of international criminal justice.

1.5 Research methodology

This study is premised on a desktop research. It therefore makes use of books, journal articles, reviews, commentaries, dissertations, papers and statements, international, regional and sub-regional instruments, and the jurisprudence of the ICJ, ICC and international tribunals, among others. Due acknowledgment is given to each referred work.

1.6 Scope of the study

The study is limited to analysing the contentious relationship between the AU and the ICC, assessing the legal implications of the AU decisions of non-co-operation of its member states with the ICC, and proposing the possibilities of resolution. The case of President Al Bashir is highly referred in study.

1.7 Overview of chapters

The study consists of five chapters. Chapter one is a research design. Chapter two discusses the relationship between the AU and the ICC. Chapter three will take a critical look at the legal status of the AU's decisions in relation to the obligations of member states under the ICC Statute and international law

³⁶ J Langer 'African perpetrators should continue to face justice at the ICC' available at <<http://johanneslanger.com/2013/06/13/africa-and-the-icc/>> (accessed 30 June 2015).

generally. Chapter four seeks to look at the approaches to resolving the contention between the AU and the ICC. While the final chapter will borders on summary of findings, conclusions and recommendations.

CHAPTER II

THE RELATIONSHIP BETWEEN THE AFRICAN UNION AND INTERNATIONAL CRIMINAL COURT

2 Introduction

The discussion of this chapter will be based on three thematic areas. Firstly, the participation of Africa in the creation of the ICC. Secondly, the discussion will trace the current relationship between the AU and the ICC. Finally, there will be a short conclusion of the discussion.

2.1 Participation of African states in the creation of the ICC – background

Three months after the adoption of the ICC Statute, the African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution calling on member states of the African Charter on Human and Peoples' Rights (African Charter) to sign and ratify the ICC Statute and reform their national laws and policies in order to conform to it.³⁷ By the same token, on 16 April 1999, a Ministerial Conference on Human Rights of the then Organisation of African Unity (OAU) held in Grand Bay, Mauritius. The conference adopted the Grand Bay (Mauritius) Declaration and Plan of Action, 1999.³⁸ In this Grand Bay Declaration, the OAU member states were requested to consider 'ratification of all major OAU human rights conventions' including the ICC Statute.³⁹

With reference to these calls, one may likely ask why the ACHPR and the conference affirmatively appealed to member states of the OAU generally and those of the African Charter specifically to ratify the ICC Statute. Paragraph 6 of the Preamble and article 11 of the Grand Bay Declaration may be a possible answer to this question; that crimes against humanity, genocide and war crimes had been committed in most parts of the African continent.⁴⁰ The ICC was therefore believed to be a way forward to dealing with the perpetrators of those crimes. However, it is worth mentioning that the abuses of human rights and commission of international crimes were not a unique phenomenon to Africa;

³⁷ African Commission on Human and Peoples' Rights, a resolution on the ratification of the treaty on the ICC, adopted at 24th ordinary session on 22-31 October 1998, in Banjul, Gambia, available at <www.achpr.org/sessions/24th/resolutions/27/> (accessed 5 September 2015).

³⁸ C Heyns & M Killander Compendium of key human rights documents of the African Union (2013) 155, it is also available at <<http://www.achpr.org/instruments/grandbay/>> (accessed 31 August 2015).

³⁹ Grand Bay Declaration and Plan of Action, art 13(m).

⁴⁰ Grand Bay Declaration, Para 6 of the Preamble: deeply concerned by acts of genocide and other crimes against humanity perpetuated in certain parts of Africa'; and article 11 of the Grand Bay Declaration states that 'deeply concerned about the acts of genocide, crimes against humanity and other war crimes being perpetuated in certain part of Africa, the Conference appeals to African states to ensure that such acts are definitively eradicated on the continent and recommends that these serious acts of violation be adequately dealt with'.

other parts of the world have witnessed the same or more. The learned American Judge Melvyn Tanenbaum has once stated that:

Establishment of an International Criminal Court *was* necessary to ensure justice and aid in the preservation of civilization. Many groups, aware of the historical perspective and present exigencies, *were* involved in the proposed formulation of a court for *that* purpose.⁴¹

In light of the above, it is to be noted that extrajudicial killings, disappearances, torture, sexual abuses and imprisonment of several people have been witnessed and continue to be witnessed in the most parts of the African continent.⁴² Bensouda, the current ICC prosecutor, once averred that ‘as Africans, we know that impunity is not an academic or abstract notion’.⁴³ A system of apartheid witnessed in South Africa, civil wars in Sierra Leone and Liberia, genocide in Rwanda, and conflicts in the Great Lakes Region and Somalia are some of the few instances that indicate Africa’s rich experience in the disturbance of justice and civilisation. Almost all African states and many NGOs based in Africa saw the need for establishing the ICC that would deal with perpetrators of the abuses of human rights.

African states participated in the establishment of the ICC since 1993 when a draft statute was presented to the UN General Assembly (UNGA) by the International Law Commission (ILC).⁴⁴ In consequence, African states forming the Southern African Development Community (SADC) set up a forum for a discussion on the involvement of Africa in the preparation and negotiation of the ICC Statute.⁴⁵ Between 11 and 14 September 1997, the SADC member states assembled in Pretoria, South Africa discussing about the adoption of the ICC Statute which would suit their needs resulted from the historical experiences. In the long run, they came up with one voice. They set up the principles best known as the SADC Principles which were fully endorsed by the Attorney Generals and Ministers for Justice of the respective SADC member states.⁴⁶ In a subsequent statement made by the South African Ambassador Khiphusizi Jele on their behalf before the Committee of the UNGA in 1997, the SADC member states stated firmly that:

⁴¹ M Tanenbaum ‘An International Criminal Court’ (1993) 32 *Judges’ Journal* 17. **Emphasis added.**

⁴² S Odera ‘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 (eds) *Prosecuting international crimes in Africa* (2011) 148 & Stockholm International Peace Research Institute (SIPRI) *Yearbook of World Armaments and Disarmaments* (2000) quoted in I Eberечи ‘Armed conflicts in Africa and Western complicity: a disincentive for African Union’s cooperation with the ICC’ (2009) 3 *African Journal of Legal Studies* 54.

⁴³ F Bensouda ‘International criminal justice and Africa the state of play’ in Southern Africa Litigation Centre *Positive Reinforcement: advocating for international criminal justice in Africa*, May 2013, 31.

⁴⁴ S Maungo ‘The establishment of the International Criminal Court: SADC’s participation in the negotiations’ (2000) 9 *African Security Review* 1 42.

⁴⁵ Member states of the SADC are South Africa, Zimbabwe, Zambia, Tanzania, Swaziland, Seychelles, Namibia, Mozambique, Mauritius, Malawi, Lesotho, Democratic Republic of the Congo, Botswana and Angola.

⁴⁶ A statement by H.E. Ambassador Khiphusizi J Jele Permanent Representative of South Africa on behalf of member states of the Southern African Development Community (SADC) before the sixth committee of the 52nd General Assembly, regarding agenda item 150: Establishment of an international criminal, New York, 21 October 1997, available at <<http://www.iccnw.org/documents/SouthAfricaSADC6Comm21Oct97.pdf>> (accessed 14 August 2015).

In order to foster a better understanding of the proposed court within our respective countries, a number of SADC consultative meetings were held over the last two years, during which time the possible implications and benefits which may arise as a result of the establishment of such a court were considered. Moreover, these meetings have resulted in the consolidation of common positions amongst SADC states on some of the articles of the draft Statute. It is important to note that at these meetings, the contributions of all role players... have been actively canvassed... We cannot, therefore, agree with those who have indicated a preference for postponing the conference to a later date, since such postponement is in our view unnecessary and secondly, would result in a loss of momentum for this most important project.⁴⁷

The SADC Principles therefore laid an important basis for a future development of the strategies towards negotiating the ICC Statute for Africa as a whole.

Between 3 and 6 February 1998, the ‘African Conference in Dakar’ held in Dakar, Senegal. The conference aimed at discussing the important matters which could be entrenched in the proposed ICC Statute. Even though it was held in two phases, the African ministers for justice, representatives of the NGOs, legal advisors, lawyers and human rights activists, among others, were the participants of the conference.⁴⁸ At the end of the conference, the ‘Dakar Declaration for the Establishment of the International Criminal Court’ was adopted in 1998.⁴⁹

Consequently, the declaration was adopted by the OAU during its session held in Ouagadougou in June 1998. The declaration became the regional tool of negotiations for Africa during the conference in Rome, Italy.⁵⁰ In both SADC Principles and Dakar Declaration for the Establishment of the International Criminal Court, African states firmly committed to the establishment of the ICC which they believed to be useful for Africa and the international community. In this spirit, it became clear that the two documents were important in the negotiating process. In both documents, African states wanted the prospective international criminal court to have full co-operation with the state parties and, indeed to be fully independent from political influence of states and international institutions particularly the UNSC.⁵¹ It is important to be noticed that the OAU was represented in the negotiations in Rome as an observer.⁵²

As mentioned, the NGOs based in Africa had played a significant role in the establishment of the ICC. Shedding some light on how they contributed to the establishment of the ICC, Mochochoko

⁴⁷ As above.

⁴⁸ P Mochochoko ‘Africa and the International Criminal Court’ in EA Ankumah & EK Kwaka (eds) *African perspectives on international criminal justice* (2005) 249.

⁴⁹ Dakar Declaration for the Establishment of the International Criminal Court, 1998 available at <<http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>> (accessed 14 August 2015).

⁵⁰ OAU Council of Ministers, the Dakar Declaration for the establishment of the International Criminal Court, meeting at Addis Ababa, the 67th ordinary session in February 1998 & OAU Assembly of Heads of State and Government, Dakar Declaration for the Establishment of the International Criminal Court, meeting at Ouagadougou, the 67th session in June 1998.

⁵¹ Maqungo (n 44 above) 43 - 45.

⁵² UN United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998 Official Records Volume I Final documents Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [with an annex containing the resolutions adopted by the Conference] A/CONF.183/13(Vol.I) 76.

explained that many discussions and debates on the draft statute of the ICC were conducted by the International Commission of Jurists (Kenya); several seminars and radio talk shows were as well conducted by the NGOs in South Africa and Botswana.⁵³ In countries such as South Africa, Nigeria, Ethiopia, Kenya, Rwanda and Uganda, many NGOs affiliated with the Coalition for an International Criminal Court (CICC) to lobby African states to accept the early establishment of the ICC.⁵⁴

2.1.1 Early operation of the ICC and its relationship with Africa

The ICC Statute was officially adopted on 17 July 1998. To enter into force, it required a deposit of 60 ‘instruments of ratification, acceptance, approval or accession’.⁵⁵ Africa through Senegal became the first continent to ratify the ICC Statute on 2 February 1999.⁵⁶ When it started to operate in 2002, the ICC seemed to be supported effectively by both African states nationally and the AU regionally. This can be proved through various activities of African states towards the ICC. It includes specifically the voluntary referrals of situations of abuses of human rights and other atrocities to the ICC, purportedly committed by their own nationals within their own territories.⁵⁷ As of September 2015, there were four situations that had been voluntarily referred to the ICC by African states themselves.⁵⁸ They are the cases of Central African Republic (CAR),⁵⁹ Uganda,⁶⁰ Democratic Republic of Congo (DRC),⁶¹ and Mali.⁶² In addition to these four situations, there is another most recent situation referred by Comoros.⁶³ Relatively distinct from the four situations, the referral by Comoros dealt with the allegations of crimes committed outside its territory against Israeli nationals who allegedly committed them during the Israel Defence Forces attacks

⁵³ Mochochoko (n 48 above) 248.

