

## Chapter 4

### **The African Union, prosecution of international crimes and the question of immunity of state officials**

#### **4.1 Introduction**

The previous chapter has discussed the jurisprudence of international courts on immunity in relation to subpoenas against state officials. This chapter now contextualises the issues of immunity and prosecution of international crimes at the African Union (AU) level. It discusses how the AU has treated the questions of the immunity and prosecution of state officials for international crimes. It examines the legality or basis of the political concerns raised by the AU in respect of the indictment of some African state officials by the ICC. The practice of the AU is examined in line with the cases against President Omar Al Bashir of Sudan.

Further, the discussion is also on the intended measures to establish a Criminal Chamber within the African Court of Justice and Human Rights (the Criminal Chamber) with criminal jurisdiction for purposes of prosecuting persons who commit international crimes in Africa. This arises from the refusal by the AU to cooperate with the ICC over the arrest warrant issued against Omar Al Bashir.<sup>1</sup> The chapter argues that, by refusing to cooperate with the ICC, African states parties to the Rome Statute have breached their obligations under the Rome Statute.

In the course of discussion, the study examines whether the AU has any legal framework relevant to the prosecution of individuals who commit international crimes, including state officials. It highlights on the efforts made by the African Commission on Human and Peoples' Rights to urge African states to ratify and implement the Rome Statute.

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<sup>1</sup> Not all African states have supported the call not to cooperate with the ICC over the arrest warrant for President Omar Bashir of Sudan. South Africa, Botswana and Uganda have shown their intent to arrest Bashir should he visit such states. However, it has recently been observed in Kenya and Chad that President Bashir can still officially visit even those states parties to the Rome Statute and those that have enacted laws implementing the Rome Statute.

Further, it discusses the existing sub-regional efforts to prosecute and punish perpetrators of international crimes, based on the example from the Great Lakes Region. Then, it examines the political concerns raised by the AU regarding the indictment of some of the African personalities of state before the ICC and some domestic courts in European states. The aim is to examine how the AU intends to address the question of immunity of state officials by refusing to cooperate with the ICC and by preferring trials of African state officials in Africa.

However, before discussing any of the concerns by the AU against the ICC, it is important to examine the current cases before the ICC which have apparently given rise to the concerns or opposition expressed by the AU against the ICC.

#### **4.2 Cases before the International Criminal Court as at 2011**

As of early 2011, all the six situations and several accused persons before the ICC<sup>2</sup> have come from Africa.<sup>3</sup> The cases before the ICC are based on the state referrals,<sup>4</sup> referrals by the United Nations Security Council<sup>5</sup> and *proprio motu* powers of the Prosecutor to initiate investigations.<sup>6</sup> Based on reasonable belief that individuals have committed international crimes in Uganda, DRC, Central African Republic, Kenya and Darfur, Sudan, the Prosecutor of the ICC requested the Pre-Trial Chamber of the ICC to issue arrest warrants for various individuals.<sup>7</sup>

Regarding the Situation in Uganda<sup>8</sup> which was referred by the Government of Uganda to the Prosecutor of the ICC in December 2003, five warrants of arrest have been issued against five top leaders of the Lord's Resistance Army (LRA), a rebel force which

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<sup>2</sup> On the jurisdiction of the ICC, see Ch 2, part 2.3.6 of this study.

<sup>3</sup> For situations in the ICC, see information on the website of the ICC, at <<http://www.icc-cpi.int>> (accessed on 27 September 2010).

<sup>4</sup> The situations in Uganda, DRC and Central African Republic.

<sup>5</sup> The situations in Libya and Darfur, Sudan, through UNSC Res 1970(2011) and 1593(2005).

<sup>6</sup> The situation in Kenya, pursuant to art 15, Rome Statute.

<sup>7</sup> See cases at the ICC website <<http://www.icc-cpi.int>> (accessed on 27 September 2010).

<sup>8</sup> For a discussion on the three situations in Uganda, DRC and Sudan, see generally, E Greppi, 'Inability to investigate and prosecute under Article 17' in Politi and Gioia (2008) 63-70.

operates in northern Uganda. The case is being heard by Pre-Trial Chamber II of the ICC. The rebel leaders that have been indicted are Joseph Kony, Vicent Otti (believed to have died), Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. All these rebel leaders are accused of crimes against humanity and war crimes.<sup>9</sup> In the Situation in the Democratic Republic of Congo, which was referred by the Government of the DRC in 2002, four cases are being heard by different chambers of the ICC. Three of those cases are still in the Pre-Trial stage while the case against Thomas Lubanga Dyilo is at the trial stage. In all these cases, the accused persons are charged with committing crimes against humanity and war crimes in the DRC.<sup>10</sup> In the Situation in the Central African Republic, which was referred by the Government of the Central African Republic in 2003, there is one person charged with war crimes and crimes against humanity. That person is Jean-Pierre Bemba Gombo, former Vice-President and Senator of the DRC, and president of the Movement for the Liberation of Congo (*Mouvement pour la Libération du Congo* 'MLC') rebel forces which fought not only in the DRC, but also in the Central African Republic between 2002 and 2003. The case against Mr Bemba is currently being heard by Pre-Trial Chamber II of the ICC, and is at the pre-trial stage.<sup>11</sup>

The situation in Libya is likely to lead to warrants of arrest being issued by the ICC. In his address to the Security Council in May 2011, the Prosecutor of the ICC indicated that he would apply for the issuance of warrants of arrest against Libyan leaders, including Muammar Gaddafi. Indeed, on 16 May 2011, the Prosecutor of the ICC filed an

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<sup>9</sup> See, Situation in Uganda, *Prosecutor v Kony*, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005, paras 1-53; *Prosecutor v Otti*, Case No. ICC-02/04-01/05, Warrant of Arrest for Vicent Otti, 8 July 2005, Pre-Trial Chamber II, paras 1-53; *Prosecutor v Odhiambo*, Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 July 2005, paras 1-43; *Prosecutor v Ongwen*, Case No. ICC-02/04-01/05, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 July 2005, paras 1-41; *Prosecutor v Lukwiya*, Case No. ICC-02/04-01/05, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 July 2005, paras 1-41.

<sup>10</sup> See, Situation in the Democratic Republic of Congo, *Prosecutor v Dyilo*, Case No. ICC-01/04-01/06, Warrant of Arrest for Thomas Lubanga Dyilo, Pre-Trial Chamber I, 10 February 2006, p.1-5; *Prosecutor v Ntaganda*, Case No. ICC-01/04-01/06, Warrant of Arrest, Pre-Trial Chamber I, 22 August 2006, p.1-5; *Prosecutor v Katanga*, Case No. ICC-02/04-01/07, Urgent Warrant of Arrest for Germain Katanga, Pre-Trial Chamber I, 2 July 2007, p.1-7; *Prosecutor v Chui*, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui, 6 July 2007, p.1-8.

<sup>11</sup> See, Situation in the Central African Republic, *Prosecutor v Bemba Gombo*, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest issued on 23 May 2008, Pre-Trial Chamber III, 10 June 2008, p.1-10.

application for the issuance of warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi<sup>12</sup> alleging their criminal responsibility for crimes against humanity committed in Libya since 15 February 2011. The application was filed pursuant to article 58 of the Rome Statute. As of 23 May 2011, the ICC had not yet decided on the application. Because investigations are still ongoing in Libya, it is anticipated that more applications and cases could arise from Libya. However, it would be important if the Prosecutor of the ICC investigated other international crimes, particularly grave breaches of the Geneva Conventions and war crimes, from both sides of the conflict in Libya: rebel forces; government forces; and crimes committed by NATO and other forces operating in Libya.

In the situation in Darfur, there are five cases being heard by Pre-Trial Chamber I of the ICC. One suspect, Bahr Idriss Abu Garda appeared voluntarily before Pre-Trial Chamber I of the ICC on 18 May 2009. His appearance followed a summons to appear issued by the Pre-Trial Chamber I of the ICC.<sup>13</sup> The Prosecutor had filed an application for the issuance of a warrant of arrest or summons to appear alleging that Abu Garda committed war crimes, particularly attacking the AU Mission in Sudan on 29 September 2007. The rebel force under control and command of Abu Garda attacked the AU peacekeepers resulting to the death of twelve peacekeepers. The Pre-Trial Chamber of the ICC conducted a confirmation hearing in respect of Abu Garda between 19 and 29 October 2009. On 8 February 2010, Pre-Trial Chamber I refused to confirm charges against Abu Garda on the ground that the prosecution had failed to prove evidence incriminating him with the crimes. An appeal by the Prosecutor was refused on 23 April 2010. Although no charges have been confirmed as yet, Abu Garda is currently being held by the ICC as the Prosecutor intends to submit new evidence.<sup>14</sup>

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<sup>12</sup> Situation in the Libyan Arab Jamahiriyah, *Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11, Public Redacted Version, Pre-Trial Chamber I (Judge Cuno Tarfusser, Presiding Judge, Judge Sylvia Steiner and Judge Sanji Mmasenono Monageng), 16 May 2011, 1-23, paras 1- 68.

<sup>13</sup> *Prosecutor v Garda*, Case No. ICC-02/05-02/09, Summons to Appear for Bahr Idriss Abu Garda (Public), 7 May 2009, Pre-Trial Chamber, 1-10.

<sup>14</sup> *Prosecutor v Garda*, Case No. ICC-02/05-02/09, Public Decision on the "Prosecution's Application for Leave to Appeal the Decision on the Confirmation of Charges", 23 April 2010, Pre-Trial Chamber, 1-15.

The appearance of Abu Garda was later followed by the voluntary appearance on 17 June 2010, by Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, charged with war crimes.<sup>15</sup> This was in compliance with a summons to appear issued by the Pre-Trial Chamber on 27 August 2009.<sup>16</sup>

The Darfur situation has at present led to indictments against two senior state officials of Sudan, a sitting president (Omar Al Bashir), and Ahmad Harun, a Minister of State for the Interior of the Government of Sudan, and former Minister of State for Humanitarian Affairs.<sup>17</sup> Ahmad Harun is charged with war crimes and crimes against humanity while Bashir is charged with genocide, crimes against humanity and war crimes. In respect of President Bashir, a charge of genocide was included in the application for a warrant of arrest by the Prosecutor but the Pre-Trial Chamber did not confirm it. The Prosecutor appealed the decision of the Pre-Trial Chamber on the question of genocide. The Appeals Chamber of the ICC rendered its decision reversing the decision of the Pre-Trial Chamber, and ordering it to reconsider the genocide charge *de novo*.<sup>18</sup> Consequently, the Pre-Trial Chamber, now composed of different judges, issued its decision allowing the genocide charge against President Omar Al Bashir,<sup>19</sup> and issued a new arrest warrant containing the genocide charge.<sup>20</sup> The Chamber decided that way because it had reasonable ground to believe that Omar Al Bashir is criminally responsible under articles 25(3) and 6(a)-(c) of the Rome Statute for the crime of genocide, at least indirectly as a

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<sup>15</sup> *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, 17 June 2010, Transcript (ICC-02/05-03/09-T-4-ENG ET WT 17-06-2010 1/27 SZ PT), 1-27.

