The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation?

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Abstract

The International Criminal Court (ICC) was set up by virtue of the Rome Statute to prosecute and punish core crimes – genocide, crimes against humanity, war crimes and crimes of aggression. The ICC has jurisdiction over such crimes in States Parties to the Rome Statute, and other States whose situation is referred to it by the Security Council. To date, the ICC has opened 18 cases in 8 situations which are all from Africa. As a result, some African leaders complained that the ICC has unfairly targeted Africans and described the Court as "a Court of Western countries." The African Union has also referred the ICC as an impediment to peace, and has eventually called African ICC member States for non-cooperation with the Court. This article thus explores the relationship between the ICC and Africa, and examines some criticisms of the Court in the exercise of its jurisdiction in Africa.

Key Terms: ICC, Africa, States Parties, the Rome Statute, core crimes, human rights, contribution, cooperation, confrontation

1. Introduction

On 17 July 1998, the International Criminal Court (hereinafter ICC) was founded with potentially worldwide jurisdiction pursuant to the Rome Statute. At the time of drafting and adoption of the Statute at the Rome conference, African States played a pivotal role in shaping and supporting the creation of the ICC. As can be seen later, the support of the Court by African States was further expressed in terms of ratification. Several African countries are parties to the Rome Statute.

The Rome Statute has granted the ICC jurisdiction over genocide, crimes against humanity, war crimes and the crimes of aggression. To date, 18 cases in 8 situations have been brought before the ICC from Uganda, the Democratic Republic of Congo, the Central African Republic, Mali, Sudan,

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Libya, Kenya and Cote d'Ivoire.[1] All the cases have been from African countries. As a result, the Court has been accused of 'exclusively' targeting Africans and losing its impartiality in the continent. In particular, following the issuance of arrest warrant for the sitting president of Sudan – Al Bashir, some African leaders have said that the ICC is a "mechanism of neo-colonialist policy used by the West against free and independent countries."[2] In this regard, the African Union (AU) has also expressed its deep concern over arrest warrants, and undertaken initiatives that undermine the Court, including calling for non-cooperation by AU members States in the arrest of President Al Bashir.[3] It now appears that the relationship between the ICC and Africa is somewhat strained.

This being so, this article intends to explore the underlying reasons for current coarse relationship between the ICC and Africa, and examine some of the major criticisms launched against the Court in this regard. The article proceeds as follows. Section 2 focuses on the creation of the ICC and on its mandates. This involves an overview of the birth and structure of the ICC, and examination of issues related to jurisdiction and the principle of complementarity. Section 3 explores what African States have contributed to

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[1] *The Prosecutor v.Thomas Lubanga Dyilo*, *The Prosecutor v. Germain Katanga, The Prosecutor v. Bosco Ntaganda*, *The Prosecutor v. Callixte Mbarushimana, The Prosecutor v. Sylvestre Mudacumura*, *The Prosecutor v. Mathieu Ngudjolo Chui* from Democratic Republic of Congo*; The Prosecutor v. Jean-Pierre Bemba Gombo* from Central African Republic*; The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* from Uganda*; The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, *The Prosecutor v. Bahar Idriss Abu Garda*, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, *The Prosecutor v. Abdel Raheem Muhammad Hussein* from Sudan*; The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, *The Prosecutor v. Uhuru Muigai Kenyatta* from Kenya*; The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* from Libya*;* and *The Prosecutor v. Laurent Gbagbo*, *The Prosecutor v. Simone Gbagbo* from Côte d'Ivoire, available at: http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx, (last accessed on 23 April 2013)

[2] The International Criminal Court (the ICC) Issues Bashir arrest warrant (5th March, 2009), available at: http://www.aljazeera.com/news/africa/2009/03/20093412473776936.html, (accessed on 23 April 2013)

[3] Assembly of the AU, Assembly/AU/Dec.296 (XV), Kampala, 27 July 2010, paras 5, 8 and 9

the creation and advancement of the ICC, how African States have cooperated with the Court, and why their relationship with the Court turned out to be contentious. It also briefly discusses the reaction of Africa to the works of the Court in the Continent. In the last section, some concluding remarks follow.