⁵⁴ As above.

⁵⁵ ICC Statute, art 126(1).

⁵⁶ WA Schabas *An introduction to the International Criminal Court* (2004) 19.

⁵⁷ The ICC ‘The states parties to the Rome Statute’ available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx> (accessed 10 July 2015).

⁵⁸ A Jones ‘States referrals at the International Criminal Court: from vision to practice’ in Zidar & Bekou (n 19 above) 75.

⁵⁹ ICC ‘Prosecutor receives referral concerning Central African Republic’ available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/press%20releases/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx> (accessed 18 September 2015).

⁶⁰ ICC ‘President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC’ available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx> (accessed 18 September 2015).

⁶¹ ICC ‘Prosecutor receives referral of the situation in the Democratic Republic of Congo’ available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx> (accessed 18 September 2015).

⁶² Letter of referral from the Government of Mali available at <<http://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>> (accessed 18 September 2015).

⁶³ Letter of referral from the Government of the Union of the Comoros available at <http://www.icc-cpi.int/iccdocs/otp/Referral_from-Comoros.pdf> (accessed 18 September 2015).

of MV Mavi Marmara vessel in Gaza on 31 May 2010.⁶⁴ However, this in all makes a totality of five self-referrals of the situations by African states.⁶⁵

Many scholars and commentators of the AU and the ICC affairs have noted that from July 2009 possibly to date, the AU and the ICC have found themselves in contentious relationship which endangers the possibilities of ending impunity of the perpetrators of international crimes and maintenance of regional and international peace and security envisaged by the ICC Statute. The following section therefore traces the existing relationship between these two organisations.

2.2 Current relationship between the AU and the ICC

Besides being represented by an observer in the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy, and for some of its member states being state parties to the ICC, the AU has no formally legal relationship with the ICC at the present.⁶⁶ Comparatively, other international organisations including particularly the European Union (EU) have well established relationship with the ICC. The relationship was made official through the agreement between the ICC and the EU signed on 10 April 2006 and came into operation on 1 May 2006.⁶⁷ The purpose of this relationship agreement is to foster ‘co-operation and assistance’ between the ICC and the EU⁶⁸ which would facilitate smooth working of the ICC towards consolidating ‘the rule of law and respect for human rights and humanitarian law as well as the preservation of peace and... international security, in conformity with the United Nations Charter’.⁶⁹

Correspondingly, article 3 of the Constitutive Act of the African Union proclaims that the AU aims at encouraging international co-operation by taking due account of the UN Charter and the Universal Declaration of Human Rights (Universal Declaration) and indeed, promoting peace, security, and stability in Africa.⁷⁰ A plain interpretation of this objective is that the AU is committed to co-operate with any

⁶⁴ As above.

⁶⁵ For the difference between situation and case in respect of the ICC context *see* Alamuddin (n 19 above) 103-108.

⁶⁶ Coalition for International Criminal Court (CICC) ‘A universal court with global support, cooperation agreements and enforcement, regional and international organizations’ available at <<http://www.iccnw.org/?mod=agreementsorgs>> (accessed 1 October 2015).

⁶⁷ ICC Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, ICC-PRES/01-01-06, available at <http://www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf> (accessed 1 October 2015).

⁶⁸ ICC Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, para 1.

⁶⁹ ICC Agreement between the International Criminal Court and the European Union on Cooperation and Assistance, para 1 of Preamble of the agreement.

⁷⁰ Constitutive Act, art 3(e): encourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights & article 3(f): Promote peace, security, and stability on the continent.

international organisation insofar as the co-operation reflects the object and purpose of the UN Charter and the Universal Declaration.

It is claimed by the CICC that ‘in May 2005 a draft relationship agreement between the ICC and the AU was finalised’.⁷¹ Since then the ICC had pressed for a signature of the AU but ended in vain.⁷² The agreement was mainly aimed at ensuring Africa’s ‘regional participation in and co-operation with ongoing investigations’.⁷³ With due regard to this background, one may ask that, why was it possible for the ICC to enter into an agreement of co-operation with the EU and not with the AU?

2.2.1 What account for the contention between the AU and the ICC?

As stated above, the ICC has worked co-operatively with African states and the AU since it became operational in 2002. Nonetheless, from 3 July 2009 onward the wind changed its blowing direction. Instead of blowing towards The Hague, the Netherlands, it was and still seemingly is blowing towards Addis Ababa, Ethiopia and other capitals in Africa. Tladi argued that ‘central to the story of the AU and the ICC collision course is the United Nations Security Council’ which referred the Darfur situation to the ICC in 2005’.⁷⁴ Tladi’s argument seems to be influential as African state parties to the ICC have publicly stated during the 13th session of the Assembly of State Parties to the ICC (ASP) held in New York that:

We should bear in mind that much of the AU’s concern vis-à-vis the ICC relates to the Security Council’s inaction. In the past four years, the AU has premised its call for non-cooperation with the ICC on the Security Council ignoring its July 2008 request to defer the case against President Al-Bashir. Concern has mounted that the Security Council has disrespected the AU by failing to respond either positively or negatively to its deferral request.⁷⁵

On 31 March 2005, Resolution 1593 (2005) was adopted by the UNSC; it referred the situation in Darfur to Prosecutor of the ICC (Prosecutor).⁷⁶ It was adopted in respect of Chapter VII of the UN Charter.⁷⁷ On 1 June 2005, the Prosecutor brought to the attention of the PTC that he planned to investigate the situation in Darfur. In light of the perceived disagreement between the Prosecutor and the Sudanese government in

⁷¹ CICC (n 66 above).

⁷² As above.

⁷³ As above.

⁷⁴ D Tladi ‘The African Union and the International Criminal Court: the battle for the soul of international law’ (2009) 34 *South African Year Book of International Law* 59.

⁷⁵ Statement by H.E Mr Kelebhone A Maope (n 4 above) para 11.

⁷⁶ ICC ‘ICC Prosecutor presents case against Sudanese President, Hassan Ahmad Al Bashir, for genocide, crimes against humanity and war crimes in Darfur’ available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/Pages/a.aspx> (accessed 30 September 2015).

⁷⁷ UNSC, Resolution 1593, S/RES/1593 (2005), adopted by the Security Council at its 5158th meeting, on 31 March 2005, para 6(1) states: the Security Council, acting under Chapter VII of the Charter of the United Nations decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the ICC.

which the Sudanese government was expected to assist the former in arresting Ahmad Harun and Ali Kushayb, the then Minister for Internal Affairs and head of the Janjaweed, respectively.⁷⁸ The Prosecutor requested the ICC to issue an arrest warrant for President Al Bashir on 14 July 2008.⁷⁹ The former accused the latter individually of committing indirectly war crimes, crimes against humanity and genocide against the ethnic ‘Fur, Masalit and Zaghawa groups’, between 2003 and 2008, in Darfur, Sudan.⁸⁰

The Prosecutor’s application raised concerns to the Peace and Security Council of the AU (PSC). As a result of which the PSC adopted a communiqué on 21 July 2008.⁸¹ By this communiqué, the PSC reaffirmed that the AU is committed to fight impunity and promote rule of law, good governance and democracy in Africa as governed by the Constitutive Act,⁸² and it indeed condemned the commission of human rights violations in Darfur.⁸³ The communiqué accentuated however that indictment of President Al Bashir would make vulnerable the peace process which was underway at the time. Aware of article 16 of the ICC Statute which warrants the UNSC to defer a situation which is before the ICC as regards Chapter VII of the UN Charter,⁸⁴ the PSC requested the UNSC:

To defer the process initiated by the ICC, taking into account the need to ensure that the ongoing peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of the victims and justice.⁸⁵

From the date this request was made to February 2009, when the AU Heads of State and Government assembled in Addis Ababa, Ethiopia, neither the application of arrest warrant of the Prosecutor nor the request of the PSC was worked on.⁸⁶ However, after hearing the submission of the Prosecutor relating to those grave crimes of which it did not agree with the accusations of genocide but of crimes against humanity and war crimes, the PTC I on 4 March 2009 issued an ‘international arrest warrant’ for President Al Bashir to all state parties to the ICC and the UNSC for its execution.⁸⁷

⁷⁸ EP Mendes *Peace and justice at the International Criminal Court: a court of last resort* (2010) 173.

⁷⁹ See ICC Statute, art 58.

⁸⁰ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, Decision on the prosecution’s application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para 4. See also Decision on second warrant of arrest for Omar Hassan Ahmad Al Bashir (12 July 2010), para 1.

⁸¹ AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) adopted Peace and Security Council 142nd meeting on 21 July 2008, Addis Ababa, Ethiopia.

⁸² Constitutive Act, art 4(m).

⁸³ PSC of the AU, (n 81 above) para 2.

⁸⁴ ICC Statute, art 16: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a 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.

⁸⁵ PSC of the AU (n 81 above) para 11(i). This request gives inference that, in the eyes of the AU, it was immature timing for the prosecutor to approach the ICC for the warrant while efforts had already been initiated by the AU to attain the solutions.

⁸⁶ Tladi (n 74 above) 60.

⁸⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir* (n 80 above), para 235; Odera (n 42 above) 147 & AT Carley ‘The Prosecutor’s strategy in seeking the arrest warrant of Sudanese President Al Bashir on charges of genocide’ (2008) 6 *Journal of International Criminal Justice* 829.

This success of application of the Prosecutor seemed to anger extremely the PSC and resulted in feelings that the UNSC neglected its well-timed request for deferment. Later, on 3 July 2009 through the summit of the Heads of States and Government held in Sirte, Libya, the AU made a decision of non-cooperation of its member states with the ICC in arresting President Al Bashir.⁸⁸ This decision seemingly sparked the stirring up of the relationship between the AU and the ICC.⁸⁹

In spite of this non-co-operation decision, on 12 July 2010, the ICC issued a second arrest warrant for President Al Bashir for charges of genocide.⁹⁰ This was the result of an appeal made by the Prosecutor to the Appeal Chamber of the ICC against the decision of the PTC I which did not include the charges of genocide ‘by killing, by causing serious bodily or mental harm, and by deliberately inflicting conditions of life calculated to bring about the group's physical destruction’ in the first arrest warrant.⁹¹ The issuance of this second arrest warrant also encountered a similar response from the AU by making a statement expressing its concerns.⁹² From this time on the relationship between the two became problematic. As of December 2012, the Assembly of the AU adopted more than 10 resolutions and has given many statements to the press encouraging strongly the UNSC to consider its requests of deferment.⁹³ None of the decision has been worked on by the UN as yet.