<sup>16</sup> *Prosecutor v Nourain and Jamus*, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, Second Decision on the Prosecutor's Application under Article 58, 27 August 2009, paras 1-35; *Prosecutor v Nourain*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009, paras 1-20; *Prosecutor v Jamus*, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Saleh Mohammed Jerbo Jamus, 27 August 2009, paras 1-20.

<sup>17</sup> See generally, Situation in Darfur, Sudan, *Prosecutor v Al-Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Al-Bashir, Pre-Trial Chamber I, 4 March 2009, p.1-8; *Prosecutor v Harun*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, Pre-Trial Chamber I, 27 April 2007, p.1-16; *Prosecutor v Al Abd –Al-Rahman (Ali Kushayb)*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Muhammad Al Abd –Al-Rahman, Pre-Trial Chamber I, 27 April 2007, p.1-17.

<sup>18</sup> *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09 OA, Judgment on the Appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", Appeals Chamber, 3 February 2010, 1-18, paras 1-42.

<sup>19</sup> *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Second Decision on the Prosecution's Application for a Warrant of Arrest, Public Document, 12 July 2010, 1-30, paras 1-44.

<sup>20</sup> *Prosecutor v Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Public Document, 12 July 2010, 1-9.

co-perpetrator or perpetrator of genocide in Darfur. President Omar Al Bashir of Sudan is now the first person ever to be charged with genocide before the ICC.

On 31 March 2010, Pre-Trial Chamber II of the ICC issued a decision authorising the Prosecutor to begin investigation into the Situation in Kenya pursuant to article 15 of the Rome Statute.<sup>21</sup> Such authorisation was based on the fact that the Chamber had reasonable ground to believe that crimes against humanity were committed in Kenya during the post-election conflict.<sup>22</sup> On 15 December 2010, the Prosecutor of the ICC filed an application for the issuance of summonses to appear for six individuals, including Kenyan senior state officials. These are Henry Kiprono Kosgey, William Samoei Ruto, Joshua Arap Sang, all members of the political party called the Orange Democratic Movement (ODM).<sup>23</sup> The other persons are Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, all state officials and members of a political party called the Party of National Unity (PNU).<sup>24</sup> The Prosecutor submitted that there were reasonable grounds to believe that all these suspects committed crimes against humanity within the jurisdiction of the ICC and therefore that the court should issue summonses to appear. On 8 March 2011, the Pre-Trial Chamber issued its decision on the Prosecutor's application for the issuance of summonses to appear for the suspects.<sup>25</sup> The suspects entered their initial appearances on 7 and 8 April 2011. The ICC will conduct a

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<sup>21</sup> See, Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, Public Document, No. ICC-01/09, 31 March 2010.

<sup>22</sup> Situation in Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, Public Document, No. ICC-01/09, 31 March 2010, 1-80, paras 1-153.

<sup>23</sup> Situation in the Republic of Kenya, Public Reducted Version of Document ICC-01/09-30-Conf-Exp, Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09, 15 December 2010, 1-79.

<sup>24</sup> Situation in the Republic of Kenya, Public Reducted Version of Document ICC-01/09-31-Conf-Exp, Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09, 15 December 2010, 1-80.

<sup>25</sup> *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber, 8 March 2011; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011. The suspects entered their initial appearances on 7 and 8 April 2011.

confirmation of charges hearing later in September 2011 either to discharge them or to confirm the charges against them.

Following the ICC Prosecutor's application for the issuance of summonses to appear for the Kenyan state officials, Kenya approached the AU asking it to request the United Nations Security Council to defer the investigations and prosecution in Kenya. In its decision on the implementation of the decisions on the ICC, the AU supported and endorsed Kenya's request for a deferral of investigations and prosecutions regarding crimes against humanity committed in Kenya during the post-election violence in 2008.<sup>26</sup> It should be understood clearly that a request for the deferral of investigation and prosecution under article 16 of the Rome Statute does not do away with subsequent prosecution. Consequently, no matter how long it takes, Kenyan individuals can still be prosecuted. The Security Council cannot tolerate impunity in the name of deferrals of investigations or prosecutions. Hence, it is wrong for the AU to endorse the request by Kenya for a deferral of investigation and prosecution. It must be recalled that Kenya did not utilise its opportunity under article 17 of the Rome Statute when it was given such opportunity. Kenya failed to prosecute persons responsible for crimes against humanity at its national courts. To request for a deferral of prosecution is not in any event going to be in line with complementarity principle for Kenya.

The fact that the accused persons currently before the ICC have all come from Africa, has given rise to a negative attitude by the AU against the ICC. Except Botswana, South Africa and Uganda, the rest of the AU member states have categorically taken a position that the ICC has targeted Africans, and state officials in particular, leaving other persons from other states scot-free. As will be observed below, the AU has decided not to cooperate with the ICC in respect of the warrant of arrest for President Omar Al Bashir of Sudan. While this declaration may hold substance at least politically, it does not hold any

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<sup>26</sup> See, Decision on the Implementation of the Decisions on the International Criminal Court, Doc.EX.CL/639(XVIII), Assembly/AU/Dec.334(XVI), para 6, Sixteenth Ordinary Session, 30-31 January 2011, Addis Ababa. However, one must note that some Kenyan authorities do not want to accept that Kenya requested the deferral of the investigations. For example, Vice President of Kenya, Kalonzo Musyoka is reported to have said in the Kenyan *Daily Nation* that Kenya had not requested any such deferral. See, 'Leaders trade barbs over Ocampo six trials at burial', *Daily Nation*, 20 March 2011.

legal validity under international law. It will be argued below that there is no legal basis to allege that the ICC has targeted Africans.

At this point, it is necessary to discuss the validity or otherwise of allegations levelled against the ICC by the AU whilst relating it to the question of immunity of African state officials. But, before doing so, it is necessary to examine whether the AU has any legal or institutional framework to prosecute crimes that are also within the jurisdiction of the ICC.

### **4.3. The African Union and legal framework on prosecution of international crimes in Africa**

The African Union (AU), which replaced the former Organization of the African Unity (OAU), was formed in 2000 through the Constitutive Act of the African Union (the Constitutive Act of the AU). The Constitutive Act of the AU was adopted by the then OAU Assembly of Heads of State and Governments in Lomé, Togo, at the 36<sup>th</sup> ordinary session of the Assembly from 10-11 July 2000. The Constitutive Act of the AU contains key principles that reject impunity in Africa. Such principles are reflected in article 4 of the Constitutive Act of the AU.<sup>27</sup> Amongst them, is the principle that allows the AU to have the right to intervene in a member state pursuant to a decision of the Assembly of Heads of State and Government of the Union in respect of grave circumstances, namely: ‘war crimes, genocide and crimes against humanity.’<sup>28</sup> The AU has the duty to respect for the sanctity of human life, condemnation and rejection of impunity<sup>29</sup> and to respect democratic principles, human rights, rule of law and good governance.<sup>30</sup>

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<sup>27</sup> Relevant parts of art 4 of the Constitutive Act of the AU provide that:

‘The Union shall function in accordance with the following principles:

(h) the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes; genocide and crimes against humanity;

(o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.’

<sup>28</sup> Art 4(h).

<sup>29</sup> Art 4(o).

<sup>30</sup> Art 4(m).



It should be recalled that the AU was meant to curb *inter alia*, the endemic problems of armed conflicts in Africa, and hence the essence of such principles. Events of the genocide in Rwanda in 1994 practically played role in providing the background to relevant provisions in the Constitutive Act of the AU on ‘rejection of impunity’ and allowing the AU to ‘intervene’ in a member state of the Union in case of ‘grave circumstances’ of genocide, war crimes and crimes against humanity.

Apart from the provisions of article 4(h) of the Constitutive Act of the AU, the AU does not seem to have an express mandate to prosecute individuals who commit international crimes in Africa, particularly at regional level. Perhaps a possible way is for the AU to rely on moral or political grounds to ask one of its member states to prosecute perpetrators of international crimes (particularly state officials) as Senegal did for Habré on behalf of the AU. It is difficult to infer that ‘intervention’ as envisaged under article 4(h) of the Constitutive Act of the AU would include ‘prosecution’ of perpetrators of international crimes in Africa. It is contended that the word ‘intervene’ as put in article 4(h) was meant to apply to military intervention (use of force) and not judicial intervention as such. Except for article 4(o) of the Constitutive Act of the AU, no other provisions reject impunity, and by analogy, immunity for international crimes. Despite the rejection of impunity, it is not entirely and specifically provided in the Constitutive Act of the AU whether really an African state official can be prosecuted for international crimes and therefore that, in grave circumstances of genocide, war crimes and crimes against humanity, a state official may not claim immunity from prosecution for such crimes in Africa. However, based on customary and conventional international law, it may be argued that such state officials cannot benefit from immunity for international crimes.

Although the Constitutive Act of the African Union contains provisions that reject impunity for international crimes<sup>31</sup> committed in African states, it nevertheless does not have an express provision outlawing immunity of state officials from prosecution for such crimes. Thus, at African regional level, there is currently no instrument which calls

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<sup>31</sup> Arts 4(h), 4(m) and 4(o).

for prosecution of individuals who commit international crimes in Africa and rejects immunity of state officials in general.<sup>32</sup> However, one may argue that since the Constitutive Act of the AU rejects impunity and by necessary inference refers to human rights, it follows that in general sense, it can be said to have rejected immunity for international crimes.

It is important to understand that in 2005 the African Commission on Human and Peoples' Rights (the African Commission) adopted a resolution in which it urged African states to end impunity in Africa, and to domesticate and implement the Rome Statute.<sup>33</sup> In this resolution, the African Commission recalled its Resolution on the Ratification of the Treaty on the International Criminal Court (the Rome Statute) by the African Commission on Human and People's Rights, which was adopted at Banjul, on 31 October 1998. It also made reference to the Resolution on the Ratification of the Statute of the International Criminal Court by OAU member states, adopted at Pretoria, on 16 May 2002.<sup>34</sup> Further, the African Commission noted that international crimes continued to be committed in Africa, while perpetrators were rarely brought to justice. In addition, it was concerned that some African states that had ratified the Rome Statute had not incorporated it at national level. In this regard, the African Commission urged member states of the AU 'to ensure that the perpetrators of crimes under international human rights law and international humanitarian law should not benefit from impunity.'<sup>35</sup> It also called for African states 'to ratify the Rome Statute and to adopt a national plan of action for the effective implementation of the Rome Statute at the national level.'<sup>36</sup> Recognising the fact that some African states had entered into bilateral immunity agreements with USA, the African Commission urged African states 'to withdraw from article 98 Bilateral

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<sup>32</sup> However, regarding corruption (which is not an international crime as per this study), there is the African Union Convention on Preventing and Combating Corruption, adopted in Maputo on 11 July 2003, entered into force on 5 August 2006. Art 3(5) of this Convention provides for total rejection of impunity in respect of corruption.