2. The ICC at a Glance

2.1 The Birth of ICC

In the aftermath of World War II, the international community had faced two important concerns: 1) how to ensure the respect of human dignity in the future, and 2) how to deal with the holocaust. Regarding the first concern, the international community attempted to ensure the respect of human dignity and worth of human being by setting human rights standards as a common universal value system. These human rights standards have been embodied in the international human rights instruments, which in turn have marked the end of the exclusive States' jurisdiction over human rights issues. International human rights instruments have, therefore, internationalized human rights standards, and made them the concern of international community as a whole.

As a reaction to the second concern, the international community established the International Military Tribunals in Nuremberg (IMT, hereinafter Nuremberg Tribunal) and the International Military Tribunal for the Far East (IMTF, hereinafter Tokyo Tribunal) by virtue of London Charter on August 8, 1945 and Special Proclamation on January 19, 1946 respectively.[4] The Nuremberg and Tokyo tribunals were created to punish the perpetrators of World War II (German and Japanese officials) for crimes against peace, crimes against humanity and war crimes.[5]

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[4] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, pp. 93& 95. These tribunals were a response to the overwhelming horrors of the Nazi genocide in Europe and the Japanese crimes perpetrated during the wartime occupation of large parts of many South East Asian nations.

[5] Simi Singh, 'The Future of International Criminal Law: the International Criminal Court', *Touro International Law Review,* 2000, p. 2

The prosecution and punishment of the major Nazi and Japanese criminals sparked a flame of hope for a new system of international criminal justice.[6] However, in spite of the hope that trials after World War II would set a precedent for others, there was no early successor to the Nuremberg and Tokyo Tribunals to prosecute international crimes at the international level. Put differently, the international community was unable to transform the flame of hope into a lasting institution i.e. permanent international criminal court.

Concomitantly, the Cold War gave rise to massive crimes in Europe, Latin America, and Asia; Africa was still under the rule of colonialism and apartheid.[7] Sadly, the Security Council failed to address those atrocities through post-conflict justice mechanisms, for some States and commentators questioned if it had a power to set up tribunals within the scope of its mandate under Chapter VII of the UN Charter.[8] The Security Council did not act in pursuit of post conflict justice between 1948 and 1992. In effect, the world had to wait for almost half a century since Nuremberg and had to witness two genocide instances – first in the former Yugoslavia, and then in Rwanda – to create the *ad hoc* tribunals for Yugoslavia and Rwanda.[9]

In response to the two conflicts during 1990s (the Yugoslav wars of dissolution and the Rwandan genocide), the United Nations revived the idea of international criminal tribunals. In the end, the Security Council established two *ad hoc* international criminal tribunals to try perpetrators of the atrocities in the former Yugoslavia[10] and Rwanda[11]. Furthermore, the Security Council

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[6] *Id*

[7] Luis Moreno-Ocampo, preface, in Jose Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The Legal Regime of International Criminal Law*, IHL series, Martinus Nijhoff publishers, 2009, p. xv

[8] M. Cherif Bassiouni, 'Perspectives on International Criminal Justice', *Virginia Journal of International Law*, Vol.50:2, 2010, 272

[9] *Id*

[10] Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

has subsequently created mixed model tribunals for Sierra Leone, Kosovo, Timor-Leste, Cambodia, Bosnia and Herzegovinian, and Lebanon.[12]

The overall successes of the Yugoslavia and Rwanda Tribunals contributed to the emergence of the International Criminal Court even if the two *ad hoc* tribunals were limited both temporally and geographically to the conflicts in the former Yugoslavia and Rwanda respectively.[13] Indeed, the wish for a permanent court to judge the most heinous crimes in humanity had been repeatedly expressed throughout history, starting in 1872[14], and was manifested in the Nuremberg and Tokyo tribunals after World War II and the *ad hoc* tribunals of Rwanda (the "ICTR") and Yugoslavia (the "ICTY") in the 1990s. [15]