The AU’s call of non-co-operation seemed to work properly. Between July 2009 and June 2015, President Al Bashir has journeyed to several African states which have accepted the jurisdiction of the ICC. At the time, President Al Bashir has two pending arrest warrants. In fact, these states did not arrest, despite attention being drawn to them by the ICC. Kenya,⁹⁴ Chad,⁹⁵ Nigeria⁹⁶ and South Africa,⁹⁷ are

⁸⁸ Assembly of the AU (n 10 above). From this decision onward, in every its decision, AU reiterates that the AU expresses its disappointment that the UNSC has not acted upon the request by the AU to defer the proceedings initiated against President Al Bashir in accordance with article 16 of the ICC Statute which allows the UNSC to defer cases for one year and reiterates its request in this regard.

⁸⁹ T Murithi ‘The African Union and the International Criminal Court: an embattled relationship?’ Justice and Reconciliation in Africa Programme, Policy Brief number 8, March 2013, 3.

⁹⁰ *The Prosecutor v. Al Bashir, Case ICC-02/05-01/09*, Second warrant of arrest for Omar Hassan Ahmad Al Bashir (July 12, 2010) <<http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf>> (accessed 30 September 2015).

⁹¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09*, Second warrant of arrest for Omar Hassan Ahmad Al Bashir, 12 July 2010.

⁹² GP Barnes ‘The International Criminal Court’s ineffective enforcement mechanisms: the indictment of President Omar Al Bashir’ (2011) 34 *Fordham International Law Journal* 6 1608.

⁹³ AS Knottnerus ‘How to reconcile the African Union and the International Criminal Court’ (2012) 1 *Journal of African Union Studies* 2 & 3 26.

⁹⁴ *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09*, Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya, 27 August 2010.

⁹⁵ *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09*, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, 13 December 2011.

⁹⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09*, Decision Regarding Omar Al-Bashir's visit to the Federal Republic of Nigeria, 15 July 2013.

⁹⁷ *The Southern Africa Litigation Centre v The Minister of Justice & Others 27740/2015*, available at <<http://constitutionallyspeaking.co.za/complete-high-court-al-bashir-judgment/>> (accessed 20 September 2015) & See also

among the ICC state parties which failed to arrest President Al Bashir who was there for different official functions.⁹⁸ The AU has never been silent of the criticisms levelled against its member states welcoming the wanted incumbent President Al Bashir. In its decision of May 2013, the AU stated the following:

Deeply regretted that the request by the AU to the UNSC to defer the proceedings initiated against President Omar Al Bashir of Sudan and senior state official of Kenya, in accordance with article 16 of the ICC Statute on deferral of cases by the UNSC, has not been acted upon; *reaffirmed* that member states such as the Republic of Chad that had welcomed President Omar Al Bashir of Sudan did so in conformity with the decisions of the Assembly of the AU and therefore, should not be penalised.⁹⁹

Although this decision did not openly call for non-co-operation with the ICC, in its paragraph 4, the AU still reaffirmed its decisions on non-co-operation adopted in 2009, 2010, 2011 and 2012. It should be noted, however, that this decision was not supported by Botswana that made publicly a reservation based on the obligations it has under the ICC Statute as a state party. Apart from those decisions, the AU's present relationship with the ICC has been associated with the case of the sitting President of Kenya, Uhuru Kenyatta, and the decision of the AU to establish an African court which will prosecute international crimes.

2.2.2 Situation in Kenya vis-à-vis the AU-ICC relationship

Massive abuses of human rights including the killings of 1 133 people were reported in the aftermath of Kenya's widespread post-elections violence of 2007.¹⁰⁰ As a result, the negotiations towards a settlement were organised, and Kofi Annan was the head of the talks.¹⁰¹ Setting up of the Commission of Inquiry on Post-election Violence (CIPEV) to assess the circumstances surrounding the violence was one of the results of the talks. The CIPEV delivered its report and made several recommendations which include the

Aljazeera 'Fatou Bensouda: S Africa 'had to arrest Omar al-Bashir' available at <<http://www.aljazeera.com/programmes/talktojazeera/2015/06/fatou-bensouda-africa-arrest-omar-al-bashir-150626132631885.html>> (accessed 28 September 2015).

⁹⁸ ICC 'African states' available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx> (accessed 9 August 2015).

⁹⁹ Assembly of the AU, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) Doc.Assembly/AU/13(XXI), Assembly/AU/Dec.482(XXI) at Assembly of the AU twenty-first ordinary session 26 - 27 May 2013 Addis Ababa, Ethiopia, para 3. *Emphasis added.*

¹⁰⁰ The Report of the Commission of Inquiry into the Post-election Violence available at <http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf> & <http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf> (accessed 2 September 2015) 345 - 346.

¹⁰¹ African Union Panel of the Wise 'Peace, justice, and reconciliation in Africa: opportunities and challenges in the fight against impunity', The African Union Series, New York: International Peace Institute, February 2013, 44.

bringing to justice individuals accountable greatly for commission of crimes, and the proposal to execute such a recommendation.¹⁰²

Bringing to justice individuals alleged to be most responsible for the atrocities faced a number of challenges including lack of political will and inadequate investigations by Kenyan police.¹⁰³ It is claimed by Asaala that Kenyan government happened to be reluctant to initiate ‘effective local prosecution’, in spite of the available evidence reflecting the involvement of local politicians alleged to have organised, financed and directed the violence.¹⁰⁴ Based on this background, the then Prosecutor Luis Moreno-Ocampo requested the PTC, on 26 November 2009, for an authorisation to investigate the situation.¹⁰⁵ As an outcome of the investigation, the Prosecutor instituted charges against Uhuru Kenyatta who at the time was the Deputy Prime Minister and Minister for Finance of Kenya, Joshua Arap Sang, Henry Kiprono, Kasgey, Francis Kirimi Muthaura, Hussein Ali, and William Ruto.¹⁰⁶

Of concern are Kenyatta who was charged with crimes against humanity in connection with ‘murder, deportation or forcible transfer, rape, persecution, and other inhumane acts’,¹⁰⁷ and Ruto who was charged with crimes against humanity in connection with ‘murder, deportation or forcible transfer of population, and persecution’.¹⁰⁸ From 9 April 2013 to date, Kenyatta is a President of the Republic of Kenya and Ruto is his Deputy. The former therefore is a serving AU Head of State and Government.

In respect of the principle of complementarity which is paramount in the ICC prosecutorial regime, Kenya on 31 March 2011 made an application to the ICC challenging the admissibility of the case whose investigation was underway.¹⁰⁹ This application was unsuccessful as on 30 May 2011, the PTC II handed down its decision rejecting the application.¹¹⁰ Some scholars seem to suggest that Kenya was unable to end impunity of the identified individuals who orchestrated crimes against humanity. To some, the decision of the PTC II was reasonable because the Kenyan government was seemingly not ready to implement the recommendations of CIPEV. One of the supporters of this proposition argued that:

¹⁰² Report of the CIPEV (n 100 above) 472 – 473.

¹⁰³ EO Asaala ‘Prosecuting the 2007 post-election violence-related international crimes in Kenyan courts: exposing the real challenges’ in MK Mbondenyei *et al* (eds) *Human rights and democratic governance in Kenya: a post-2007 appraisal* (2015) 348.

¹⁰⁴ Asaala (n 103 above) 358.

¹⁰⁵ Decision pursuant to article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya by the Pre-Trial Chamber II, ICC-01/09-19, 31 March 2010.

¹⁰⁶ F Viljoen *International human rights law in Africa* (2012) 74.

¹⁰⁷ *The Prosecutor v. Uhuru Muigai Kenyatta* ICC-01/09-02/11.

¹⁰⁸ *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ICC-01/09-01/11.

¹⁰⁹ Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of ICC Statute, ICC-01/09-01/11-19.

¹¹⁰ ICC Decision on the application by the Government of Kenya challenging the admissibility of the case pursuant to article 19(2) (b) of the ICC Statute.

In several instances, local politicians as well as the then Police Commissioner, Mohammed Ali, telephoned his officers instructing them to release suspected perpetrators of post-election violence. Consequently, despite overwhelming evidence that the police may have gathered against suspected perpetrators, they had no option but to discard it and release the suspect without further prosecution.¹¹¹

The PTC II's decision was never an exception to the AU's discontent at the ICC. The AU deeply regretted the decisions of both the PTC II and the Appeals Chamber for holding against the sitting Head of State and Government on '30 May 2011 and 30 August 2011 respectively'.¹¹² The AU viewed those decisions as a denial of Kenya's right to primarily investigate crimes, prosecute and punish those suspected of post-election crimes. Somewhere, it was averred that the AU requested the UNSC in good faith to defer the case under article 16 of the ICC Statute.¹¹³ The said decisions and the UNSC's alleged disregard for the deferment application led overwhelmingly the AU to convene an extraordinary session which ultimately adopted a special decision regarding its relationship with the ICC on 12 October 2013. It is called the 'Decision on Africa's Relationship with the International Criminal Court (ICC)'.¹¹⁴

According to Hansungule, this decision is 'the most important trigger of the non-cooperation'¹¹⁵ between the AU member states and the ICC, although it did not explicitly call member states not to cooperate with the ICC. The decision proscribed the judicial proceedings against a sitting Head of State and Government or their authorised representatives before any international judicial organ at the time they are in office. This decision seems to have some implications on the functioning of the ICC in Africa. Certainly, it signifies that even if the AU incumbents commit international crimes, their impunity should be respected at all cost as far as they are in office. As such, the likelihood of violation of the principle of equality before the law of which the ICC guarantees in article 27 in its Statute is obvious. It must be borne in mind that there are debates around this decision assessing the real motive of the AU. However this study does not attempt to dwell on them as they are out of its scope, and indeed it is a subject of its own.

2.2.3 AU's decision to expand the Africa Court on Human and Peoples' Rights

Some African Heads of State, senior officials of the AU and opponents of the ICC happened to have strong feelings that the ICC is 'biased', and 'neo-colonial institution' which 'targets politically' the

¹¹¹ Asaala (n 103 above) 358.

¹¹² Assembly of the AU (n 99 above) para 6.

¹¹³ Statement by Ambassador Irene F.M. Kasyanjū, Director for Legal Affairs, Ministry of Foreign Affairs and International Cooperation on the United Republic of Tanzania during the General Debate of the Assembly of States Parties to the Rome Statute of the International Criminal Court, New York, 11 December 2014, para 6.