<sup>33</sup> *Resolution on Ending Impunity and on the Domestication and Implementation of the Rome Statute of the International Court* (2005). The resolution is reprinted in C Heyns and M Killander (eds.), (2007) *Compendium of key human rights documents of the African Union*, 323-324.

<sup>34</sup> Preamble to *Resolution on Ending Impunity and on the Domestication and Implementation of the Rome Statute of the International Court* (2005).

<sup>35</sup> Para 1 of the Resolution.

<sup>36</sup> Para 2.

Immunity Agreements and refrain from engaging in acts that would weaken the effectiveness of the Court in line with their international obligations.’<sup>37</sup> Finally, it encouraged ‘the Assembly of Heads of State and Government of the African Union to urge its member states to condemn and reject impunity.’<sup>38</sup>

From the preceding, one observes that the African Commission had made efforts to ensure that African states ratified the Rome Statute in order to end impunity for international crimes. However, it is common that resolutions of the African Commission are non-binding as such. In particular, the resolution at issue was merely to encourage states but not to create obligation on African states to reject impunity or repress international crimes. Given this observation, one needs to look at the binding treaties on this matter.

It has been observed earlier that there is no African regional treaty to punish international crimes. Short of any regional legal framework on the prosecution of international crimes in Africa, one must rely on the sub-regional legal instruments. In Africa, the only express sub-regional mechanism that calls for prosecution of individuals who commit international crimes, and rejects immunity of state officials is the *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination*, which was signed by the International Conference on the Great Lakes Region, on 29 November 2006. The Protocol is now examined in turn.

#### **4.3.1 Protocol for the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination**

On 29 November 2006, Heads of State and Governments of the International Conference on the Great Lakes Region adopted a *Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of*

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<sup>37</sup> Para 3.

<sup>38</sup> Para 5.

*Discrimination.* This is a Protocol to the Pact on Security, Stability and Development in the Great Lakes Region.<sup>39</sup> The Protocol is an integral part of the Pact and does not need separate signatures.<sup>40</sup> Eventually, all members to the Pact are members to this Protocol. The Protocol was adopted against the background of obligations arising from the Genocide Convention and the United Nations General Assembly Resolution 96(I) of 11 December 1946 which declared that ‘genocide’ is a crime under international law. It was adopted on the premises of the endemic armed conflicts aggravating massive human rights violations and impunity for international crimes of genocide, war crimes and crimes against humanity especially in the Great Lakes Region. Further, the precept of this Protocol was the Geneva Conventions governing the conduct of hostilities during armed conflicts, as well as the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Amongst other international instruments setting the background for this Protocol is the Rome Statute.

The Preamble to the Protocol states that all member states of the Great Lakes Region were mindful of their duty to exercise criminal jurisdiction over the perpetrators of genocide, war crimes and crimes against humanity. It also refers to Common Article 3 to the Geneva Conventions as enshrined in article 3 of the Statute of the ICTR. This results from the history of the genocide in Rwanda in 1994. The Great Lakes Region is determined to put an end to such international crimes in its region.<sup>41</sup>

The Protocol defines the crimes of genocide, war crimes and crimes against humanity as defined under articles 6, 7 and 8 of the Rome Statute.<sup>42</sup> The purpose of the Protocol is also to give effect to the Genocide Convention, 1948, and the Rome Statute in the member states of the Great Lakes Region.<sup>43</sup> Importantly, the Protocol imposes

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<sup>39</sup> Pact on Security, Stability and Development in the Great Lakes Region, International Conference on the Great Lakes, 2006, signed at Nairobi, Kenya.

<sup>40</sup> Art 43, Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, International Conference on the Great Lakes Region, signed on 29 November 2006, Preamble, paras 1-12 (hereinafter ‘ Protocol on International Crimes’).

<sup>41</sup> See, Protocol on International Crimes, Preamble, paras 1-12.

<sup>42</sup> Art 1(a), (h) and (i).

<sup>43</sup> See Ch. III, art 8(1) – (3), Protocol on International Crimes.

obligations on member states of the Great Lakes Region to combat impunity and to take appropriate measures to bring before competent courts the perpetrators of genocide, war crimes and crimes against humanity in accordance with the Genocide Convention, the Rome Statute as well as relevant UN Security Council Resolutions. The option is provided to either punish perpetrators of such crimes before competent national courts or before international judicial bodies.<sup>44</sup> Further, member states to the International Conference on the Great Lakes Region are obliged to take measures to ensure that courts have jurisdiction to punish genocide, war crimes and crimes against humanity. Article 11 of the Protocol provides that statutes of limitation shall not apply with regards to genocide, war crimes and crimes against humanity. More relevant is article 12 of the Protocol, which expressly outlaws immunity and provides that:

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 an elected representative or agent of a State shall in no way shield or bar their criminal liability.

It should be noted that despite this good authority outlawing immunity, state parties to the Protocol have nevertheless never respected this obligation because they have actually participated in the AU decisions refusing cooperation with the ICC over the arrest warrant for President Bashir. It is submitted that states parties to the Protocol should have respected their clear obligation under article 12 of the Protocol regarding the Sudanese president.

As the Protocol was adopted whilst having the provisions of the Rome Statute in mind, it is not surprising that article 12 of the Protocol replicates the contents of article 27 of the Rome Statute. Member states in the Great Lakes Region have also undertaken to cooperate in the detection, prevention and punishing of individuals who commit genocide, war crimes and crimes against humanity in the region.<sup>45</sup> Extradition may be sought by any member state to the Protocol and the Great Lakes Region in respect of

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<sup>44</sup> Art 9, Protocol on International Crimes.

<sup>45</sup> Art 13.

international crimes of genocide, war crimes and crimes against humanity.<sup>46</sup> Article 21 of the Protocol creates an express obligation on member states to ratify the Rome Statute in accordance with their constitutional requirements. Perhaps this provision has led to the ratification of the Rome Statute in many of the member states of the Great Lakes Region. Of the eleven core member states of the International Conference on the Great Lakes Region,<sup>47</sup> only Angola, Rwanda and Sudan have not ratified the Rome Statute as at 2010.<sup>48</sup>

Article 22 of the Protocol obliges member states to enact laws to enable cooperation with the ICC. Despite this express obligation, it must be understood that states parties to the Protocol such as Tanzania, Rwanda, Zambia, Angola and Sudan have not yet enacted such laws to enable cooperation with the ICC. Failure to enact such laws seems to be a clear breach of their legal obligation under the Protocol. Article 23 of the Protocol is more emphatic on the cooperation with the ICC. It requires the member states to provide cooperation in respect of arrest and hand over to the ICC, of all persons suspected of having committed crimes within the jurisdiction of the ICC. It also deals with requests for cooperation related to renunciation of immunity and consent to hand over indicted persons and execution or enforcement of the ICC sentences to individuals. Article 24 of the Protocol provides that in case of competing requests, the ICC shall take precedence over the national requests of member states. This provision empowers the ICC to have supremacy over national courts in cases of requests. However, all cooperation with the

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<sup>46</sup> Arts 14-16.

<sup>47</sup> The eleven core member states of the Great Lakes Region are: Republic of Angola; Republic of Burundi; Central African Republic; Republic of Congo; Democratic Republic of Congo; Republic of Kenya; Republic of Rwanda; Republic of Sudan; United Republic of Tanzania; Republic of Uganda and the Republic of Zambia.

<sup>48</sup> Angola signed the Rome Statute on 7 October 1998 but has not ratified it; Sudan signed the Rome Statute on 8 September 2000 but has not ratified it, hence the two states of Angola and Sudan are not states parties to the Rome Statute. Rwanda has neither signed nor ratified the Rome Statute. Tanzania ratified the Rome Statute on 20 August 2002, but has not yet enacted an implementing law. Kenya ratified it on 15 March 2005 (and has enacted a law to implement the Rome Statute of the ICC—the law is called the *International Crimes Act, 2008*). Zambia ratified the Rome Statute on 13 November 2002. Uganda ratified it on 20 August 2002 and has enacted a law to allow cooperation with the ICC, the law is called the *International Criminal Court Act, 2010*; Congo ratified the Rome Statute on 3 May 2005; DRC ratified it on 11 August 2002 (and is in the process of enacting an implementing legislation); Central African Republic ratified it on 3 October 2001; Burundi ratified the Rome Statute on 21 September 2004, and has amended its Penal Code to include crimes within the jurisdiction of the ICC.

ICC is subject to the ratification of the Rome Statute by member states of the Great Lakes Region who are parties to the Protocol.

In the end, the Protocol is the only strong legal instrument in Africa at present which specifically does not recognise immunity from prosecution for international crimes, and calls for punishment of persons who commit international crimes in the sub-region. It is a major sub-regional effort to curb the rising trend of commission of international crimes by state officials as well as private individuals in Africa.

In the preceding part, the discussion has been on the existing legal framework on the prosecution of international crimes in African regional and sub-regional levels. The following part will now address the growing concerns by the AU over prosecution of international crimes before the ICC. The purpose here is to examine how the AU intends to address the question of prosecution of international crimes and immunity of state officials by refusing to cooperate with the ICC and by preferring trials of African state officials in Africa.

#### **4.4 The African Union concerns over prosecution of serving African state officials by the ICC**

Following the issuance of a warrant of arrest for President Omar Al-Bashir of Sudan by the ICC, there has emerged in Africa, sentiments on the prosecution of African state officials. Apart from Africa, the Council of the League of Arab States had also issued a decision condemning the decision of the Pre-Trial Chamber of the ICC on President Omar Al Bashir of Sudan.<sup>49</sup> On its part, the AU which initially appeared to be amongst the greatest supporters of the ICC,<sup>50</sup> has now changed its position and relationship with the ICC and has embarked on the move not to cooperate with the ICC on the Omar Al

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<sup>49</sup> See, Decision adopted by the Council of the League of Arab States meeting at Ministerial Level in Cairo, Egypt, on 4 March 2009.

<sup>50</sup> For a comprehensive understanding on the work of the African states in the creation of the ICC, see generally, P Mochochoko, 'Africa and the International Criminal Court' in EA Ankumah and EK. Kwakwa (eds.), (2005) *African perspectives on international criminal justice*, 241-258. As at 2010, only 30 African states are states parties to the Rome Statute.

Bashir's warrant of arrest despite the arrest warrants circulated by the ICC to states parties to the Rome Statute, including African states.

The AU has raised concerns reflecting that the ICC is an imperialist tool of Western powers and that it has only targeted and is discriminating against Africans. The Chairperson of the AU Commission, Jean Ping once echoed the views of the AU regarding the warrant of arrest issued against President Omar Al Bashir of Sudan in which he complained that the ICC is discriminating against Africa. He said:

We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war...This is what we are doing but Ocampo doesn't care. He just wants to catch Bashir. Let him go and catch him...We are not against the ICC...But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.<sup>51</sup>

Similarly, the Rwandan President, Paul Kagame raised concerns that the ICC is a new form of imperialism intending to undermine African and other powerless states. The argument that the ICC is an imperialist Western tool is also advanced by some African scholars. Mahmood Mamdani argues that the ICC is a manifestation of the modern Western colonialism. To Mamdani, the ICC is 'rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them.'<sup>52</sup>

Further, it has been argued by the AU that the focus by the ICC on Africa undermines peace processes in African states. It is also the view of the AU that by refusing to authorise deferrals of the investigations and prosecutions in Kenya and Sudan, the Security Council has ignored calls by the AU for peace in Sudan and Kenya. The other concern is that the Security Council has played double standards against African states by referring the situation in Darfur, Sudan to the ICC. The argument goes further that the

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<sup>51</sup> The AU Chief challenges ICC to arrest Sudanese president, Sudan Tribune, 24 July 2010, available at <<http://www.sudantribune.com/spip.php?article3574>> (accessed on 12 February 2011).