The question of a permanent international criminal court came back on to the United Nations' agenda and was taken up by the International Law Commission (ILC) in 1989. The International Law Commission responded by producing the draft Statute of the International Criminal Court. In the summer of 1998, over 160 countries met in Rome to negotiate the draft Statute of the ICC that would establish a permanent international criminal court. After five weeks of intense negotiations, the final text of the Statute (hereinafter the Rome Statute) was adopted by a vote of 120 to 7 (USA, Libya, Israel, Iraq,

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[11] Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

[12] M. Cherif Bassiouni, *supra note* 8, P. 272

[13] Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, P.34.

[14] Gustave Moynier, one of the founders of the International Committee of the Red Cross, presented a proposal to the International Committee of the Red Cross calling for the establishment by treaty of an international tribunal to enforce laws of war and other humanitarian norms on 3 January 1872. Until Moynier suggested a permanent court, almost all trials for violations of the laws of war were by ad hoc tribunals constituted by one of the belligerents – usually the victor – rather than by ordinary courts or by an international criminal court. He did not think that it was appropriate to leave judicial remedies to the belligerents because, no matter how well respected the judges were, they would at any moment be subjected to pressure.

[15] Anna Triponel & Stephen Pearson, 'African States and the International Criminal Court, A Silent Revolution in International Criminal Law', *Journal of Law and Social Challenges*, Vol.12, 2010, p. 66

China, Qatar, Yemen) with 21 abstentions.[16] In 1998, the international community finally created the International Criminal Court (the ICC) to try perpetrators of the most heinous crimes. The establishment of the ICC marked a major advance in international criminal justice. Its creation represents a great step forward in the march towards universal human rights and rule of law, and signifies international efforts to replace impunity with accountability.[17]

Article 126 of the Rome Statute requires sixty ratifications or accessions for entry into force. Accordingly, the Rome Statute entered into force on 1 July 2002 upon the fulfillment of the required sixtieth ratification. The Rome Statute not only establishes a new judicial institution to investigate and try international offences, but also sets out a new code of international criminal law. Thus, the adoption of the Rome Statute is seen as one of the most important developments in international criminal law.

2.2 Structure

The ICC is structurally not part of the United Nations, rather an independent judicial institution endowed with an international legal personality. However, the framers of the Rome Statute wished the Court to maintain a cooperative relationship with the United Nations through an agreement so as to assert the authority of the Security Council (acting under Chapter VII of the UN Charter) over issues concerned with case referral to the Court, and international peace and security.[18]

The ICC consists of a judicial, prosecutorial and administrative (registry) branch. According to article 34 of the Rome Statute, the Court is composed of four organs: the Presidency, the judicial Divisions, the Office of the

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[16] Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd edition, Cavendish publishing, 2003, P.376.

[17] Triponel & Pearson, *supra note* 15, P.66

[18] Bantekas and Nash, *supra note* 16, p. 376. *See also* the Rome Statute of the International Criminal Court, document A/CONF.183/9, 1998, Articles 2, 4 and 13(b) [Hereinafter, the Rome Statute].

Prosecutor and the Registry. The judicial Divisions consist of eighteen fulltime judges organized into the Pre-Trial Division, the Trial Division, and the Appeals Division. Judges are nominated by Assembly of States Parties[19] and elected for a non-renewable nine years by secret ballot requiring a two thirds majority of the States present and voting.[20] Under article 36 (3) of the Rome Statute, there is a requirement that judges must be fluent in at least one of the official languages of the Court and is required to have a high moral character, impartiality and integrity. Article 36(3) also requires judges to have competence in criminal law or in relevant areas of international law such as international human rights law and international humanitarian law.