¹¹⁴ Assembly of the AU (n 15 above).

¹¹⁵ Email from M Hansungule, Professor of law, Centre for Human Rights, University of Pretoria, South Africa, on 13 September 2015.

African leaders for the economic interests of European states.¹¹⁶ Others have accused the ICC of having ‘double standards’ in a way it exercises its investigatory and prosecutorial mandates.¹¹⁷ And, several have arrived at the verdict that African states are a ‘favourite customer of the ICC’, and the most affordable one throughout the world. In respect of these feelings, it was argued that the AU has decided to strengthen the African Court on Human and Peoples’ Rights (AfCHPR) in order to prosecute those international crimes committed within Africa, under the spirit of African problems are for Africans.

It was stated that the idea to expand the AfCHPR with criminal jurisdiction originated when the African state parties to the ICC assembled in Addis Ababa, Ethiopia in June 2009 to discuss the fate of the ICC¹¹⁸ which interfered ‘the constitutional order, stability and integrity’ of the AU member states.¹¹⁹ The attending member states finally recommended, among others, that the Assembly of the AU should inquire into examining the possibility of strengthening the AfCHPR to assume a role of the ICC by dealing with international crimes in a complementary manner to the African national jurisdictions.¹²⁰ Later, the Assembly of the AU supported the recommendation by deciding the following in October 2013:

That the Commission should expedite the process of expansion of AfCHPR to deal with international crimes in accordance with the relevant decision of the Policy Organs and invites member states to support this process.¹²¹

Based on both the recommendation and decision, one would conclude that the AU wanted to implant the prosecution of war crimes, crimes against humanity and genocide in an AfCHPR with the intention of barring the ICC from intervening in the African continent at some point.

Moreover, in June 2014 the AU adopted the Malabo Protocol which puts forward a complete scope of the African Court of Justice and Human and Peoples Rights (Court of Justice) with full mandate to prosecute international crimes.¹²² Some of the provisions of the Malabo Protocol seem to contradict the provisions of the ICC Statute; a palpable example is article 46*Abis* which provides that:

¹¹⁶ G Mukundi ‘Africa and the ICC: can a new prosecutor bridge the divide’ (2012) 2 *International Criminal Justice* 20 & Odera (n 42 above) 154.

¹¹⁷ R Lough ‘African Union accuses ICC prosecutor of bias’ available at <<http://www.reuters.com/article/2011/01/30/ozatp-africa-icc-idAFJ0E70T01R20110130>> (5 October 2015); Jean Ping was quoted saying that ‘we Africans and the African Union are not against the International Criminal Court. That should be clear. We are against Ocampo who is rendering justice with double standards. Why not Argentina, why not Myanmar ... why not Iraq?’ Ping’s statement finds it support in the statement of Jeremy Corbyn, a British Labour Party frontrunner, quoted saying ‘...the attack on Afghanistan was a tragedy, the war in Iraq was a tragedy. Tens of thousands of people have died. Torture has come back on to the world stage...’ available at <<http://www.msn.com/en-gb/news/uknews/jeremy-corbyn-under-fire-over-calling-osama-bin-ladens-killing-a-tragedy/ar-AAAdLNqD?ocid=spartandhp>> (accessed 31 August 2015).

¹¹⁸ Mendes (n 78 above) 167.

¹¹⁹ Assembly of the AU (n 16 above).

¹²⁰ Mendes (n 78 above) 168.

¹²¹ Assembly of the AU (n 15 above) para 10(v).

¹²² Assembly of the AU (n 22 above).

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

On the contrary, article 27(1) of the ICC Statute provides that:

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

In the former, Heads of State or Government or their accredited representatives or senior state officials cannot be brought before the prospective Court of Justice while they are in office. In the latter, no difference between the serving Heads of State or Government and ordinary individuals is existent, all can be charged as long as the available evidence establishes their responsibility for the commission of international crimes. The cases of the incumbent Presidents Al Bashir and Kenyatta are a quick example of that. However, it should be noted that article 46B(2) of the Malabo Protocol makes it clear that ‘subject to the provisions of article 46A^{bis} of [the annexed] Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment’. Besides that seeming technicality, the Court of Justice upon coming into operation will most likely put the ICC in more troubling times. The voluntary referrals of the situations by African states will possibly be unavailable anymore. Indeed, the possibilities of withdrawal from the ICC are so high. That is because while the Court of Justice is not operational, threats to withdraw have been expressed openly by various African Heads of state and the senior AU officials.

Supporters of the ICC maintain that a decision to establish the Court of Justice evidences a conflict between the AU and the ICC. Conversely, Deya¹²³ and Abass¹²⁴ seem to disagree with that argument. In spite of the varied wordings, they set forth some identical factors supposed to account for the AU’s move towards establishing the Court of Justice. The factors include the historical need for a court that would prosecute crimes committed in Africa which are of less prosecutorial interest to the world as a whole; a need for an alternative to the possible misuse of the doctrine of universal jurisdiction by European states; challenges experienced in prosecuting Hissene Habre by Senegal; and a necessity of prosecuting crimes peculiar to Africa which neither the ICC nor any international criminal tribunal would deal with them, such as a crime of ‘unconstitutional change of government’.¹²⁵

¹²³ D Deya ‘Worth the wait: pushing for the African Court to exercise jurisdiction for international crimes’ (2012) 2 *International Criminal Justice* 22 - 23.

¹²⁴ A Abass ‘Prosecuting international crimes in Africa: rationale, prospects and challenges’ (2013) 24 *The European Journal of International Law* 3 936 -941.

¹²⁵ African Charter on Democracy, Elections and Governance, art 25(5).

Overall, considering the timing of the decision, this study concludes that the present conflicting relationship between the AU and the ICC has a significant bearing on the establishment of the Court of Justice. It however supports the idea at its entirety as it will be pointed out in the following chapters.

2.3 Conclusion

From the discussion above, it is concluded that Africa had played a significant role in establishing the ICC and its eventual operation in 2002. The tormenting experiences of violation of human rights, and the need to end impunity of the perpetrators of those violation were among the main motives for Africa to involve fully in the process of negotiating of the ICC in Rome, Italy. At the regional level, the discussion indicated that the then OAU encouraged its member states to take heed of the ICC Statute. Commendably, as of 2015, the appeal seems to be effective as 34 out of the 54 member states of its successor AU are state parties to the ICC Statute. In light of their ratification, these African states expressly bound themselves to abide by the obligations laid down in the ICC Statute. Such obligations include particularly the duty to co-operate with the ICC in its investigation and prosecution of the crimes.

It is also deduced that referrals of the situations in Sudan by the UNSC and Kenya by the Prosecutor are a core factor for the AU to adopt the decisions of no-co-operation of its member states with the ICC. It is because of the UNSC's alleged disrespect for the deferment requests of the AU that followed the issuance of warrants of arrest for its sitting President Al Bashir and subsequent indictment of President Kenyatta. The AU's decisions of non-co-operation have evidently led 'the relationship between the AU and the ICC to be far from satisfactory'. There is scepticism about the legal status of these decisions on the AU member states which have several obligations under the ICC Statute and in other international treaties. Therefore, the study in the following chapter attempts to grapple with this question.

CHAPTER III

LEGAL STATUS OF THE AU'S DECISIONS IN RELATION TO THE OBLIGATIONS OF MEMBER STATES UNDER THE ICC STATUTE AND INTERNATIONAL LAW GENERALLY

3 Introduction

The AU is composed of 54 African sovereign states with the exception of Morocco.¹²⁶ The AU member states are as well members or parties to several other treaties. As mentioned above, 34 states are parties to the ICC Statute.¹²⁷ Over 25 states are parties¹²⁸ to the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).¹²⁹ Twelve states are members of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination of 2006¹³⁰ (Genocide Protocol of the Great Lakes Region or Protocol). And, all states are members of the UN.¹³¹ Noting this fact, the chapter seeks to interrogate a legal status of decisions of the AU as to the obligations of its members in the ICC Statute, the UN Charter, the Genocide Convention, and the Genocide Protocol of the Great Lakes Region. These treaties have considerable bearing on the decisions of the AU. After this introduction, the chapter discusses the powers of the AU to adopt decisions. Discussion on legality of the decisions follows next. Finally, it is a chapter conclusion.

3.1 Does the AU have explanation for adopting decisions?

The AU on 3 July 2009 decided that its members 'shall not cooperate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar

¹²⁶ Heyns & Killander (n 38 above) 504.

¹²⁷ South Africa, Benin, Madagascar, Burundi, Liberia, Central African Republic (CAR), Seychelles, Ghana, Sierra Leone, Tunisia, Comoros, Cape Verde, Chad, Congo, Gambia, Niger, Democratic Republic of the Congo (DRC), Djibouti, Gabon, Guinea, Ivory Coast, Kenya, Lesotho, Nigeria, Malawi, Namibia, Botswana, Burkina Faso, Senegal, Uganda, Tanzania, and Mali, Mauritius, Zambia, available at <http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx> (accessed 2 October 2015).

¹²⁸ Sudan (before secession) Ethiopia, Ghana, Algeria, Lesotho, South Africa, Guinea-Bissau, Burkina Faso, Mozambique, Burundi, Ivory Coast, Seychelles, Senegal, DRC, Egypt, Gabon, Liberia, Gambia, Namibia, Cape Verde, Nigeria, Rwanda, , Tanzania, Togo, Uganda Comoros, Guinea, and Zimbabwe.

¹²⁹ UNGA Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, 277.

¹³⁰ Angola, Congo, Kenya, CAR, Sudan, Uganda, Rwanda, South Sudan, Burundi, DRC, Tanzania and Zambia. *See* The International Conference on the Great Lakes Region 'Background' available at <<http://www.icglr.org/index.php/en/background>> (accessed 3 October 2015).

¹³¹ UN 'Member states of the United Nations' available at <<http://www.un.org/en/members/index.shtml>> (accessed 5 October 2015).

El Bashir...¹³² A year later, it adopted another decision reiterating that its ‘member states shall not cooperate with the ICC in arrest and surrender of President El-Bashir...’¹³³ Is the AU capable of adopting such decisions? To what extent are the member states bound by those decisions? In view of Amnesty International, both the decisions are legal and binding on all member states.¹³⁴ Kanska, however, claims that decisions made by international organisations differ substantially, depending on the subject-matter, addressees, and category of sanctions that may be imposed on the addressees.¹³⁵ As such, before giving judgment of whether international organisations are capable of making binding decisions, it is important to identify the provisions conferring powers to adopt decisions and their legal implications within respective constitutive instruments of the organisations.¹³⁶ Kanska’s observations seem to be supported by Akande who argued that:

In determining whether or not a particular decision of an international organisation is legally binding on its addressee one must consider, first, whether that organ or organisation is empowered by its constitution (expressly or impliedly) to make binding decisions and, secondly whether the language of decision reveals an intention on the part of the organ to issue a binding decision.¹³⁷

Given this reasoning, the Constitutive Act which is the constitution of the AU does not expressly provide the AU with the powers to adopt decisions which are binding on its member states. However, it is maintained that article 23(2) of the Constitutive Act can be used to assess the ability of the AU to adopt decisions which are binding, as already expounded by Lee above. The said article provides that:

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 transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

Indeed, the language of this article does not literally empower the AU to make decisions. Rather, it recognises the ability of the Assembly of the AU to sanction the member states for failure to abide by the AU’s policies and decisions. It has however been argued that if a member state is penalised for failure to abide by the decisions, then article 23(2) impliedly means that the AU has power to adopt decisions which are binding on all its members.¹³⁸ This argument is reasonable as it is enormously supported by the views of the AU itself. On 9 January 2012, the Commission of the AU made a public statement to respond to the

¹³² Assembly of the AU (n 10 above).