<sup>52</sup> M Mamdani 'The new humanitarian order' The Nation, 29 September 2008, available at <<http://www.thenation.com/doc/20080929/mamdani>> (accessed on 11 February 2011).



Security Council has failed to refer the situation in Gaza, Palestine, as recommended by the Goldstone Report following an inquiry on the crimes committed by Israel soldiers in Gaza in 2009.<sup>53</sup> Similarly, the Security Council has also failed to take measures to refer the conflict in Iraq to the ICC for further investigation and possible prosecution. However, the Prosecutor of the ICC seems to be considering the situations in Gaza, Iraq and Georgia.

The other concern raised by the AU and some individuals in Africa is that the ICC has decided to proceed against a serving President of Sudan while Sudan is not a state party to the Rome Statute. This argument seems to lean on articles 98 and 27 of the Rome Statute. Apparently, this argument would seem to also base on state sovereignty. During his time as Chairman of the AU, Bingu wa Mutharika (President of Malawi) pointed out clearly the issues of immunity of a state official and state sovereignty regarding President Bashir of Sudan. He said,

To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for for so many years... There is a general concern in Africa that the issuance of a warrant of arrest for... al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union charter (sic). May be there are other ways of addressing this problem.<sup>54</sup>

The merits and demerits of these grounds of objection or concerns by the AU will be considered later. However, before dealing with the objections, it is important that one sets the background on the AU decisions not to cooperate with the ICC as we turn to discuss below.

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<sup>53</sup> See, 'Human Rights in Palestine and other Occupied Arab Territories' Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, Human Rights Council, Twelfth Session, Agenda Item 7, 25 September 2009, 1-452, paras 1-1979 and annextures. However, one must note that after the report was submitted to the UN, Richard Goldstone retracted from his findings, which makes it difficult to confirm whether military commanders and state officials from Israel should be held responsible for the crimes committed in Gaza.

<sup>54</sup> Quoted in M du Plessis (2010) *The International Criminal Court that Africa wants*, Monograph No.172, 18.

On 5 March 2009, the Peace and Security Council of the African Union at its 175<sup>th</sup> meeting at Addis Ababa, Ethiopia, adopted a position on the decision of the Pre-Trial Chamber I of the ICC to issue an arrest warrant against the President of the Republic of Sudan, Omar Al Bashir.<sup>55</sup> While recalling its Communiqué<sup>56</sup> as well as the AU Assembly decision,<sup>57</sup> the Peace and Security Council of the African Union expressed ‘deep concern over the decision that was taken by the Pre-Trial Chamber of the ICC on 4 March 2009, to issue an arrest warrant against the President of the Republic of Sudan, Mr. Omar Hassan Al-Bashir, for war crimes and crimes against humanity, and the far reaching consequences of this decision.’<sup>58</sup>

The Peace and Security Council of the AU noted with regrets that the ICC decision came at a critical juncture in the process of promoting lasting peace and reconciliation in Sudan, and underlined that the search for justice should be pursued in a way that does not impede or jeopardise the promotion of peace in Sudan.<sup>59</sup> It reaffirmed the ‘AU’s conviction that the process initiated by the ICC and the decision of its Pre-Trial Chamber have the potential to seriously undermine the on-going efforts to address the many pressing peace and security challenges facing Sudan and may lead to further suffering for the people of the Sudan and greater destabilisation of the country and the region.’<sup>60</sup>

Again, in its decision, the Peace and Security Council of the AU deeply regretted that despite the request made by the AU to the United Nations Security Council to defer prosecution of President Omar Al Bashir of Sudan under article 16 of the Rome Statute, the UN Security Council had failed to consider such a request.<sup>61</sup> It thus appealed once again to the UN Security Council to assume its responsibilities by deferring the process

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<sup>55</sup> See, Communiqué of the 175<sup>th</sup> meeting of the Peace and Security Council of the African Union, 5 March 2009, PSC/PR/Comm (CLXXV), Addis Ababa, Ethiopia.

<sup>56</sup> PSC/PR/Comm (CXLII) Rev 1., Adopted at its 142<sup>nd</sup> meeting held on 21 July 2008, at Addis Ababa, Ethiopia.

<sup>57</sup> See, Decision Assembly/AU/Dec.221(XII), adopted by the Assembly of the AU at its 12<sup>th</sup> Ordinary Session held in Addis Ababa, Ethiopia from 1 to 3 February 2009.

<sup>58</sup> See, Communiqué of the 175<sup>th</sup> meeting of the Peace and Security Council of the African Union, 5 March 2009, paras 1 and 2.

<sup>59</sup> Para 2.

<sup>60</sup> Para 4.

<sup>61</sup> Para 5.

initiated by the ICC against President Omar Al Bashir of Sudan.<sup>62</sup> The UN Security Council did not agree to the AU's request, and only noted such a request. Although the AU may have a collective voice on the arrest warrant against Omar Al Bashir, it must be noted that the AU is not a party to the Rome Statute as a collective body. Instead, only some individual African states are parties to the Rome Statute. This could be the reason for the UN Security Council's rejection to the request by the AU.

It is argued further that the request by the AU did not demonstrate a clear case of a threat to international peace and security to merit a deferral by the Security Council. The issue of President Omar Al Bashir's prosecution cannot be solved by simply requesting a deferral. Even if the matter were to be deferred, it would still mean that President Omar Al Bashir can be tried at some other future time.

Relying on the decision by the Peace and Security Council of the AU,<sup>63</sup> the African Union's position is expressly stated in its decision of the AU Assembly on the ICC adopted on 3 July 2009 at Sirte, Libya.<sup>64</sup> But, before this decision, the AU Assembly had adopted another decision on the application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan.<sup>65</sup> In its decision, the AU expressed its deep concern at the indictment made by the Prosecutor of the ICC against President Omar Al Bashir of Sudan.<sup>66</sup> The AU warned that, in view of the 'delicate nature of the peace processes' underway at the time in Sudan, the approval by the Pre-Trial Chamber of the ICC on the application for the issuance of arrest warrant against President Omar Al Bashir would 'seriously undermine the ongoing efforts' aimed at facilitating peace in

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<sup>62</sup> Para 6.

<sup>63</sup> See, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Decision Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya, para 3 ('The Assembly...Endorses the Communiqué issued by the Peace and Security Council(PSC) of the African Union(AU) at its 142<sup>nd</sup> meeting, held on 21 July 2008, and Urges the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, and as requested by the PSC at its above mentioned meeting, to defer the process initiated by the ICC').

<sup>64</sup> Decision on the Application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya.

<sup>65</sup> Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya.

<sup>66</sup> Para 1.

Darfur.<sup>67</sup> The AU Assembly went ahead and requested the Commission of the African Union to discuss the issue of indictments against African leaders. Specifically, the Commission was required to do the following:

[T]o convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.<sup>68</sup>

In addition, reacting to the UN Security Council's position, the AU took a new perspective regarding the prosecution of President Omar Al Bashir:

[The AU Assembly] decides that in view of the fact that the request by the African Union has never been acted upon, 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 Bashir.<sup>69</sup>

The AU decisions on non-cooperation with the ICC indicate how African states are unwilling to cooperate with the ICC. In my field research at The Hague based international courts; I was convinced that the AU opposition to the ICC prosecutions poses a problem to prosecuting African individuals, including state officials responsible for international crimes. With particular reference to the arrest warrant issued against President Omar Al Bashir of Sudan, my discussions with officials of the ICC revealed that there are practical challenges in prosecuting state officials. One Judge of the Appeals Division of the ICC pointed out that the real problem is the lack of political will and state cooperation with the ICC in respect of enforcement of arrest warrants.<sup>70</sup> At the time of the discussion, Kenya had invited President Omar Al Bashir of Sudan. So, it was echoed that Kenya was in clear violation of its obligations arising from the Rome Statute by failing to arrest President Omar Al Bashir. A legal Officer at the ICC gave an opinion

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<sup>67</sup> Para 2.

<sup>68</sup> Para 5.

<sup>69</sup> Para 10.

<sup>70</sup> Discussion with Judge Daniel Ntanda Nsereko, Appeals Division of the ICC, 31 August 2010, in his Chamber.

that states should cooperate with the court to enforce the warrants of arrest issued against President Omar Al Bashir of Sudan.<sup>71</sup>

The fact that the ICC officials called for state cooperation indicates that there is already lack of state cooperation with the ICC in respect of the arrest warrant against President Bashir. My discussions with the ICC officials revealed that the AU has also played a role in hampering the legal processes against President Omar Al Bashir. During the discussion, it was pointed out that by failing to arrest Omar Al Bashir; states like Chad and Kenya have clearly breached their international obligations arising from the Rome Statute. This suggests that states are not politically willing to cooperate with the ICC in the prosecution of President Bashir for international crimes.

Whether Omar Al Bashir will ever escape justice is an issue which remains to be seen.<sup>72</sup> Like Radovan Karadžić, President Omar Al Bashir of Sudan could face justice after his time in office as president. So, Omar Al Bashir will probably be prosecuted no matter how long it takes to arrest him. A Senior Appeals Counsel at the ICTR<sup>73</sup> echoed the view that as long as a state official is charged with international crimes, such official is no less different from other accused persons. To this view, it is apparent that there is no much problem in prosecuting a state official as such.

Despite the AU decision not to cooperate with the ICC in respect of the warrant of arrest for Omar Al Bashir, it should be noted that some African states were not in support of the AU position. Botswana and South Africa had not agreed to the terms of the AU decision on the arrest and surrender of President Omar Al Bashir of Sudan, contending that they are bound by the terms of the Rome Statute, to which they are states parties. Botswana made it clear that it will support the ICC in enforcing the warrant of arrest issued against President Omar Al Bashir of Sudan. On 8 July 2009, Botswana stated that '[a]s a State

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<sup>71</sup> Response by Eleni Chaitidou, Legal Officer, Chambers, ICC, on 27 July 2010. The response was in respect of the question I posed during the Question and Answer session after a presentation on the work of the ICC was made by the two officials from the ICC. The presentation took place in the Auditorium, The Hague Academy of International Law.

<sup>72</sup> Response by a Legal Officer, Office of the Prosecutor, ICC, on 27 July 2010.

<sup>73</sup> Dr George William Mugwanya, Senior Appeals Counsel, ICTR. Discussions were held on 9 July 2009 at The Hague.