The Presidency is composed of three judges of the Court - the president and two vice-presidents - and elected by the judges from among their number, for a term of three years.[21] The Presidency is responsible for the overall administration of the Court, with the exception of the Office of the Prosecutor, and for specific functions assigned to the Presidency in accordance with the Statute.[22]

The Office of Prosecutor is the other part of the ICC. As described under article 42 of the Rome Statute, the prosecutorial branch is responsible for receiving and examining referrals and information on crimes within the jurisdiction of the Court, and for investigation and prosecution. The Prosecutor as outlined under article 42(2) of the Rome Statute has full authority over the management and administration of the Office, and is assisted by one or more Deputy Prosecutors. The Prosecutor and Deputy Prosecutors are elected from different nationalities by the Assembly of States Parties for a nine year non-renewable term. Both the Prosecutor and the Deputy Prosecutors are to be persons "of high moral character" with

[19] As per article 112 of Rome Statute, Assembly of States consist one representative from each nation who is a party to the Rome Statute, although other nations that have signed the Statute can be observers in the Assembly. The Assembly of States, albeit not an official organ of the court, is still an important unit of the ICC.

[20] The Rome Statute, *supra note* 18, Article 36(6) and (9) (a).

[21] *Ibid* Article 38

[22] *Id*

"extensive, practical experience" in criminal prosecutions. In order to preserve the independence of the Office, the Rome Statute under article 42(5) prohibits the Prosecutor and a Deputy Prosecutor from engaging in any activity which is likely to interfere with his/her prosecutorial functions or to affect confidence in his/her independence. None of them can participate in any matter in which their impartiality might reasonably be doubted on any ground. Besides, article 42(1) of the Rome Statute in its last sentence states that a member of the Office should not seek or act on instructions from any external source.

The other organ of the Court is the Registry which is responsible for the non-judicial aspects of the administration and servicing of the Court.[23] Registry is headed by the Registrar who is described in the Rome Statute as a principal administrative officer of the Court.[24]

2.3 Jurisdiction and the Principle of Complementarity

Article 5(1) of the Rome Statute has granted the Court jurisdiction over the most serious crimes of international concern: genocide, crimes against humanity, war crimes and crimes of aggression. Regarding Crimes of aggression, the Court cannot however exercise jurisdiction until an amendment to the Rome Statute is made to define crime of aggression and set out preconditions for the ICC to take jurisdiction.[25] For the time being, the

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[23] Rome Statute, *supra note* 18, Article 43

[24] *Id*

[25] *Ibid*, Article 5(2), Article 121 and 123. The first Review Conference of the Rome Statute was held in Kampala, Uganda on 12 June 2010. After a week of high-level discussions on the impact of the Rome Statute to date, ICC States Parties came to an agreement regarding amendments to the Rome Statute pertaining to the crime of aggression. They provided a definition for the crime of aggression which criminalizes the use of armed force by one State against another and carried out in contravention to the United Nations Charter. On this basis individuals responsible for unlawful acts of war may be subject to prosecution before the ICC. The Review Conference determined that the Court will not be able to exercise jurisdiction until 30 states have ratified the new amendment. In addition, states parties will have to make a positive decision to activate the jurisdiction after 1 January 2017.

ICC is thus limited to jurisdiction over crime of genocide, crimes against humanity and war crimes which are defined in detail from article 6 – 8 of the Rome Statute. But the Court can only try such crimes committed on or after July 1, 2002 – *jurisdiction ratione temporis* (article 11(1) of the Rome Statute).[26]

International agreements are capable of binding only contracting States, and they do not bind third parties without their consent.[27] Being multilateral treaty, the Rome Statute has created obligations on States Parties. Thus, the ICC is granted the power to exercise jurisdiction over crimes committed in States Parties, even when perpetrated by nationals from States which are not parties to the Rome Statute. However, the jurisdiction of the Court may also be extended to crimes committed in non-States Parties if they accept jurisdiction of the Court with respect to the crimes in question, or if a situation is referred to the Prosecutor by the Security Council by virtue of article 13(b) of the Rome Statute. As per Article 12(1) a State Party to the Statute is subject to the automatic jurisdiction of the Court, whereas non-State Parties (where a crime takes place or the State of the perpetrator's nationality) can accept ICC jurisdiction with regard to a specific case or situation by lodging a declaration to that effect.[28]