¹³³ Assembly of the AU (n 9 above).

¹³⁴ Amnesty International ‘Bringing power to justice absence of immunity for heads of state before the International Criminal Court’ 2010 31, available at <https://www.amnesty.nl/sites/default/files/public/bringing_power_to_justice.pdf> (accessed 7 October 2015) 31.

¹³⁵ K Kanska ‘The normative force of decisions of international organizations’ available at <http://www.esil-eu/sites/default/files/Kanska_0.PDF> (accessed 7 October 2015) 1.

¹³⁶ As above.

¹³⁷ D Akande ‘International organisations’ in M Evans *International law* (2003) quoted in M du Plessis & C Gevers ‘Balancing competing obligations: the Rome Statute and AU decisions’, ISS Paper 225, October 2011, 13.

¹³⁸ Du Plessis & Gevers (n 137 above) 1.

decision of the PTC I relating to Chad and Malawi's failure to act in accordance with the ICC's requests of arrest and hand over of President Al Bashir to the ICC. The statement, among others, contended that:

The African Union Commission expresses its total disagreement with the decisions of the Pre-Trial Chamber I which did not take cognisance whatsoever of the obligations of AU member states arising from article 23(2) of the Constitutive Act of the African Union, to which Chad and Malawi are state parties, and which obligate all AU member states 'to comply with the decisions and policies of the Union'. Moreover, by decision Assembly/AU/Dec. 245(XIII) adopted by the 13th Ordinary Session of the Assembly of Heads of State and Government, the Assembly 'decided that in view of the fact that the request by the African Union has never been acted upon by UN Security Council, the AU member states shall not cooperate pursuant to the provisions of article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan'. This decision adopted by the AU policy organs pursuant to the provisions of Rule 33 of the Rules of Procedure of the Assembly is binding on Chad and Malawi and it would be wrong to seek to coerce them to violate or disregard their obligations to the African Union.¹³⁹

The statement indicates that article 23(2) of the Constitutive Act is an implied authority for the AU to make decisions which are binding on all members. In addition, the study holds the views that the AU is capable of making binding decisions if article 23(2) is read together with article 9(1)(e) of the Constitutive Act. The latter lays down powers and functions of the Assembly of the AU which is to 'monitor the implementation of policies and decisions of the Union as well ensure compliance by all member states'. The provision still insists on compliance with the decisions. It connotes that one way of assuring compliance with the decisions is to sanction the member states pursuant to article 23(2). Thus, the AU is competent to make binding decisions over its member states.

3.2 Decisions of the AU in relation to the obligations of member states under the ICC Statute

Part IX of the ICC Statute encompasses states' obligations including an obligation to 'co-operate fully with the Court in its investigation and prosecution of crimes'.¹⁴⁰ State parties are bound to co-operate with the ICC because they have ratified the ICC Statute.¹⁴¹ However, a state which is not party to the ICC Statute may be equally bound if it declared acceptance of the ICC's jurisdiction.¹⁴² Ivory Coast is a vivid example of this. Before ratifying the ICC Statute, it accepted the jurisdiction of the ICC.¹⁴³ Similarly, if a situation is referred to the ICC by a resolution of the UNSC, the state addressed in such a resolution is

¹³⁹ AU Press release no. 002/2012 On the decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) pursuant to article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of President Omar Hassan Al Bashir of the Republic of the Sudan Addis Ababa, 9 January 2012, para 7.

¹⁴⁰ ICC Statute, art 86.

¹⁴¹ UN Vienna Convention on the Law of Treaties (VCLT), Treaty Series, vol. 1155, p. 331, art 34.

¹⁴² ICC Statute, art 12(3).

¹⁴³ See the letter of the President of Ivory coast to the President of the ICC 'Confirmation de le declaration de reconnaissance' dated 14 December 2010 available at <<http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>> (accessed 30 September 2015).

bound to co-operate with the ICC even if it has not ratified the ICC Statute nor accepted the jurisdiction of the ICC.¹⁴⁴ Sudan and Libya are examples of states which were obligated to co-operate fully with the ICC by the UNSC's resolutions adopted in respect of Chapter VII of the UN Charter. The binding force of resolutions adopted by the UNSC is high to such an extent that states may violate their obligations under other treaties.¹⁴⁵ In view of this, Akande argued that:

Non-parties to the ICC Statute ordinarily have no obligation to cooperate with the Court. The ICC Statute is a treaty and treaties may not impose obligations... for non-parties... without the consent of that state... nothing in the ICC Statute can of itself impose obligations of cooperation on non-parties unless those non-parties accept those obligations... Security Council referrals may only be made under Chapter VII of the Charter... it may choose to impose obligations on all states... especially... non-parties... those obligations will prevail over other obligations that those states will have under other international treaties... However, in the case of the Sudan referral, the Security Council has only imposed explicit obligations of cooperation on one non-party (Sudan). There is no explicit obligation in Resolution 1593 for other states to cooperate with the Court... Therefore... non-parties have no obligation to arrest Al Bashir (or the other accused persons sought by the ICC in relation to crimes in Darfur), were he to come within their territory.¹⁴⁶

That being the position, one may conclude that the decisions of the AU were legal as far as non-state parties to the ICC were concerned. Nonetheless Sudan is an exception to that. This is because it has binding obligations emanated from a resolution of the UNSC. If Sudan government does not arrest President Al Bashir in compliance with the AU's decision, then the decisions of the AU violate the obligations under the UNSC resolution according to article 25 and 103 of the UN Charter. In such a case, the AU's decision may be said to be invalid. Quite the opposite, member states of the AU which are state parties to the ICC are seemingly in conflicting obligations.¹⁴⁷

In the July 2009 decision, and on numerous other occasions, the AU has associated its non-cooperation obligation with the question of immunity stipulated in article 98 of the ICC Statute. Under international law, immunity is categorised into personal immunity (immunity *ratione personae*) and functional immunity (immunity *ratione materiae*).¹⁴⁸ The former relates 'to the particular status of the Head of State'.¹⁴⁹ It is attached to the 'senior state officials' or heads of state because they are 'the personification of the state'.¹⁵⁰ The latter relates to the 'official functions of senior state officials'.¹⁵¹ Generally, the gist of both categories of immunity is to protect the senior state officials from being held susceptible to the judicial processes in foreign jurisdictions. Here, of concern is personal immunity.

¹⁴⁴ Amnesty International (n 134 above) 46 & D Akande 'The Effect of Security Council resolutions and domestic proceedings on state obligations to cooperate with the ICC' (2012) 10 *Journal of International Criminal Justice* 306.

¹⁴⁵ R Cryer *et al* *An introduction to international criminal law and procedure* (2010) 175 – 176.

¹⁴⁶ D Akande 'The legal nature of Security Council referrals to the ICC and its impact on Al Bashir's immunities' (2009) 7 *Journal of International Criminal Justice* 343 – 344.

¹⁴⁷ Du Plessis & Gevers (n 137 above) 15.

¹⁴⁸ Murungu 'Immunity of state officials and the prosecution of international crimes' in Murungu & Biegon (n 42 above) 42.

¹⁴⁹ EY Benneh 'Sovereign immunity and international crimes' (2002 – 2004) 22 *University of Ghana Law Journal* 115.

¹⁵⁰ As above.

¹⁵¹ Murungu (n 148 above) 43.

Benneh¹⁵² argued that a personal immunity or sovereign immunity was traditionally accepted under international law, but today it is of less relevance as article 27 of the ICC Statute provides that the heads of state are not immune from the ICC's prosecutions.¹⁵³ Some have argued that article 27 should be read together with article 98 of the ICC Statute.¹⁵⁴ While article 27(2) denies immunities for state officials, article 98(1) seems to estop the ICC from requesting for the surrender or seeking assistance which would likely make the requested state violate its international obligations. Gaeta asserted that all states are under an obligation to respect rules of customary international law which guarantee the personal immunity of heads of state.¹⁵⁵ States cannot therefore apprehend heads of state until their states (third states) agreed to waive their immunities, in respect of article 98(1).

In that respect, the ICC obligations on its state parties to arrest President Al Bashir who is a sitting Head of State was inconsistent with obligations under customary international law; and therefore they 'are ultra vires and at odds with article 98(1)'.¹⁵⁶ On the contrary, Amnesty International argued that article 27 applies squarely to all ICC state parties, thus for them the immunities of their heads of state are not available.¹⁵⁷ However, because of the trend of the jurisprudence of international criminal tribunals, the immunities for heads of state of the state not parties to the ICC are unavailable, too.¹⁵⁸

3.3 Decisions of the AU in relation to the obligations of their member states under the UN Charter

Article 25 of the UN Charter provides that 'the members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.' And article 103 of the same Charter makes it clear that all obligations laid down in the UN Charter prevail 'over any other international agreement' of which the UN members are parties.¹⁵⁹ As such, members are obliged to comply entirely with resolutions adopted by the UNSC under the purview of Chapter VII of the UN Charter. On clarifying this matter, the ICJ held that article 25 imposes obligations on all members of the

¹⁵² Benneh (n 149 above) 115 – 116 & 122.

¹⁵³ ICC Statute, art 27(2): 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.

¹⁵⁴ Amnesty International (n 134 above) 19.

¹⁵⁵ ICC Office of the Prosecutor 'Invited experts on Darfur question: What are the obligations of contracting parties to the Genocide Convention to implement arrest warrants for genocide issued by the ICC, and of African Union State Parties to implement ICC arrest warrants generally?' available at <<http://iccforum.com/darfur>> (accessed 10 October 2015).

¹⁵⁶ As above.

¹⁵⁷ Amnesty International (n 134 above) 23 – 30.

¹⁵⁸ See Benneh (n 149 above) 149.