Party to the Rome Statute of the ICC, Botswana will fully abide with its treaty obligations and will support the International Criminal Court in its endeavours to implement the provisions of the Rome Statute.’<sup>74</sup> On 4 July 2009, after the adoption of the Sirte AU decision on the warrant of arrest for Omar Al Bashir, Botswana issued a press statement in which it indicated that it did not agree with the AU decision not to cooperate with the ICC. Botswana contended that it has treaty obligations to cooperate with the ICC in the arrest and surrender of Omar Al Bashir to the ICC to face trial.

Following Botswana’s expression not to support the AU decisions, South Africa also made it categorically that it will support the ICC on the question of Omar Al Bashir. On 31 July 2009, Dr Ntsaluba (South African Minister for Foreign Affairs) explained that South Africa is a state party to the Rome Statute and therefore it is obliged to cooperate with the ICC. The Minister further stated that article 27 of the Rome Statute rejects immunity of state officials, comparing article 27 of the Rome State with section 4(1) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.<sup>75</sup> The effect of this position is that if Omar Al Bashir visits South Africa, he can be arrested and surrendered to the ICC or prosecuted in South Africa for crimes within the jurisdiction of the ICC and South African courts.

Equally, contending on the cooperation with the ICC and obligations arising from the Rome Statute to which is a state party, Uganda indicated its position that it would arrest Omar Al Bashir, should he step on the Ugandan territory. This means that despite the AU collective decisions, individual states can proceed to arrest Omar Al Bashir in their own territories, doing so under the Rome Statute and national laws imposing obligations to arrest and surrender suspects of international crimes. In July 2010, during the 15<sup>th</sup> AU Summit held at Kampala, the AU took a decision once again not to cooperate with the

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<sup>74</sup> A letter dated 8 July 2009 from the Minister of Foreign Affairs and International Cooperation of the Republic of Botswana to Justice Sany-Hyun Song, President of the ICC.

<sup>75</sup> M du Plessis (2010)16.

ICC in respect of arrest and surrender of Omar Al Bashir of Sudan, and rejected the request by the ICC to open a Liaison Officer to the AU in Addis Ababa, Ethiopia.<sup>76</sup>

However, as the preceding examples indicate, the AU decisions not to cooperate with the ICC on the arrest warrant issued against Omar Al Bashir are not free from criticism. African Non-Governmental Organisations raised concerns over the decision of the AU on Omar Al Bashir, reminding African states of their obligations under the Rome Statute, to which some are states parties.<sup>77</sup> The statement issued by representatives of African Civil Society Organisations called upon African states parties to the Rome Statute 'to reaffirm their commitment to end impunity for serious international crimes and uphold the values of accountability, protection of human rights and the rule of law, as espoused in the AU's Constitutive Act.'<sup>78</sup> African states parties to the Rome Statute were also called upon to 'reaffirm [their] commitment to uphold (...) international and domestic obligations stemming from [their] decision to ratify the Rome Statute of the ICC.'<sup>79</sup>

In South Africa, a group of NGOs as well as individuals petitioned the President of South Africa, Jacob Zuma, to remind the government that South Africa is a state party to the Rome Statute<sup>80</sup> and has enacted a law implementing the Rome Statute,<sup>81</sup> and therefore that, that being the case, the South African government was obliged to adhere to international law obligations as recognised under the Constitution of South Africa, 1996.<sup>82</sup>

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<sup>76</sup> See, Press Release No.104, '15<sup>th</sup> AU Summit, Decisions of the 15<sup>th</sup> AU Summit', Addis Ababa, 29 July 2010, 6.

<sup>77</sup> See, 'Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's recent Decisions on Universal Jurisdiction and the work of the International Criminal Court in Africa', Cape Town, 11 May 2009. The meeting of the 39 representatives was convened by the Institute for Security Studies (ISS). The statement was issued ahead of the meeting of the African States Parties to the Rome Statute of the ICC convened by the AU Commission which took place from 8-9 June 2009, at Addis Ababa, Ethiopia.

<sup>78</sup> 'Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union's recent Decisions on Universal Jurisdiction and the work of the International Criminal Court in Africa', Cape Town, 11 May 2009, 3.

<sup>79</sup> As above.

<sup>80</sup> See, 'Statement by Civil Society Organizations and Concerned Individuals on South Africa's Support for the Decision by the AU to refuse Cooperation with the ICC', 15 July 2009.

<sup>81</sup> *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.*

<sup>82</sup> Sec 231, Constitution of the Republic of South Africa, 1996.

According to sections 231 and 232 of the Constitution of South Africa, international treaties are part of the law of South Africa. Since the Rome Statute is an international treaty, and South Africa has enacted a law implementing the Rome Statute, it is therefore trite to say that South Africa is under obligation to respect its obligations under the Rome Statute, the constitution and *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*. In essence, the South African government was under duty to cooperate with the ICC on the issue of Omar Al Bashir. According to the law in South Africa,<sup>83</sup> if Omar Al Bashir stepped on the territory of South Africa, South Africa is obliged to arrest him and hand him to the ICC for prosecution. Hence, as a state party, South Africa is under obligation to cooperate with the ICC on the arrest warrant of Omar Al Bashir. The Civil Society Organisations and individuals had called for unequivocal statement by the Government of South Africa to honour its obligations under the constitution and the *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

After the issuance of warrant of arrest for Omar Al Bashir, the AU echoed its voice that, whilst it did not tolerate impunity,<sup>84</sup> it nevertheless was concerned with the indictment and warrant of arrest issued by the ICC against Omar Al Bashir. The AU contended that arresting and possibly prosecuting Omar Al Bashir ‘would disrupt the peace process in Darfur.’<sup>85</sup>

The AU signaled its concerns that Omar Al Bashir was needed for the peace process in Darfur, and some authorities in Africa made allegations that the ICC is a creation of the Western powers or allies. It would appear that Africa had expressed its concerns that the ICC is largely portrayed as ‘imperialist’ imposition by powerful Western nations. But, it must be noted that the African Civil Society Organisations and members of the legal profession have diametrically argued that ‘this is a misleading and unproductive approach

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<sup>83</sup> *Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002*.

<sup>84</sup> ‘Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan’, Decision Assembly/AU/Dec.221 (XII), para 6 (stating that “The Assembly...Reiterates AU’s unflinching commitment to combat impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with its Constitutive Act”).

<sup>85</sup> Paras 2 and 3.



to the Court, and one which illustrates the urgent need to raise awareness about international criminal justice and how the ICC works throughout Africa.<sup>86</sup>

It is a fact that the concerns by the AU have been that – the ICC has only targeted African leaders and other African individuals, and that – it represents the neo-colonial influences. The AU also seems to argue that arresting or prosecuting some African state officials for international crimes interferes with sovereignty of African states. However, it is important to know from the authorities at the ICC on this issue of selecting or targeting only Africans. The President of the ICC, Judge Sang-Hyun Song, has dismissed this claim as being political. Judge Song strongly argued,

And those who do not know that the ICC has sought none of the four situations currently before it could be forgiven for thinking that the Court has intended to have particular focus on Africa. Where facts are well understood, the Court enjoys broad support. But where they are not, there can arise efforts to exercise political influence on the Court.<sup>87</sup>

Despite the above defensive statement by Judge Song of the ICC, the real issue is why the Prosecutor of the ICC has not indicted any of the leaders from Western powers such as USA, UK, France or Israel for their alleged crimes in Iraq and Palestine, or in Libya (during the war in Libya in 2011). This is for example, despite the authoritative reports, such as the one by Judge Richard Goldstone submitted to the UN with recommendations that the Prosecutor of the ICC should initiate legal investigation in respect of the international crimes committed by Israel state officials and military commanders in Palestine.<sup>88</sup>

Arguably, the Prosecutor of the ICC can invoke his investigatory powers as he did for the Kenyan situation under article 15 of the Rome Statute in investigating crimes committed

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<sup>86</sup> ‘Statement by Representatives of African Civil Society and the Legal Profession on the Implications of the African Union’s recent Decisions on Universal Jurisdiction and the work of the International Criminal Court in Africa’, Cape Town, 11 May 2009, 2.

<sup>87</sup> See, Remarks of Judge Sang-Hyun Song, President, International Criminal Court, made at a Seminar, ‘The International Criminal Court: Working for Africa’, Organised by the Institute for Security Studies, on 3 June 2009, at Pretoria, South Africa, 3.

<sup>88</sup> See, ‘Human Rights in Palestine and other Occupied Arab Territories’ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, Human Rights Council, Twelfth Session, Agenda Item 7, 25 September 2009, 1-452, paras 1-1979 and annexures. As noted before, Goldstone later retracted from the findings contained in that report.

in Palestine and Iraq. However, the only obstacle is that states such as Israel and USA (unlike UK) are not parties to the Rome Statute. Nevertheless, should the UN Security Council act under its Chapter VII powers as per the Charter of the United Nations and refer the Iraq and Palestine situations to the ICC, the Prosecutor will be mandated. But this assertion can easily be defeated by the Veto powers from both the UK and USA, states that authorised their armed forces to invade Iraq and thereby committing international crimes. As to Israel, it could be difficult for the UN Security Council to pass a resolution authorising the ICC Prosecutor to investigate crimes committed in Palestine. This is so because Israel is an ally to both the USA and UK, and therefore that, any such proposal in the Security Council is likely be vetoed by UK and USA.

The above part has demonstrated the real concerns raised by the AU regarding the indictment of President Omar Al Bashir of Sudan by the Prosecutor of the ICC. The following part presents criticism and challenges against the AU concerns based on international law principles.

#### **4.5 The African Union trend: A critique**

This study maintains that African states must not deviate from what they had voluntarily subscribed to in the establishment of the ICC.<sup>89</sup> It would be fair to argue that African states, including Sudan had participated in the initial processes leading to the creation of the ICC.<sup>90</sup> Sudan had signed the Rome Statute of the ICC<sup>91</sup> even though it has not ratified it, hence not a state party to the Rome Statute.

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<sup>89</sup> For a critical understanding on Africa's contribution to the creation of the ICC, see, SBO Gutto, 'Africa's contradictory roles and participation in the international criminal justice system' in Ankumah and Kwakwa (2005) 17-27.

<sup>90</sup> Remarks of Judge Sang-Hyun Song, President, International Criminal Court, made at a Seminar, 'The International Criminal Court: Working for Africa', Organised by the Institute for Security Studies, on 3 June 2009, at Pretoria, South Africa, 2.

<sup>91</sup> Sudan signed the Rome Statute of the ICC on 8 September 2000. But, on 27 August 2008, a few days after the indictment of President Bashir of Sudan, the Government of Sudan, through its Minister for Foreign Affairs, Deng Alor Koul, notified the Secretary-General of the United Nations that it does not intend 'to become a party to the Rome Statute', and therefore that it 'has no legal obligation arising from its signature on 8 September 2000.' Available at the UN treaties depository, <<http://treaties.un.org>> (accessed on 15 January 2010).