According to article 13 of the Rome Statute, the Court may exercise its jurisdiction when a situation is referred to the Prosecutor by a State Party, in instances where a situation is referred to the Prosecutor by the Security Council, or in instances where the Prosecutor initiates an investigation of a particular crime within the jurisdiction of the Court. Acting under the terms of Chapter VII of the United Nations Charter[29], the Security Council may refer a situation to the Prosecutor of the ICC. In order for the Security Council to act

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[26] As indicated under Article 11(2) of the Rome Statute, with regard to a State that becomes a Party to the Statute after its entry into force, the ICC may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for that State, unless that State has made a declaration.

[27] The 1969 Vienna Convention on the Law of Treaties, 1969, Article 34

[28] Rome Statute, *supra note* 18, Article 12 (3)

[29] The United Nations Charter, 1945, Article 39-51

under Chapter VII, the specific situation must be a threat to the international peace, or a breach of peace, or an act of aggression. In that case, no State consent is required.

In relation to Prosecutor's independent power of referral, different mechanisms are set in place under article 15 of the Rome Statute to counterbalance the possible abuse of such power. For example, the said article of the Statute provides a judicial guarantee that such a power will be exercised in a neutral and non-politically motivated manner. Once the Prosecutor receives information about the occurrence of crimes of international concern, the Prosecutor has to make an assessment whether there is a reasonable basis for continuing with an investigation.

In his/her assessment, the Prosecutor must determine whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed", whether the case is admissible and whether the proceeding is in the interest of justice.[30] If the Prosecutor determines a reasonable basis exists based on the assessment, he/she has to submit a request for the authorization to investigate to the Pre-Trial Division. Then the Pre-Trial Division will independently determine whether a reasonable basis exists to carry on an investigation. No investigation by the Prosecutor will be conducted if the Pre-Trial Division determines that no reasonable basis exists. The Prosecutor must, therefore, obtain the authorization of the Pre-Trial Division before commencing an investigation into a situation. By contrast, in the case of referral of a situation by the Security Council or a State, the Prosecutor is not required to request the Pr-Trial Division for the authorization of investigation.

The other issue which needs to be discussed in connection with jurisdiction is the principle of complementarity. The term complementarity is defined nowhere in the Rome Statute. But Article 1 of the Statute states that the Court shall "be a permanent institution and shall have the power to

[30]The Rome Statute, *supra note* 18, Article 53. The procedures for investigation and prosecution such as ensuring the properness of the case for the Court in terms of evidence and jurisdiction, and the inability or unwillingness of a national court to try the case have the effect of restricting the power of the Prosecutor.

exercise its jurisdiction over persons for the most serious crimes of international concern ... and shall be complementary to national criminal jurisdictions." In the Preamble of the Statute, it is also stated that the ICC is "complementary to the national criminal jurisdictions."[31] Complementarity is understood as a principle that priority must be given to trials for international crimes at national level rather than at the ICC.[32] The principle is embodied in the Rome Statute not only for respect of the primary jurisdiction of States but also for practical considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.[33] Regarding the principle, it is said:

> *The ICC is intended to supplement the domestic punishment of international violations, rather than supplant domestic enforcement of international norms. The complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crimes. It balances that supranational power against the sovereign right of States to prosecute their own nationals without external interference.*[34]

The ICC is created to complement national courts in a way which gives priority to national courts, where a State with jurisdiction wants to prosecute. The ICC is only one way to prosecute crimes of international concern and it may not in all circumstances be the best one. As described under article 17(1) of the Rome Statute, the Court will be able to exercise jurisdiction over a case only if a State with jurisdiction is unwilling[35] or unable[36] to genuinely

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[31] The Rome Statute, *supra note* 18, para. 10

[32] Andrew Clapham, Issues of Complexity, Complicity and Complementarity: from the Nuremberg Trials to dawn of the New International Criminal Court in Philippe Sands (ed.), *From Nuremberg to The Hague: the Future of International Criminal justice*, Cambridge University Press, 2003, p.63.