¹⁵⁹ UN Charter, art 103: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

UN, even members of the UNSC which voted against the decisions made by the UNSC (or those which abstained from voting), and also those which are not members of the UNSC at the time the resolution is adopted.¹⁶⁰

Acting under Chapter VII of the UN Charter, the UNSC referred ‘the situation in Darfur since 1 July 2002’ to the ICC.¹⁶¹ Certainly, by the preceding clarification, all members of the UN are bound by such a referral. It is argued that the obligations of African states stemming from the AU’s decisions are automatically overridden by the UNSC resolution that referred the case of Sudan to the ICC, thus all members of the UN are obliged to co-operate according to articles 25 and 103.¹⁶² Some commentators hold the views that this reasoning is not sound enough to justify the illegality of the obligations of the AU on its member states.¹⁶³ Du Plessis and Gevers averred that, according to the rules of interpretation, the language in a respective UNSC resolution seeking to obligate member states should be explicit to that effect.¹⁶⁴ There should be no implication or inference of the same.¹⁶⁵ In analysing this matter, the study adopts the decision of the ICJ in the case of Namibia Advisory Opinion that stated that:

In view of the nature of the powers under article 25, the question whether they have been in fact exercised is to be determined in each case, having regards to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and in general, all circumstances that might assist in determining the legal consequences of the resolution of the security council.¹⁶⁶

This Opinion gives an avenue to assess Resolution 1593 to find out its binding nature on the UN member states who are also members of the AU. According to Marczynski terms used in this resolution are imprecise to impose obligations on member states to co-operate with the ICC.¹⁶⁷ The resolution here read that the UNSC:

Decides 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 and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.¹⁶⁸

¹⁶⁰ Legal consequences for states of the continued presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory Opinion of 21 June 1971 available at <<http://www.icj-cij.org/docket/files/53/5597.pdf>> (accessed 11 October 2015) 80.

¹⁶¹ Resolution 1593, para 1.

¹⁶² Du Plessis & Gevers (n 137 above) 16.

¹⁶³ Du Plessis & Gevers (n 137 above) 17 – 18.

¹⁶⁴ Du Plessis & Gevers (n 137 above) 17.

¹⁶⁵ As above.

¹⁶⁶ *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, International Court of Justice* (ICJ), 21 June 1971, para 114.

¹⁶⁷ Marczynski (n 30 above) 234.

¹⁶⁸ Resolution 1593, para 2.

This language invites a discussion on two issues. First, the full co-operation obligation is apparently imposed on ‘Sudan and all other parties to the conflict’,¹⁶⁹ and not on all members of the UN. It cannot not be disputed that African state parties to the ICC Statute have a basic obligation to co-operate fully with the ICC under article 86 of the ICC Statute, irrespective of this resolution.¹⁷⁰ However, the non-state parties have no obligation at all under the ICC Statute; the resolution urged palpably all non-ICC ‘states and concerned regional and other international organizations to cooperate’.¹⁷¹ The usage of the word ‘urge’ in the resolution is proof of that. Oxford Advanced Learner’s Dictionary defines the word ‘urge’ as ‘to advise or try hard to persuade somebody to do something or to recommend something strongly.’¹⁷² With these connotations, non-state parties to the ICC are strongly recommended to co-operate with the ICC. One may therefore argue that the urged states are of their own volition to co-operate, should they prefer to.

Second, the scope of effective co-operation that would literally bind all states was not defined in Resolution 1593, unlike Resolutions 827¹⁷³ and 955¹⁷⁴ of the UNSC adopted on 25 May 1993 and 8 November 1994, respectively. The former established the International Criminal Tribunal for former Yugoslavia (ICTY) and the latter established the International Criminal Tribunal for Rwanda (ICTR). In both resolutions, the UNSC demarcated clearly the scope of obligations to co-operate with the tribunals. In the ICTY resolution, the UNSC decided that:

All states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of International Tribunal and that consequently all states shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of states to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.¹⁷⁵

With a very slight difference of wording, the same was provided in Resolution 955.¹⁷⁶ These resolutions obligated all members of the UN to co-operate with the tribunals within the parameters of the resolutions themselves and the Charters establishing the tribunals. In this way, one cannot argue that specific of the members UN were demanded by the resolutions to co-operate. The provisions were comprehensive to the extent the regime of co-operation provided in those Charters would be used equally by all addressees, that is members of the UN in effecting the co-operation requests.

¹⁶⁹ As above.

¹⁷⁰ H King ‘immunities and bilateral immunity agreements: issues arising from articles 27 and 98 of the Rome Statute’ (2006) 4 *New Zealand Journal of Public and International Law* 294.

¹⁷¹ As above.

¹⁷² S Wehmeier *et al* (ed) *Oxford Advanced Learner’s Dictionary* (2006) 1627.

¹⁷³ UNSC, Resolution 827(1993) UN Doc S/RES/827, adopted by the UNSC at its 3217th meeting on 25 May 1993.

¹⁷⁴ UNSC, Resolution 955(1994) UN Doc S/RES/955, adopted by the UNSC at its 3453rd meeting on 8 November 1994, para 2.

¹⁷⁵ Resolution 827, para 4.

¹⁷⁶ Resolution 955, para 2.

This language is missing in Resolution 1593 which obligated only ‘Sudan and other parties in conflict’ to co-operate with the ICC ‘pursuant to this resolution’. It does not bind Sudan and other parties in conflict to be co-operative with the ICC according to the provisions of the ICC Statute itself. Thus, the obligation to cooperate fully with the ICC lies on only Sudan by virtue of Resolution 1593 adopted in respect of article 25 of the UN Charter and article 103 of the UN Charter of which Sudan is a member.

With respect to all the above, and considering the fact that the UNSC expressly stated that the costs incurred by the referral are to be borne by the ICC state parties,¹⁷⁷ the study disputes the argument that once the ICC assumes jurisdiction of a certain situation, the ICC Statute becomes the primary authority imposing obligations on all states no matter the state is a party to the ICC Statute or not, and that mode of triggering jurisdiction becomes irrelevant.¹⁷⁸ It has to be remembered again, that a treaty is binding only on state party to it.¹⁷⁹ The ICC Statute which is a multilateral treaty cannot impose an obligation on any AU member state that was not required by the UNSC explicitly to do so. Equally, the study prefers to differ from the assumption that the UNSC assented automatically to the ICC’s investigations and prosecutions regulated by the ICC Statute.¹⁸⁰ Were one to conclude that Resolution 1593 is illegal, a result would then be that there is no obligation on all the UN members to conform to the UNSC’s decision under article 25; thus the obligation under article 103 of the UN Charter is not prevalent over the AU’s non-co-operation obligations.

3.4 Decisions of the AU in relation to the obligations of member states under the Genocide Convention

One may claim that the 27 July 2010 decision of the AU was an immediate response to the issuance of the genocide arrest warrant for President Al Bashir by the ICC on 12 July 2010. The contracting parties to the Genocide Convention confirmed genocide as a crime under international law which has to be prevented and its perpetrators be punished accordingly.¹⁸¹ Given this context, one can make an inquiry about whether the Genocide Convention imposes obligations on its contracting parties to support the apprehension and hand over an individual accused of genocide to the ICC, when there is an outstanding AU’s obligation of not to do so.

¹⁷⁷ Resolution 1593, para 7.

¹⁷⁸ A Johanne ‘A critical analysis of some of the legal issues raised by the indictment of President Al-Bashir of Sudan by the ICC’ unpublished LLM dissertation, University of Pretoria, 2012, 41.

¹⁷⁹ VLCT, art 28.

¹⁸⁰ Johanne (n 178 above); Amnesty International (n 134 above) 42 & ICC-02/05-01/09-3, para 45.

¹⁸¹ Genocide Convention, art 1.

Akande, Gaeta, Schabas and Sluiter agree arguably that the Genocide Convention does impose obligation not only on its contracting parties, but also on the ICC state parties and members of the UN.¹⁸²

Gaeta argues that article VI of the Genocide Convention¹⁸³ imposes the obligation on its contracting parties to execute warrants of arrest issued by the ICC only if such parties have accepted the jurisdiction of the ‘international penal tribunal’, here the ICC,¹⁸⁴ and those non-ICC state parties that have made declaration pursuant to article 12(3) of the ICC Statute.¹⁸⁵ It may also be a case for a state not party to the ICC Statute but has a binding obligation under a resolution adopted by the UNSC to be bound by article VI of the Genocide Convention.¹⁸⁶ Sudan is a member of Genocide Convention, but has not ratified the ICC Statute nor accepted jurisdiction of the ICC as yet. Nonetheless, by virtue of the obligation to co-operate with the ICC being imposed by the UNSC in accordance with Chapter VII of the UN Charter, as explained above, Sudan becomes as equal as any other state party to the ICC in terms of co-operation.¹⁸⁷

Therefore, the non-contracting parties to the Genocide Convention seem to have no obligation to co-operate with the ICC. In this case, the decisions of the AU are effective on all African non-state parties to the Genocide Convention. On the contrary, it is concurred that the decisions of the AU make the African ICC state parties to the Genocide Convention plus Sudan to have contradicting obligations.

3.5 Decisions of the AU in relation to the obligations of member states under the Genocide Protocol of the Great Lakes Region

In 2006, the Heads of State and Government of the subregion, the International Conference on the Great Lakes Region (ICGLR), signed a Pact on Security, Stability and Development in the Great Lakes Region which came into operation in 2008.¹⁸⁸ The Pact is a legal framework binding on all member states.¹⁸⁹

¹⁸² ICC (n 155 above).

¹⁸³ Genocide Convention, art VI: Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.

¹⁸⁴ The ICC is not connected to the Genocide Convention in any way; and indeed within its Statute there is no a single provision reflecting the Genocide Convention. However in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Bosnia and Herzegovina v Serbia and Montenegro (Judgment)* [2007] ICJ Rep 2, para 445, the ICJ held that an international penal tribunal within the meaning of art VI must at least cover all international criminal courts created after the adoption of the Genocide Convention of potentially universal scope, and competent to try the perpetrators of genocide. The ICC was established after the adoption of the Genocide Convention and it has jurisdiction of trying perpetrators of genocide universally. Therefore it is certain that the ICC is an international penal tribunal.

¹⁸⁵ Gaeta (n 155 above).

¹⁸⁶ As above.

¹⁸⁷ Sluiter (n 155 above).

¹⁸⁸ Murungu (n 148 above) 53.

¹⁸⁹ ICGLR ‘The Pact’ <<http://www.icglr.org/index.php/en/the-pact>> (accessed 13 October 2015).