Several arguments are presented below against the AU's opposition to the issuance of an arrest warrant against Omar Al Bashir. It will be recalled that African states collectively in regional and sub-regional organisations had supported the establishment of the ICC. Besides, it is argued (as will be demonstrated below) that the Darfur situation was referred to the ICC by the UN Security Council. Further, thirty one African states are parties to the Rome Statute – which means that – such states are duty bound to cooperate with the ICC. It is also argued that the AU position not to cooperate with the ICC violates international law obligations arising from the Rome Statute. Additionally, it is argued below that the African states parties to the Rome Statute are obliged to prosecute and punish persons responsible for international crimes. This translates into cooperating in the arrest and prosecution of perpetrators of international crimes, including assisting the ICC in this regard. Further, it is argued that the AU's sentiment that only Africans are targeted by the ICC is countered by the fact that some African personalities occupy positions at the ICC and that African states may have failed to use complementarity principle. One must be mindful that although African states had ideally supported the establishment of the ICC, it is true that this does not mean they had accepted to be singled out by the ICC in its operation. While sympathising with African states in the way the operation of international justice has apparently taken shape in the ICC, it is appropriate to consider arguments countering the opposition raised by the AU as discussed below.

#### **4.5.1 African regional and sub-regional organisations supported the ICC**

Although African states have now turned against the ICC, it must be noted that African states had played a great role in the establishment of the ICC. Below is a clear indication of the previous initiative by African states. The African states through regional and sub-regional groupings had expressed desire for the establishment of the ICC. Both SADC and OAU (now AU) had taken steps towards achieving this goal. It should be recalled that on 14 September 1997, legal experts from the SADC member states met in Pretoria, South Africa and formulated ten principles<sup>92</sup> for the establishment of the ICC.<sup>93</sup> The

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<sup>92</sup> SADC Principles of Consensus and Negotiations, formulated on 14 September 1997, available at <<http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html> > (accessed on 27 September 2010).

experts from SADC had met to discuss their negotiation strategies and agree on a common position. This meeting served as an impetus for an Africa wide consultation process on the establishment of the ICC. The principles adopted were then transmitted for review to SADC Ministers of Justice and Attorney-Generals.<sup>94</sup> The SADC Ministers of Justice and Attorney-Generals adopted a common statement which later became an instruction manual for SADC's negotiations.<sup>95</sup> The statement affirmed the commitment of SADC to an early establishment of an independent and impartial court which is an effective complement to national criminal justice systems, with an equitable geographical composition.<sup>96</sup> SADC also believed that the ICC was necessary for peace and security.<sup>97</sup> It also believed that the ICC should have inherent jurisdiction in respect of core international crimes of genocide, war crimes and crimes against humanity.<sup>98</sup>

Further, it was the SADC's position that the court should have competence to determine admissibility of cases regarding the inability, unwillingness and unavailability of national criminal justice with regard to international crimes.<sup>99</sup> Moreover, SADC believed that court must respect human rights of victims and accused persons before it.<sup>100</sup> SADC had warned that the court must not be subjected to the United Nations Security Council for it could cause a political influence on the court.<sup>101</sup> Most importantly, SADC, including Zimbabwe had urged states to cooperate with the court, and encouraged member states to

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<sup>93</sup> SADC was the first sub-regional organisation in Africa to formulate and agree on a set of principles of consensus for an effective ICC.

<sup>94</sup> For an exhaustive discussion on the SADC Principles, including the relevant attachment of the text of the Common Statement issued by SADC Ministers of Justice and Attorney-Generals, see, S Maqungo, 'The establishment of the International Criminal Court: SADC's participation in the negotiations' (2000) 9(1) *African Security Review* 42, available at <<http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html> > (accessed on 27 September 2010).

<sup>95</sup> S Maqungo, 'The African contribution towards the establishment of an International Criminal Court' in AA Yusuf (2000) 8 *African Yearbook of International Law*, 333-350. The ten principles of SADC are listed at 335-336, fn.6 thereof.

<sup>96</sup> Common Statement issued by SADC Ministers of Justice and Attorney-Generals, 1997, para 1, available at <<http://www.iss.co.za/pubs/asr/9No1/InCriminalCourt.html>> (accessed on 27 September 2010).

<sup>97</sup> Para 2.

<sup>98</sup> Para 3.

<sup>99</sup> Para 4.

<sup>100</sup> Paras 5-6.

<sup>101</sup> Para 8.

participate fully in the Rome Conference in order to finalise and adopt a Statute for the establishment of the court.<sup>102</sup>

The SADC principles called for automatic jurisdiction over international crimes of genocide, crimes against humanity and war crimes. They also called for an independent Prosecutor with power to initiate proceedings *ex officio*; full cooperation of all states with the ICC at all times; and adequate funding for the court. The African states had also ‘banded together to ensure the court’s independence.’<sup>103</sup> In principle, African states had rejected proposals that the ICC be placed under control of the United Nations Security Council.<sup>104</sup>

The SADC meeting was later followed by the meeting of the representatives of African governments in Dakar, Senegal from 5 to 6 February 1998 to discuss the establishment of the ICC. The Dakar Declaration on the ICC was adopted drawing largely from the SADC principles, and called for an early establishment of an effective and independent ICC.<sup>105</sup> The Dakar Declaration on ICC called for an independent ICC free from the UN Security Council; fair trial and rights of suspects and accused persons; and prosecution of individuals for international crimes when national courts proved unable and unwilling to prosecute. The Dakar Declaration on ICC was later to be acknowledged by the OAU Council of Ministers at its meeting on 27 February 1998, which appealed to all OAU member states to support the creation of the ICC.

The resolution of the OAU Council of Ministers was later approved by the OAU Summit of Heads of State and Governments at a meeting in Burkina Faso in June 1998.<sup>106</sup> It

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<sup>102</sup> Paras 9-13.

<sup>103</sup> Remarks by the President of the ICC, Judge Sang-Hyun Song, made at a Seminar, ‘The International Criminal Court: Working for Africa’, Organised by the Institute for Security Studies, on 3 June 2009, at Pretoria, South Africa, 4.

<sup>104</sup> As above.

<sup>105</sup> On the historical overview on the events and calls by African states leading to the establishment of the ICC, see, P Mochochoko, ‘Africa and the International Criminal Court’ in Ankumah and Kwakwa (2005) 241-258, 245.

<sup>106</sup> Mochochoko in Ankumah and Kwakwa (2005) 248-249.

would seem that, for Africa, the ‘establishment of the ICC was a matter of priority’<sup>107</sup> because it could strengthen measures adopted by African states in combating human rights violations, and thus peace and security. Former Prime Minister of Senegal had also said that ‘Africa needs a court that can deter and punish genocide and crimes against humanity since these are major human tragedies and obstacles to Africa’s economic and social development.’<sup>108</sup> Probably, African efforts towards establishing the ICC were a result of past history on the continent, particularly the events in Rwanda in 1994.

Even after the Rome Statute was adopted, some African states had recognised the necessity and importance of the ICC such that they mobilised themselves to take measures to ensure effective ratification and implementation of the Rome Statute. For instance, member states of the International Conference on the Great Lakes Region had in 2006 adopted a Protocol,<sup>109</sup> which called for ratification and implementation of the Rome Statute in national jurisdictions<sup>110</sup> and cooperation with the ICC.<sup>111</sup>

It can be said that the Protocol contributed to the ratification of the Rome Statute of the ICC by member states to the International Conference on the Great Lakes Region, except for Angola, Rwanda and Sudan. These states are non-parties to the Rome Statute of the ICC. So, given that member states to the Protocol have clear obligations to cooperate with the ICC, it is trite that by participating in the decisions of the AU not to cooperate with the ICC such states have breached their international obligations arising from the Protocol. An alarming fact is when Kenya defied its obligation to cooperate with the ICC in respect of the arrest warrant issued for Omar Al Bashir (who visited Kenya in August

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<sup>107</sup> Tiyanjana Maluwa, the then OAU legal Counsel, had said on behalf of the OAU at the opening of the Rome Conference: “From the OAU’s point of view, the adoption of the statute establishing the international criminal court should not be delayed a day longer than necessary.” See, *Speeches and Statements at the Opening of the Rome Conference on 17 June 1998*. But see also, Mochochoko in *Ankumah and Kwakwa* (2005) 242, fn 3 where this statement is quoted.

<sup>108</sup> Statement of Senegalese Prime Minister, Habib Thiam at the Close of the Dakar Conference, 5-6 February 1998. The Dakar Conference was attended by 24 African states.

<sup>109</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, 1996 (Protocol on International Crimes). See Part 4.3.1 of this chapter above for further discussion on the Protocol.

<sup>110</sup> See arts 9-11, Protocol on International Crimes.

<sup>111</sup> Arts 21-25, Protocol on International Crimes.

2010). By this, Kenya actually breached its clear international law obligations under the Rome Statute, the Protocol and its domestic law implementing the Rome Statute.<sup>112</sup>

#### **4.5.2 African states had hailed the establishment of the ICC**

By supporting the establishment of the ICC, African states favoured the world-wide move against a culture of impunity for international crimes. More importantly, African states were among the first to become states parties to the Rome Statute. Senegal became the first state party to the Rome Statute after it ratified the statute on 2 February 1999. Even more interesting is the fact that when the Rome Statute was adopted and opened for signature, some African states, particularly Zambia and Zimbabwe signed the treaty on the same day, that is, 17 July 1998. Some African states had held key positions in the Drafting and Preparatory Committees of the Rome Statute. South Africa, Lesotho and Zambia had participated in leading such groups. Siyuvule Maqungo has documented how the African states were generally represented in all the structures of the Rome Conference. Notable in this case, is ‘Egypt which chaired the Drafting Committee and Lesotho was a member of the Bureau of Committee of the Whole.’<sup>113</sup> South Africa’s Peter Kruger was responsible for coordinating the Working Group on International Cooperation and Judicial Assistance at the Preparatory Committee. During the Rome Conference, this duty was given to Mr Phakiso Mochochoko of Lesotho. Medard Rwelamira of South Africa coordinated the Working Group on Organisational Questions (Composition and Administration of the Court).<sup>114</sup>

Studying the issues and negotiations for the ICC, it is apparent that African states had hailed the establishment of the ICC. Roy Lee has documented views and comments by all governments,<sup>115</sup> including African governments on the establishment of the ICC. This study considers it useful to examine the African views, which are pertinent to the

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<sup>112</sup> *International Crimes Act*, 2008, discussed in Ch 5, on Kenya.

<sup>113</sup> Maqungo in Yusuf (2000) 339, fn 14 thereof.

<sup>114</sup> For different roles held by African states, see, Maqungo in Yusuf (2000) 338.

<sup>115</sup> See, RS Lee (Ed.), *The International Criminal Court: The making of the Rome Statute, issues, negotiations, results* (1999) 573-639. This paper adopts the views of African states as presented in extract form by Roy Lee who was the Executive Secretary of the Diplomatic Conference and Secretary of the Preparatory Committee on the Establishment of an International Criminal Court.

discussion at hand, as presented by Roy Lee. Much reliance is placed on the extracts of statements of views and comments of African states as presented.