[33] Cryer , *supra note* 4, P.127

[34] Mohamed M. El Zeidy, The *principle of Comeplementarity in the International Criminal Law: Origin, Development and Practice*, Martinus Nijhoff Publishers, 2008, p.158.

[35] As per 17(2) of the Rome Statute, a State may be considered as 'unwilling' when: (i) in fact the national authorities have undertaken proceedings for the purpose of shielding the

prosecute. Thus, the Court is a court of last resort. The drafters of the Rome Statute have given the first bite of prosecution to national courts. According to Antonio Cassese, there are two underlying reasons for this approach. First, the drafters saw a practical ground: if the Court were a court of first resort, it would be flooded with cases from all over the world which they considered it inappropriate.[37] Secondly, the drafters were perhaps intended to respect State sovereignty as much as possible.[38]

3. The Relationship between the ICC and Africa

As we will discuss below in detail, Africa has undeniably contributed a lot to the establishment and advancement of the ICC. The continent has also cooperated with the Court by enacting national legislation for the implementation of the Rome Statute, and referring situations. Regardless of these earlier contributions and cooperation, recent developments in African countries reveal that the ICC has faced serious limitations in winning the hearts and minds of Africa leaders. In fact, the relationship between the Court and Africa has become weak and coarse. In this section, we will analyze what the relationship between Africa and the ICC has looked like since the creation of the Court, and discuss the underlying reasons for their current contentious relationship.

person concerned from criminal responsibility; or (ii); there has been an 'unjustified delay' in the proceedings showing that in fact the authorities do not intend to bring the person concerned to justice; or (iii) the proceedings are not being conducted independently or impartially or in any case a manner of showing the intent to bring the person to justice.

[36] As per 17(3) of the Rome Statute, a State is 'unable' when, due to a total or substantial collapse or unavailability of judicial system, it is not in a position: (i) to detain the accused or to have him surrendered by the authorities or bodies that hold him in custody; or (ii) to collect the necessary evidence; or (iii) to carry out criminal proceedings.

[37] Cassese, *supra note* 13, p 351. The Court, having a limited number of judges and limited financial resources and infrastructure, would be unable to cope with a broad range of cases.

[38] *Id*

3.1 Contributions

After the Rwanda and Yugoslav Tribunals, the international community has provided the strongest support for the idea that a permanent international criminal court is desirable and practical. Like other regions Africa showed a very positive gesture towards the creation of permanent international criminal court. In this respect, during the Rome negotiations for the creation of the ICC, the representative of the then Organization of African Unity (OAU) remarked that Africa has a special interest in the establishment of the ICC, for its people had for centuries endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence which continue to exist despite the continent's post-colonial phase.[39] In particular, the vivid memories of the Rwandan horrendous genocide strengthened the determination of Africa to support the idea of permanent international criminal court that would prosecute and punish perpetrators of such heinous crimes in the future.[40]

The participation of Africa in discussions regarding the creation of an International Criminal Court (ICC) begun as early as 1993 when the International Law Commission presented a draft ICC statute to the United Nations General Assembly for consideration.[41] The delegations of South Africa, Senegal, Lesotho, Malawi, and Tanzania were among African countries present in the 1993 discussions.[42]

After the presentation of the draft statute by the International Law Commission in 1993, different ICC related activities were carried out in Africa to make a meaningful impact on the outcome of negotiations. For

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[39] T. Waluwa, Legal advisor of the OAU Secretariat Statement at the 6th plenary, 17 June 1998; Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, UN Doc A/CONF 183/13/(Vol. II) 104, 115-118 Para 116.