Among the instruments included in the Pact is the Genocide Protocol of the Great Lakes Region. Its inclusion in the Pact factually meant that the member states committed themselves to prevent genocide, war crimes, and crimes against humanity¹⁹⁰ as advocated by international law.¹⁹¹ The member states of this Protocol have several obligations including the obligation to co-operate actively with the ICC. In order to analyse the legal status of the decisions of the AU in relation to this Protocol, it is useful to quote some of provisions of the Protocol, as hereunder follows:

The member states undertake to cooperate actively with the International Criminal Court with specific reference to: (a) Requests to the arrest and hand over of persons alleged to have committed crimes falling within the jurisdiction of the International Criminal Court; (c) Requests concerning other forms of cooperation mentioned in article 93 of the Statute of the International Criminal Court; (d) Requests for cooperation related to renunciation of immunity and consent to hand over indicted person...¹⁹²

Further:

(1) If a member state receives a request from the International Criminal Court for the surrender of the indicted person and a competing request from another state to extradite the same person for the same crime, the requested member state shall give priority to the request of the International Criminal Court. (2) The *status of the national of the requested state* shall not constitute a bar to the hand over or surrender of such a national.¹⁹³

Furthermore:

The provisions of this chapter shall apply to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such persons. In particular, the official status of a Head of State or Government, or an official member of a Government or Parliament, or elected representative or agent or a state shall in no way shield or bar their criminal liability.¹⁹⁴

The language of the provisions are very clear that member states of the Genocide Protocol of the Great Lakes Region have the obligation to co-operate fully with the ICC in its investigation and prosecution of international crimes. It includes the duty to enforce and prioritise the requests for the arrest and surrender of those accused of grave crimes. The status of the indicted person is irrelevant. Kenya and Sudan are member states of this Protocol. The failure of Kenya to arrest President Al Bashir by abiding by the AU's call of non-co-operation against the ICC's request is obviously violation of this Protocol. According to article 25 of this Protocol, articles 23 and 24 apply only to the member states that have ratified or will ratify the ICC Statute. Kenya had already ratified it. Therefore, Kenya and other state parties to this

¹⁹⁰ Genocide Protocol of the Great Lakes Region, art 8(1): The member states recognise that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and are crimes against people's rights which they undertake to prevent and punish.

¹⁹¹ Genocide Protocol of the Great Lakes Region Art 1(a)(h)(i) adopted the definitions of crimes of genocide, crime against humanity and war crimes provided for in arts 6, 7 and 8 of the ICC Statute, respectively.

¹⁹² Genocide Protocol of the Great Lakes Region, art 23.

¹⁹³ Genocide Protocol of the Great Lakes Region, art 24.

¹⁹⁴ Genocide Protocol of the Great Lakes Region, art 12.

Protocol that have ratified the ICC Statute are bound by both the ICC Statute and this Protocol to comply with the ICC's requests to arrest and surrender the indicted individual such as President Al Bashir, and they have to act per the principle of *pacta sunt servanda* guaranteed by the Vienna Convention on the Law of Treaties (VCLT).¹⁹⁵

Article 28 of the VCLT provides for the non-retroactivity of a treaty.¹⁹⁶ It was shown above that the Genocide Protocol of the Great Lakes Region was adopted in 2006 and came into force in 2008. The issuance of the request by the ICC to arrest President Al Bashir happened in 2009 onwards, the time during which the obligations not to co-operate with the ICC for the same, by the AU, emerged. The acts or atrocities in Sudan that led to the issuance of arrest warrant happened before the adoption of the Genocide Protocol of the Great Lakes Region. A simple question that this study poses is that, what is the implication of this situation under international law in respect of the obligations laid down by the AU to its member states? All in all, the AU is independent from the ICGLR. The obligations of members under each organisation are binding and required to be implemented faithfully. Based on this, the study holds that there is conflicting obligations between the Constitutive Act and the Protocol of the Great Lakes Region.

3.6 Conclusion

This chapter has attempted to discuss the legal status of the decisions of the AU which place its member states under obligations not to co-operate with the ICC in arresting President Al Bashir. From the discussion, it was demonstrated that the AU as an international organisation has power to adopt binding decisions on its member states, despite the fact that its Constitutive Act does not explicitly lay down such an authority. And, non-compliance with those obligations by a member of the AU results in sanctions.

As to the legal status, the decisions are legal in so far as all African states which are not parties to the ICC Statute, the Genocide Convention, the Genocide Protocol of the Great Lakes Region and states that have no obligation stemming from a resolution of the UNSC are concerned. Simply, they have no obligations under these instruments. On the contrary, the decisions make member states the AU have conflicting obligations which needs political resolution instead of strict 'principles of interpretation'.

¹⁹⁵ VCLT art 26: Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

¹⁹⁶ VCLT art 28: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

CHAPTER IV

APPROACHES TO RESOLVING THE CONFLICT BETWEEN THE AU AND ICC

4 Introduction

An international justice project has a number of stakeholders, each one of which has a significant role to play. In order to improve the existing relationship between the AU and the ICC, all stakeholders have to participate effectively in the process that seeks to resolve the conflict. This chapter therefore attempts to discuss some possible approaches towards an effective and indissoluble relationship between these institutions. It should be noted initially that much of the discussion is reliant on views of various scholars.

4.1 Challenging the legality of article 98 of the ICC Statute before the ICC itself

According to Akande, article 98 is addressed only to the ICC, that it may not request the state to surrender any individual or request for assistance if the requested state will be in contradiction with ‘its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State’.¹⁹⁷ To go about this approach, a state which may be requested by the ICC to arrest President Al Bashir, should he travel there, has to invoke article 97 of the ICC Statute and Rule 195 of the Rules of Procedure and Evidence which warrant seeking consultation with the ICC when potential inconsistencies are likely under article 98.¹⁹⁸ Akande, further argued that the tension may be resolved if articles 27 and 98 of the ICC Statute are made clear by distinguishing between immunity of non-ICC state parties and those accruing to ICC parties.¹⁹⁹

The approach is supported by the study specifically because it will bring a permanent solution over the claim that articles 27 and 98 are in contradiction. The study proposes that the African state parties to the ICC should invoke particularly article 97(c)²⁰⁰ which clearly fits in the circumstance of the present case of President Al Bashir. In other words when President Al Bashir visits a state which may be

¹⁹⁷ D Akande ‘Is the Rift between Africa and the ICC Deepening? Heads of States Decide Not to Cooperate with ICC on the Bashir Case’ <<http://www.ejiltalk.org/is-the-rift-between-africa-and-the-icc-deepening-heads-of-states-decide-not-to-cooperate-with-icc-on-the-bashir-case/>> (accessed 8 October 2015).

¹⁹⁸ As above.

¹⁹⁹ As above.

²⁰⁰ ICC Statute, article 97(c): where a state party receives a request under this part in relation to which it identifies problems which may impede or prevent the execution of the request, that state shall consult with the Court without delay in order to resolve the matter. Such problems may include, *inter alia*: The fact that execution of the request in its current form would require the requested state to breach a pre-existing treaty obligation undertaken with respect to another state.

requested by the ICC to arrest him, then the requested state should seek its consultation based on the obligation of not to co-operate under the AU.

In addition to the above, Barnes sees an amendment of article 98 as the best approach to remove the confusion and excuses for not to co-operating with the ICC.²⁰¹ The amendment should indicate precisely what constitutes immunity in a way that clarifies the priority of the ICC in the hierarchy of international obligations of the state parties.²⁰² Barnes further suggests that an amendment of article 98 should go together with the clear definition of the consequences for state parties that refuse to fully co-operate with requests of the ICC.²⁰³ Altogether, an amendment of the ICC Statute is a process that may take a long time. Therefore, the above proposal of seeking consultation with the ICC should sustain.

4.2 Adoption of guidelines or rules to govern the powers of referral and deferral of the UNSC

Articles 13(b) and 16 of the ICC Statute provide an avenue for the UNSC to refer and defer situations, respectively. Nevertheless, both the ICC Statute and its Rules of Procedure and Evidence seem to be silent on providing for the criteria and parameters of which the UNSC would use in exercising such powers.²⁰⁴ The AU decisions clearly derived from the alleged indecision of the UNSC over deferment requests of the AU which viewed it as an intolerable disrespect. Towards combating this situation Alamuddin proposes that guidelines should be adopted so that they will place the UNSC in a position of acting ‘objectively and with greater degree of consistency’.²⁰⁵ Such guidelines or rules should include a guidance relating to when the referral by the UNSC can be preferred to, and a guidance relating to when the permanent members of the UNSC may invoke their veto power when it comes to the resolutions involving the ICC.²⁰⁶ The approach is sound but the question is how this is going to happen. The study proposes that the President of the ICC has to initiate the move as he did on bringing the ICC and UN into a binding agreement.²⁰⁷

²⁰¹ Barnes (n 92 above) 1616.

²⁰² As above.

²⁰³ As above.

²⁰⁴ L Moss ‘The UN Security Council and the International Criminal Court: towards a more principled relationship’, March 2012, 4, available at <<http://library.fes.de/pdf-files/iez/08948.pdf>> (accessed 9 October 2015).

²⁰⁵ Alamuddin (n 19 above) 128.

²⁰⁶ As above. *See also* UNSC ‘The promotion and strengthening of the rule of law in the maintenance of international peace and security: Peace and justice, with a special focus on the role of the International Criminal Court’, UN Doc S/PV.6849, UNSC 6849th meeting, New York, on 17 October 2012, available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_6849.pdf> (accessed 9 October 2015).

²⁰⁷ Relationship Agreement between the United Nations and the International Criminal Court, 20 August 2004, A/58/874 available at <http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf> (accessed 9 October 2015).

4.3 Development of the domestic judicial systems to try international crimes

Regarding the principle of complementarity of the ICC, Mbaku holds the opinion that no matter how the contention between the AU and the ICC is ultimately resolved, each state ‘must develop the capacity to effectively investigate and prosecute the crimes against humanity, a crime of genocide, and war crimes committed within its borders’.²⁰⁸ The AU should be available to help the process particularly when the accused individuals have absconded from the state they committed the crimes to avoid justice. In supporting the approach, Moss suggests that the UNSC should also in the first place demand that national authorities proceed complementarily with the prosecutions before making any referral to the ICC as it did in Sudan.²⁰⁹ It can refer the situation only when a state failed to adequately investigate and prosecute.²¹⁰

This approach provides the accused individuals with an opportunity to be tried within the territories the atrocities were committed. It is also true that an investigation may be possible as it is conducted by the local officials who know well the surrounding environment. The other apparent advantage of this approach is that the worries of the AU member states of their sovereignty being interfered with by the ICC will be avoided.²¹¹ Moreover, availability of the credibly domestic prosecutions of heinous crimes will largely distance the ICC from quick stepping into the states for an investigation of the same.²¹²

In spite of all those possible advantages, the study cautions that the approach is a demanding project. High political will needs to be appreciated by the states. It has already been indicated by Asaala that Kenya was very reluctant to prosecute the perpetrators of atrocities in 2007, even though it was given a chance to do so.²¹³ Worries have also been expressed by the Cameroonian scholar, Roland Abeng, by asking ‘provocatively whether there were even five African countries with judicial systems that could try grievous international crimes fairly and equitably through the effective national court structures’.²¹⁴ Thus, the approach may be an effective way out for the conflict between the AU and the ICC only if the national judicial systems will be robust enough to do justice to the accused individuals and victims, too.