Algeria had expressed its position that it ‘always longed for such Court, and ‘had always been committed to its achievement.’<sup>116</sup> Benin contended that, ‘[t]he adoption of the Statute was historic. Benin would have preferred action by consensus. Africa would welcome the adoption of the Statute as it had for centuries suffered the most heinous crimes, such as slavery.’<sup>117</sup> Botswana viewed the Rome Statute as a landmark in the history of the United Nations and mankind. It ‘supported the adoption of the Statute because it reflected consensus, and believed future generations should be able to perfect it.’<sup>118</sup> Burkina Faso indicated that on the basis of its jurisdiction, its permanence and its universal in character, the court would provide an appropriate legal framework for the punishment of all grave breaches of fundamental rights. It also expressed that the court would eliminate the need for recourse to *ad hoc* tribunals.<sup>119</sup> Cameroon welcomed the consensus on the complex principle of complementarity, but had suggested that the relation between the ICC and the Security Council should be one of cooperation and complementarity insofar as the court’s purpose was to reinforce the Security Council’s action in fulfilling its mandate under Chapter VII of the Charter of the United Nations.<sup>120</sup>

Ghana indicated that the Rome Conference marked an important stage in efforts to establish a legal institution for prosecuting perpetrators of genocide, crimes against humanity, war crimes and serious violations of international humanitarian law. It also stated that ‘with the adoption of the Rome Statute, the international community had scored a historic victory.’<sup>121</sup>

Kenya welcomed the idea of having the ICC, and recognised the ‘contributions made by the Non-Governmental Organisations to the work of the Preparatory Committee and the

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<sup>116</sup> Lee (1999) 573 (citing Press Release, L/Rom/22, 17 July 1998).

<sup>117</sup> Lee (1999) 577 (citing, Press Release, L/Rom/22, 17 July 1998).

<sup>118</sup> Lee (1999) 577.

<sup>119</sup> Lee (1999) 579, referring to Doc. A/C.6/53/SR.12, 22 October 1998.

<sup>120</sup> Lee (1999) 583, citing A/C.6/53/SR.12, 22 October 1998.

<sup>121</sup> Lee (1999) 594.



Diplomatic Conference.’<sup>122</sup> Kenya went further to suggest that the experience at the ICTY and ICTR be used by the ICC. The Nigerian delegation at the Rome Conference was ‘convinced that the establishment of the ICC would contribute towards the maintenance of international peace and security.’ As such, it called upon the international community to take all possible measures to ensure that the court came into operation without unnecessary delay.<sup>123</sup> Senegal welcomed the adoption of the Rome Statute in July 1998 in that such event marked an important stage in the international community’s efforts to build a world of justice and peace. Particularly, Senegal was concerned that ‘in the twentieth-century, too many acts of violations had gone unpunished’, which was why it supported the process of establishing the ICC. Indeed, Senegal was the first African state to sign the Rome Statute.<sup>124</sup>

Speaking on behalf of the SADC, South Africa welcomed the adoption of the Rome Statute, which would ‘serve notice to those responsible for acts of genocide and other serious crimes that the culture of impunity was at an end.’<sup>125</sup> South Africa sent a message that the international community would no longer stand by and watch the perpetration of ‘horrendous crimes.’ It was South Africa’s belief that the Rome Statute ‘would serve as a reminder that even during armed conflicts the rule of law must be upheld.’ South Africa urged states to ratify the Rome Statute, and encouraged states that had voted against the adoption of the Rome Statute to put aside their misgivings and contribute to the establishment of the court. South Africa stated that it was necessary that there is impartiality, effectiveness and universality in the court. Lesotho aligned with the position stated by South Africa. It stressed the significance of adopting the Rome Statute. It urged for a compromise to be reached on the court’s jurisdiction, principle of complementarity, independence of the prosecutor and prohibited any reservations to be entered against provisions of the Rome Statute.<sup>126</sup> Equally, Zimbabwe associated itself with a statement

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<sup>122</sup> Lee (1999) 604-605.

<sup>123</sup> Lee (1999) 612.

<sup>124</sup> Lee (1999) 619-620.

<sup>125</sup> Lee (1999) 622-623, extracting the statement from A/C.6/53/SR.9, 20 October 1998.

<sup>126</sup> Lee (1999) 606-607, extracting the statement from A/C.6/53/SR.11, October 1998.

made by South Africa on behalf of SADC. It preferred ‘an independent, impartial court with automatic jurisdiction over the core crimes, including the crime of aggression.’<sup>127</sup>

Sudan spoke on behalf of the Arab Group of States. It expressed the point that the ICC ‘must try every criminal that commits a crime against humanity.’<sup>128</sup> But indications were that the Arab states were not happy with the Rome Statute. They wanted the crime and act of aggression and nuclear weapons to be prohibited by the Statute. Also, concerns were that the Rome Statute could give power to the Security Council instead of the General Assembly. The Arab states wanted reservations to the Statute to be allowed. However, regarding Sudan’s own position, it was principally ‘to support judicial and other forms of peaceful settlement of disputes.’ Sudan expressed the concerns ‘whether it would be possible for the ICC to indict and try aggressors, or whether the principle of no impunity would be applied selectively to try only weak and absolve the strong. Sudan insisted that the ICC be independent from the Security Council and that the crime of aggression be included in the crimes falling within the competence of the ICC.’<sup>129</sup>

Egypt called for the establishment of the ICC contending that the Arab world would need such a court, as acts of the perpetrator went unpunished. It accepted the text of the Rome Statute with some reservations for the need to include the use of weapons of mass destruction such as nuclear weapons, and the definition of aggression. Egypt indicated that determination of aggression should be under the purview of the General Assembly. Despite these, Egypt remained optimistic that the ICC would punish war crimes, genocide, crimes against humanity and protect children in situations of armed conflict.<sup>130</sup>

In addition, other African states such as Uganda, Sierra Leone, Democratic Republic of Congo, Djibouti, Ivory Coast, Guinea, Malawi and Tanzania, supported the establishment of the ICC. Tanzania associated with the statement made by South Africa on behalf of SADC. But, Tanzania wanted criminal responsibility to be imputed to legal entities.

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<sup>127</sup> Lee (1999) 637.

<sup>128</sup> Lee (1999) 624-625.

<sup>129</sup> Lee (1999) 624, referring to A/C.6/SR.12, 22 October 1998.

<sup>130</sup> Lee (1999) 591-592.

Tanzania's position was informed by the genocide in Rwanda.<sup>131</sup> It can be said that if all these African states had supported the establishment of the ICC, any opposition against the ICC is not justified in law.

#### **4.5.3 The Darfur Situation was referred to the ICC by the UN Security Council**

Although the referral of the situation in Darfur sparks debates as to the impartiality of the Security Council and the issue of double standards against Africa, it is important to understand that the Darfur Situation was referred to the ICC by the United Nations Security Council by its resolution 1593 of 2005, well within the jurisdiction of the ICC in accordance with the Rome Statute.<sup>132</sup> The referral was an implementation of the recommendations contained in the report of the International Commission of Inquiry on Darfur of 2005. The Security Council did so because it considered the judicial bodies in Sudan unable to do justice to the victims because the state authorities were unwilling and had therefore, failed to utilise the opportunity accorded to them through article 17 of the Rome Statute on complementarity principle. Under this principle, states enjoy the supremacy over prosecution of international crimes within the jurisdiction of the ICC. It is only when states have genuinely failed or are unwilling that the ICC can exercise its jurisdiction.

It must be recalled, the Sudanese authorities failed to conduct meaningful trials for perpetrators of international crimes in Darfur, and where there were prosecutions, such prosecutions were not genuine as such. This is why the Prosecutor of the ICC had to proceed against individuals responsible for the crimes committed in Darfur. Therefore, the AU should desist from levelling allegations against the ICC because the ICC is not meant to target Africans only.

As observed above, except for the situation in Kenya, all current situations before the ICC have actually been referred to the court by the African states and the United Nations Security Council. Again, it can be rightly argued that the Prosecutor of the ICC had

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<sup>131</sup> A/C.6.53/SR.9, 21 October 1998.

<sup>132</sup> Art 13(b), Rome Statute.

followed all the necessary legal requirements and procedures stipulated under the Rome Statute in seeking the court's order to issue a warrant of arrest against Omar Al Bashir of Sudan.<sup>133</sup> The Prosecutor of the ICC had established that there were reasonable grounds to believe that Omar Al Bashir bears criminal responsibility for international crimes committed in Darfur.<sup>134</sup> As we have noted above, the Pre-Trial Chamber of the ICC was satisfied with the legal requirements set by the Rome Statute before it issued its decision allowing the Prosecutor's motion to issue a warrant of arrest for Omar Al Bashir for crimes against humanity, genocide and war crimes committed in Darfur.

#### **4.5.4 Darfur and the question of immunity of serving state officials**

It is true that the indictment of Omar Al Bashir raises an important concern regarding immunity attaching to state officials. It should be recalled that the AU condemned the issuance of warrants of arrest for Omar Al Bashir on *inter alia*, the issue of sovereignty and immunity of state officials, as we have noted the statement by the then Chairman of the AU, President Bingu wa Mutharika. The contention by the AU is that the issuance of the warrants of arrest seems to ignore the rule on immunity as provided for under article 98 of the Rome Statute. One must recall that article 27 of the Rome Statute outlaws immunity. Further, although a plain interpretation of the Rome Statute seems to suggest that the court can only exercise its jurisdiction over individuals from states parties to the Rome Statute, it must be understood that the ICC was empowered by the UN Security Council through resolution 1593 of 2005 to proceed against individuals from Sudan. This is only possible under article 25 of the Charter of the United Nations.

Sudan, and by extension, individuals from Sudan, are bound by article 25 of the Charter of the United Nations and resolution 1593 of 2005. Arguably, an obligation in respect of Sudan arises not from the express provisions of the Rome Statute, but rather, from the decision and referral by the UN Security Council and article 25 of the Charter of the

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<sup>133</sup> Arts 53 and 58, Rome Statute.

<sup>134</sup> See, 'The Situation in Darfur, The Sudan', *Summary of the Case, Prosecutor's Application for Warrant of Arrest under Article 58 against Omar Hassan Ahmad Al Bashir*, Office of the Prosecutor, 1-32, available at <<http://www.icc-cpi.int>> (accessed on 15 January 2010).

United Nations. Hence, any immunity attaching to Sudanese state officials cannot apply under article 27 of the Rome Statute.

#### **4.5.5 The peace processes in African states and calls for deferrals**

One of the concerns raised by the AU is that the prosecutions at the ICC may affect peace process in Sudan and Kenya. This has been one of the reasons for calls for deferrals<sup>135</sup> of investigations and prosecutions in Sudan and Kenya respectively. This issue leads to the conclusion that the AU wants the UN Security Council to defer investigations in Sudan and Kenya and that such call should be seriously considered. It also seems that peace could prevail over the search for justice in African states. One must not undermine the role of international justice. Arguably, the search for peace has to go hand in hand with the search for justice. International crimes cannot be met with impunity as stressed in article 4(h), 4(m) and 4(o) of the Constitutive Act of the African Union.