[40] *Id*

[41] Coalition for the International Criminal Court (CICC), Africa and the International Criminal Court, available at: http://www.iccnow.org/documents/Africa_and_the_ICC.pdf, (accessed 20 June, 2013)

[42] *Id.*

instance, in September 1997, experts of Southern African Development Community (SADC) met and provided impetus for a continent-wide consultation process on the creation of the Court.[43] The participants agreed on a set of principles which included a number of far-reaching suggestions .[44] The SADC principles were embodied in the Dakar Declaration for establishment of the ICC. In February 1998, the Council of Ministers of the Organization of African Unity took note of the Dakar Declaration and called on all OAU member States to support the creation of the Court.[45]

In July 1998, 47 African Countries attended the Rome Conference for the drafting of the Statute; many of these countries were members of the Like-Minded Group that pushed for adoption of the final Statute.[46] The African delegates participating in the conference considerably contributed to the outcome of negotiations, for they had two guiding documents: the SADC principles and the Dakar Declaration.[47] Finally, the vast majority of African Countries voted in favor of adopting the Rome Statute and establishing the ICC.

After the adoption of the Rome Statute, an African country, Senegal, became the first country in the world to ratify the Rome Statute on 2 February

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[43] Max Du Plessis, *The International Criminal Court that Africa wants, Institute for Security Studies*, Remata iNathi Printing, 2010, p.6.

[44]Ibid, The SADC principles include: the ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes; the court should have an independent prosecutor with power to initiate proceedings *proprio motu*; there should be full cooperation of all states with the court at all stages of the proceedings; and stable and adequate financial resources should be provided for the ICC and states should be prohibited from making reservations to the statute.

[45] Plessis, *supra note* 43, p.7. The resolution of the Council of Ministers of the OAU was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998. Dakar Declaration was the result of an African conference in favor of the establishment of the ICC.

[46] Coalition for International Criminal Court, *supra note* 41. Members of Like-minded Group were countries from all regions of the world which were committed to a Court independent from UN Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.

[47] *Ibid*

1999.[48] This can obviously make Africa's early support to the ICC clear. Moreover, there are 120 countries currently parties to the Rome Statute and of which Africa comprises 33 member States, the largest regional bloc in the Assembly of States Parties.[49] This also illustrates that Africa is the major support base of the ICC. Besides, Assembly of States Parties elected some African legal experts to serve as judges and prosecutor of the ICC; and Africa is thus well represented in the ICC.[50]

Apart from African States' robust backing for the Court, many African non-governmental organizations and civil societies made a significant contribution to the emergence and advancement of the ICC through domestic advocacy and joining the Coalition for an International Criminal Court (CICC) which comprises activists from different parts of the world.[51]

Another measure of commitment to the ICC is noticeable from the response of a few African States to the United States efforts of encouraging States to enter into bilateral immunity agreements (non-surrender agreement)

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[48] The Rome Statute of the International Criminal Court, Plans for International Criminal Court gather momentum, available at: http://untreaty.un.org/cod/icc/general/court.htm, (accessed on 4 April, 2013)

[49] Nanjala Nyabola, 'Does the ICC have an African problem?', 28 March 2012, Al Jazeera, available at : http://www.aljazeera.com/indepth/opinion/2012/03/20123278226218587.html, (accessed on 4 April, 2013)

[50] At time of writing of this article, Africans out of eighteen judges of the ICC are: Sanji Mmasenono Monageng of Botswana (first vice president of the Court), Akua Kuenyehia of Ghana, Joyce Aluoch of Kenya, and Chile Eboe-Osuji of Nigeria. Fatoumata Dembele Diarra (Mali) is continuing in office to complete their trials, in accordance with article 36(10) of the Rome Statute. The Office of Prosecutor is also headed by the Prosecutor, Mrs. Fatou Bensouda of the Gambia. In addition, Medard Rwelamira, a citizen of South Africa and Tanzanian by birth was the first director of the secretariat of the Assembly States Parties, before his untimely passing in 2006.