²⁰⁸ JM Mbaku ‘International justice: the International Criminal Court and Africa’ Foresight Africa: Top Priorities for the Continent in 2014, the Brookings Institution, Africa Growth Initiative 1 10.

²⁰⁹ L Moss ‘The UN Security Council and the International Criminal Court: towards a more principled relationship’, March 2012, 13.

²¹⁰ As above.

²¹¹ J Gondi ‘Debunking the conspiracy theory: analysing the failure to achieve complementarity and the responsibility to protect in Kenya and other jurisdictions’ in The Kenyan Section of the International Commission of Jurists (ICJ Kenya) *International criminal justice the ICC and complementarity* (2014) 153.

²¹² UNGA ‘The cope and application of the principle of universal jurisdiction (Agenda item 84)’ Decision 63/568 available at <<http://www.un.org/en/ga/sixth/64/UnivJur.shtml>> (accessed 9 October 2015).

²¹³ Asaala (n 103 above) & Gondi (n 211 above) 149.

²¹⁴ Mendes (n 78 above) 166.

CHAPTER V

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Summary of findings and conclusion

The violations of human rights in the world, and Africa in particular, are not an issue of recent; they have been there since time immemorial. Realising the need to do away with those abuses, the prosecution of perpetrators was considered a solution by the nation states. The international community therefore created several international judicial institutions with mandate to bring individuals responsible for the abuses to justice. The ICC is an example of such institutions. African states were in the front line of all initiatives that brought about the existence of the ICC. They welcomed it in the belief that it would be a mechanism for promotion of human rights, maintenance of international peace, and universal guarantee of rule of law.

The conflict between the AU and the ICC is central to this study. Chapter two sought to analyse the manner in which the AU is related to the ICC. This was important because empirically a conflict is a process that evolves from standing relationship between two or more individuals or organisations.²¹⁵ The study demonstrated that the AU and the ICC are two independent international organisations which differ in terms of mandate and scope of operation. While the AU is an organisation that has charge of regional integrations on the African continent, the ICC is an international judicial institution having charge of the criminal prosecution of individuals accused of international crimes in the whole world.²¹⁶ However these two institutions share the commitments to fighting impunity of those individuals.

The discussion pointed out further that the AU has hitherto no formal relationship with the ICC. This is due to the fact that it failed to enter into binding relationship agreement with the ICC in 2005. Nevertheless, by virtue of its 34 member states being parties to the ICC Statute, the AU found itself in relationship with the ICC due to the decisions it adopted. The decisions imposed binding obligations on all member states. In this way, the AU has been in open contentions with the ICC by making resolutions and other statements reflecting directly on the ICC. Therefore, it is concluded that the AU and the ICC have strong relationship that makes them to be in conflict, or conflicting relationship.

Moreover, chapter two sought to assess the factors that brought the AU into conflict with the ICC. Ever since it started to operate officially in July 2002, the ICC exercised its mandates with active co-operation and much confidence from its state parties and international organisations. African states and

²¹⁵ MA Rahim *Managing conflict in organizations* (2001) 18.

²¹⁶ The ICC exercises criminal jurisdiction in all states in the world where such states have ratified the ICC Statute or have accepted the ICC's jurisdiction in accordance with article 12(3) of the ICC Statute.

the AU have perfectly exemplified this. African states referred their own nationals alleged to be responsible for the grave crimes to the ICC. The study however indicated that the situation has completely changed since 2009. The AU has severally resolved that its member states would not co-operate with the ICC in apprehending President Al Bashir. As of June 2015, the said president has freely tripped to several African states which are the ICC jurisdiction.

From the discussion above, the decision of the UNSC sanctioning the Prosecutor to initiate investigation in the Darfur situation, and failure of the UNSC to formally respond to the deferment request of the AU is the primary factor accountable for the strife between the AU and the ICC. Further, the discussion revealed that an issuance of warrants of arrest for President Al Bashir, and arraignment of President Kenyatta and his Deputy Ruto by the ICC accelerated the impasse. It is therefore agreed and concluded that a conflict between the AU and the ICC followed the conduct and omission of the UNSC and escalated after the ICC initiating the proceedings against the mentioned incumbent AU heads of state.

Seeking to interrogate a legal status of decisions of the AU in line with the obligations of African states in the ICC Statute and several international instruments, the study firstly attempted to assess the legal capacity of the AU to adopt such decisions. It was established that the AU being an international organisation has ability to adopt decisions. Non-compliance with the adopted decisions and policies results in penalties. The chapter three above indicated that such ability is not laid down literally in the Constitutive Act. Rather, it is found impliedly in some articles including article 23(2) of the Constitutive Act which enshrines the impact of the failure to implement the resolutions and policies of the AU.

Secondly, the chapter then discussed the legality of decisions of the AU in respect of the obligations of African states provided for in the ICC Statute, UN Charter, Genocide Convention and Genocide Protocol of the Great Lakes Region. The legal status of decisions of the AU is not straightforward matter. This is because the issue of membership of African states to these international treaties is of paramount importance. Not all members of the AU are parties to these treaties. African state parties to the ICC Statute, Genocide Convention and Genocide Protocol of the Great Lakes Region have binding obligations. All treaties are independent of each other and obligations laid down in each treaty are required to be implemented faithfully by parties to it. It was shown in the above discussion that there is no hierarchy among these treaties. The obligation decisions of the AU therefore are as legal as the obligations under the three mentioned treaties. In view of that, it is concluded that the AU state parties to the ICC Statute, Genocide Convention, and Genocide Protocol of the Great Lakes Region have legal obligations that contradict the legal obligations under the AU.

That said, for the African states that are not parties to these treaties or have not accepted the jurisdiction of the ICC, decisions of the AU are absolutely legal. Conversely, the study revealed that all UN members are bound by the obligations under the UN Charter in the light of articles 25 and 103 of the UN Charter. In the context of decisions of the AU, it was established that the obligations imposed by the UNSC in its Chapter VII referral resolution 1593 bound only one state of Sudan and not all UN members. Therefore, decisions of the AU stand to be legal as far as 53 member states of the AU are concerned. However, the study indicated and maintains that for Sudan whose obligations to co-operate with the ICC emanated from the UNSC resolution in respect of articles 25 and 103 of the UN Charter, decisions of the AU are ineffective. Sudanese government's failure to co-operate with the ICC is an obvious violation of those obligations.

The chapter four sought to interrogate the possible methods that could be employed to resolve conflict. Many have been proposed by different scholars. The study however has analytically adopted some of the relevant approaches suggested by scholars for the immediate settlement of the contention. Some schools of thought viewed that the conflict will be resolved, if the African states challenge the legality of article 98 of the ICC Statute before the ICC itself; other schools hold that adoption of guidelines or rules that govern the powers of referral and deferral of the UNSC will cure the conflict. Many other scholars suggested that development of capacity of the domestic judicial systems to try international crimes is the best alternative towards harmonious relations between the AU and the ICC. The study concurred with all suggestions. Moreover, it additionally makes the following recommendations.

5.2 Recommendations

Following are the recommendations of the study:

- a. The ICC should use diplomacy instead of insisting on prosecution all the time. To begin with, the ICC should withdraw the case against President Al Bashir, as it did for President Kenyatta. This is important because, first, it may possibly relieve the AU's discontent. Second, since the arrest warrant for President Al Bashir was issued it is almost seven years now – nothing has changed. This brings in questions of where is the legitimacy of the ICC if states are welcoming the wanted accused and even shielding him within their territories like the case of South Africa.
- b. The ICC should allow each region to have its own ICC regime prosecuting the perpetrators of international crimes within the respective regions. In other words, the ICC should conduct its proceedings in each region instead of being stationed in a single place. The ICC's office in The

Hague should be dealing with the matters of appeal, should it necessarily be. Execution of this recommendation will reduce the feelings that the ICC is a European court against Africans.

- c. The ICC should maintain its culture of being transparent for whatever it does, subject however to its Rules of Procedure and Evidence. It should make available the information relating to any investigation or initiatives it conducts in other parts of its jurisdiction apart from Africa. This may enable the opponents of the ICC to understand that the ICC is not after African leaders alone. The best way to do this is to work with the African based NGOs. And, whenever it is possible, awareness of those activities should be raised through national radio and television broadcast in Africa and beyond. For Africa, the liaison office to be established in Addis Ababa should be tasked with matter.
- d. The ICC should carefully assess the situations referred to it by the UNSC before launching any investigations. Here, diplomacy needs to be considered, again. If it appears the prosecution of referred situation is likely to be chaotic based on experience, the ICC should stop moving ahead as provided within the ICC Statute. Rather, it should consider settling the issue politically.
- e. The African states both parties and non-parties to the ICC Statute should consider to have an audience with the Assembly of State Parties to the ICC. In this conference, they should express openly their concerns. This is important because since the impasse emerged it is evident that there is no such a forum conducted by the AU. The study believes that the mutual commitments which may be arrived at by both sides will exceptionally boost and refresh the existing relationship.
- f. The AU should consider endorsing its signature on the Relationship Agreement which has been mooted since 2005. Through this Agreement, the AU will be able to work closely with the ICC.
- g. The AU should allow the ICC to open a liaison office within its headquarters in Addis Ababa. The office will be a vital linkage between the two. Whenever the AU happens to have concerns relating to the ICC, it will be easier to present them to that office without incurring any cost.
- h. African state parties to the ICC should not consider withdrawal from the ICC Statute. Withdrawal will tremendously injure the legitimacy of the ICC which has already been affected by their non-co-operation determination. Moreover, withdrawal from the ICC will not only defeat automatically their own efforts that brought the ICC into being but also it will rebut the commitments of the AU recorded in the 2004 – 2007 Plan of Action of the AU.

- i. African state parties to the ICC should in good faith respect their obligations under the treaties and national laws respectively in regard to the prosecutions of international crimes. They must avoid double standards at all cost. Indeed, they have to stand firmly with their commitments and promises they undertake for the interest of the victims of atrocities. To emphasise this, it is noteworthy to recall what South Africa stated and then did in June 2015 when President Al Bashir was in the country attending the AU meeting. Through the ANC, it was reported saying: *If Bashir were to come to South Africa today, we will definitely implement what we are supposed to in order to bring the culprit to [The] Hague...We can't allow a situation whereby an individual tramples on people's rights and gets away with it...The perpetrators of war crimes should be tried at all costs.*²¹⁷
- j. The NGOs should raise special awareness on the obligations of the states prescribed in the Genocide Protocol of the Great Region. This is crucial because most of the academic literature does not address this matter widely in relation to the present AU-ICC dispute. Their role so far is well known. However they should continue to press the African Heads of State and Government to abiding by their obligations, and lobby and criticise whenever needed.

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²¹⁷ Briefing paper on recent setbacks in Africa regarding the International Criminal Court, November 2010, available at <https://www.issafrica.org/anicj/uploads/Recent_Setbacks_RE_the_ICC.pdf> (accessed 10 October 2015).

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