It should be recalled that the ratification of the Rome Statute by African states defeats the purposes of calls for deferrals of investigations or prosecutions. Demands for deferrals must be supported by convincing evidence that prosecutions or investigations could threaten international peace and security. Even if deferrals could be the course, this does not mean that perpetrators of international crimes may escape justice. One has to weigh the evidence in favour of prosecution and that of a deferral. Regarding the situation in Darfur, it is true that serious international crimes were committed and that, the Commission of Inquiry on Darfur had found that Sudan had not commenced high profile prosecutions. Further, it is apparent that Sudan has refused to cooperate with the ICC in arresting and surrendering suspects of international crimes in Darfur. It should be understood that calls for deferrals by the Security Council do not indicate any possibility for Sudan to prosecute responsible persons for international crimes, despite arguments based on ensuring peace processes in Darfur.

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<sup>135</sup> For a detailed study on deferrals under article 16 of the Rome Statute, see D Akande, M du Plessis and CC Jalloh 'An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC', Position Paper, Institute for Security Studies, Pretoria, 2010, 1-30.

Given that Sudan and Kenya have failed to prosecute persons responsible for international crimes, why should the two states be given the opportunities through deferrals? There is no clear indication at present to suggest that the deferrals might give rise to the domestic criminal prosecutions. In this regard, it is argued that requests by the AU for the deferrals should not be honoured because they do not show how the ongoing prosecutions are likely to jeopardise international peace and security. The only avenue left for Kenya and Sudan is the exercise of powers given to the Prosecutor under article 53 of the Rome Statute. This is a discretionary power conferred to the Prosecutor of the ICC and must require the proof of interests of justice before the Prosecutor can halt investigations or prosecutions. However, the Rome Statute seems to favour prosecution than deferrals, and that is why the ICC was established as such. It is thus recommended that calls for deferrals should not be taken to defeat the demand for justice. The AU should demonstrate genuinely that Kenya or Sudan can genuinely institute domestic criminal prosecutions which might perhaps frustrate the work of the ICC.

#### **4.5.6 Some African states are states parties to the Rome Statute**

The AU position against the ICC is flawed in law because the African states were instrumental to the establishment of the ICC.<sup>136</sup> At the time of writing, a total of thirty one African states are parties to the Rome Statute.<sup>137</sup> The last state to ratify the Rome Statute is Seychelles. These states ratified the Rome Statute and some of them, particularly South Africa, Kenya, Burundi, Uganda, Burkina Faso, Niger and Senegal, have enacted national laws recognising the competence of the ICC over international

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<sup>136</sup> However, it can also be argued that supporting the establishment of the ICC does not necessarily lead to acceptance of the outcome of the court prosecutions.

<sup>137</sup> As of May 2011, African states parties to the Rome Statute of the ICC are thirty one: Benin (ratified the Rome Statute on 22 January 2002); Burkina Faso (30 November 1998); Ghana (20 December 1999); Mali (16 August 2000); Lesotho (6 September 2000); Botswana (8 September 2000); Sierra Leone (15 September 2000); Gabon (20 September 2000); South Africa (27 November 2000); Nigeria (27 September 2001); Central African Republic (3 October 2001); Mauritius (5 March 2002); Senegal (2 February 1999); Niger (11 April 2002); Democratic Republic of Congo (11 April 2002); Uganda (14 June 2002); Namibia (20 June 2002); The Gambia (28 June 2002); United Republic of Tanzania (20 August 2002); Malawi (19 September 2002); Djibouti (5 November 2002); Zambia (13 November 2002); Guinea (14 July 2003); Congo (3 May 2004); Burundi (21 September 2004); Liberia (22 September 2004); Kenya (15 March 2005); Comoros (18 August 2006); Chad (1 January 2007); Seychelles (October 2010) and Madagascar (14 March 2008) and Seychelles. This information is available at <<http://www.icc-cpi/int/Menu/ASP/statutes+parties>> (accessed on 29 August 2010).

crimes.<sup>138</sup> As such, these states are under obligation to provide full cooperation with the ICC in all aspects as enshrined under the Rome Statute of the ICC. Besides, by incorporating the Rome Statute into national laws, such states are under obligation to prosecute international crimes or arrest and surrender suspects of international crimes, such as President Bashir of Sudan, to the ICC to face justice. Some African states, although not yet parties to the Rome Statute of the ICC, had nevertheless signed the Rome Statute of the ICC.<sup>139</sup> Such states had signified their commitment to the ICC in the prosecution of international crimes. So, there is no genuine objection by the AU to the arrest warrant issued for Omar Al Bashir issued by the ICC.

#### **4.5.7 African states have the duty to prosecute and punish international crimes**

It should be understood that African states have an international obligation to prosecute and punish perpetrators of international crimes. Such obligation stems from the Rome Statute,<sup>140</sup> customary international law and other international law treaties.<sup>141</sup> However, critics may argue that the Rome Statute does not contain an express universal jurisdiction provisions. Nonetheless, it is an international law obligation for states to either prosecute or punish international crimes<sup>142</sup> (*aut dedere aut judicare*).<sup>143</sup> This is what is known as the duty to prosecute or punish individuals who commit international crimes. It must be

<sup>138</sup> South Africa, Senegal, Burundi, Niger, Burkina Faso, Uganda and Kenya have enacted laws to prosecute and punish crimes under the Rome Statute.

<sup>139</sup> Such states are the following: Algeria (signed the Rome Statute of the ICC on 28 December 2000); Angola (7 October 1998); Cameroon (17 July 1998); Cape Verde (28 December 2000); Cote d'Ivoire (9 November 1998); Egypt (26 December 2000); Eritrea (7 October 1998); Guinea-Bissau (12 September 2000); Morocco (8 September 2000); Mozambique (28 December 2000); Sudan (8 September 2000) and Zimbabwe (17 July 1998).

<sup>140</sup> The Preamble to the Rome Statute states that:

'[...] Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes [...]

<sup>141</sup> See, The Genocide Convention, arts I and IV; The Convention against Torture, 1984, arts 5 and 7; The Geneva Conventions, 1949; ICCPR, art 2(3); International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, art 3.

<sup>142</sup> G Robertson, (2002) *Crimes against humanity: The struggle for global justice*, 265-268.

<sup>143</sup> For an understanding of '*aut dedere aut judicare*', see, MC Bassiouni and EM Wise (1995) *Aut dedere aut judicare*; A Cassese, (Ed), (2009) *The Oxford Companion to International Criminal Justice*, 253-254.

recalled that such obligation has attained the status of *jus cogens* under customary international law. This is an obligation *erga omnes*. The ICJ has held that this obligation is contained in the Genocide Convention and had found Serbia in violation of article 1 of the Genocide Convention by failing to arrest and surrender to the ICTY, persons wanted by that tribunal for genocide committed in Srebreniča.<sup>144</sup> Hence, African states have an international law obligation to cooperate with the ICC in arresting Omar Al Bashir of Sudan to be prosecuted by the court.

After the above discussion, it is important to note yet another key factor why the African states should not perceive that their leaders are being targeted by the ICC as such. It is a fact that some of the Africans serve in the ICC as discussed below.

#### **4.5.8 African personalities occupy positions at the ICC**

It is valid to argue that as at 2011, there are five Judges from African states, and that the Deputy Prosecutor and the First Vice-President of the ICC are from African states. Some Judges from African states sit in the Appeals, Trial and Pre-Trial Chambers. These Judges include Joyce Aluoch (Kenya), Sanji Mmasenono Monageng (Botswana), Daniel Ntanda Nsereko (Uganda), and Fatoumata Dembele Diarra (Mali).<sup>145</sup> So, the African Union must not complain that only Africans are being targeted by the ICC. Conversely, it would seem that if indicted by the Prosecutor of the ICC, some African individuals, including state officials, would be tried before their fellow Africans. Perhaps it would be right to ask: *what do African states want?* The only possible speculation is that these states want to try perpetrators of international crimes within Africa in the name of justice for Africa. This can only be achieved once there are legal and institutional frameworks in Africa, which at present are still debated in Africa.

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<sup>144</sup> See, *Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v Serbia and Montenegro)*, ICJ Reports (2007), paras 439-450.

<sup>145</sup> International Criminal Court, <<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/>> (accessed on 13 August 2010); International Criminal Court, 'Fifth Annual Report, August 2008-July 2009' (2009) *Hague Yearbook of International Law* 141-158, 157.



In conclusion, it is wrong for the African Union to refuse to cooperate with the ICC in respect of the arrest warrant issued by the ICC. There is no legal authority to support the AU's decisions, except on political grounds and African partisanship or solidarity. Perhaps it could be right to assert that African states perceive the ICC as targeting their leaders due to the fact that the Prosecutor of the ICC has not been able to indict leaders of powerful nations, who may as well bear the same responsibility for international crimes as some leaders of African states.

#### **4.6 Conclusion**

In this chapter, it has been shown that there is generally no legal mechanism in the African continent that addresses the question of prosecution of international crimes and immunity of state officials at regional level. This is despite the 2005 resolution by the African Commission on Human and Peoples' Rights to end impunity in Africa and implement the Rome Statute. However, 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 the Great Lakes Region) is the only sub-regional mechanism that exists, and renders a very useful example for Africa which the AU should imitate.

In summary, arguments presented by the AU against the ICC are based on imperialism, selective justice of targeting only Africa, peace processes, that the Security Council has ignored the calls for deferrals, that the Security Council has acted with double standards, and finally that, the issue of immunity attaching to Sudanese or Kenyan state officials arise in the cases before the ICC. All these arguments are credible in some way. It is true that at least geographically, the only cases and accused persons before the ICC as of 2011 come from Africa. It is also true that the case against President Omar Al Bashir of Sudan raises immunity concerns. True is also the fact that the Security Council has not yet referred situations such as those in Gaza, Iraq and Georgia to the ICC. There is serious concern that even if proposals were to be tabled before the Security Council for such referrals, there is imminent danger of the exercise of veto powers by states like US and UK, which are responsible for the crimes committed in Iraq.

While the preceding arguments are valid, this study opposes them. Legally, arguments against cooperation with the ICC are flawed in law because some African states are parties to the Rome Statute. Besides, by refusing to cooperate with the ICC over prosecution of President Omar Al Bashir, African states have violated their obligations in respect of cooperation in the arrest and surrender of suspects to the ICC,<sup>146</sup> the Constitutive Act of the AU as well as customary international law. The AU has not proved that Kenya and Sudan can effectively commence domestic criminal prosecutions in order that the Security Council may defer such situations. Moreover, deferrals do not necessarily do away with prosecutions before the ICC; they are only temporal suspension of prosecutions or investigations. This means that if national authorities do not act genuinely, the ICC can allow investigations and prosecutions.

It is not clear whether by refusing to cooperate with the ICC over President Omar Al Bashir, the AU protects immunity of African state officials for international crimes, or it rejects impunity as per article 4(h), 4(m) and 4(o) of the Constitutive Act of the African Union. There is need for the AU member states, especially those which are parties to the Rome Statute, to support the ICC as per the Rome Statute, particularly under article 87(6) thereof.

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<sup>146</sup> See, arts 86-93, Rome Statute.