[51] Plessis, *supra note* 43, P.20. The CICC has actively been engaged in various activities for creation and support of the ICC, such as lobbying for the adoption of the Rome Statute, campaigning for swift achievement of the minimum ratifications of the Statute, and supporting for the draft of ancillary legal instruments such as the ICC's Rule of Procedures and Evidence.

whereby States agreed not to send United States citizens for trial at the ICC.[52] Such an agreement conspicuously undermines the works of the ICC. Although United States extracted such agreements from more than 60 mostly poor countries under pressure, a few African countries such as Kenya, Mali, Namibia, Niger, South Africa and Tanzania refused to sign an agreement.[53] Thus, Africa has been actively involved in the creation and advancement of the ICC ranging from shaping the creation of the Court to expressing its commitment to the ICC by a few African countries irrespective of the American pressure.

3.2 Cooperation

Prior to 1998, the focus of the international community was on the issues of the establishment of the permanent international criminal court and the importance of ending impunity. After the ICC came into being and through the passage of time, the focus of attention turned into some practical issues like whether the ICC would be able to operate effectively so as to meet its noble mission.[54] The ICC does not have its own police force or law enforcement agency with powers to arrest, to search and seize evidentiary materials or to execute other orders of the Court. The Court cannot itself implement its decisions such as an arrest warrant or execution of sentence in

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[52] *Ibid*, P. 9. The US has negotiated bilateral agreements with other States, some of them parties to the Statute, others not, which provide that no nationals, current or former officials, or military personnel of either party may be surrendered or transferred by the other State to the ICC for any purpose. The US refer to Article 98(2) of the Rome Statute as the basis for these agreements, maintaining that the ICC will not be able to request a State to surrender a US national to the Court, once that State has entered into such an agreement with the US. The agreements will of course only be effective in preventing the Court from making such a request if they are in truth compatible with the Statute. Non-surrender agreements are usually linked with other area of cooperation such as granting aid. US threatened South Africa to cut military aid, as the latter was not signed such agreement with the US.

[53] *Ibid* p.10.

[54] The mission of the ICC is, through prosecution and punishment, to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community, and thus to contribute to the prevention of such crimes.

cases of conviction on the territory of a State. As a result, the success of the ICC heavily depends on the level of cooperation secured from states and intergovernmental organizations. In this regard, the former president of the Court described:

> *[T]he Rome Statute is a two pillar system: a judicial pillar represented by the Court, and an enforcement pillar represented by the States, which undertook a legal obligation to cooperate with the Court through the Rome Statute. Cooperation is the inter-play between these two pillars, shown clearly by the fact that the Court requires the States to play their part in order for the system created by the Statute to work.*[55]

Thus, the issue of cooperation is at the core of the Rome Statute. In accordance with article 86 of the Rome Statute, States Parties are under a general obligation to co-operate with the Court in its investigation and prosecutions of the core crimes. More specifically, the Statute obliges States Parties to cooperate with the Court in various ways such as arresting and surrendering suspects, investigating and collecting evidence, protecting witnesses, extending privileges and immunities to ICC officials.[56]

From the moment that the Rome Statute became binding on States in question, some African member States to the Rome Statute have cooperated with the Court at least in two ways: self-referral of situations, and enactment of national legislation for the implementation of the Rome Statute. Regarding self-referral, the governments of Uganda, Democratic Republic of Congo, Central African Republic and Mali have referred their respective situations to the ICC. Besides, the Democratic Republic of Congo set an example in terms of cooperation regarding enforcement in dealing with the arrest warrants issued against Thomas Lubanga Dyilo, Germain Katanga and Mathieu

[55] Silyana Arbina (ICC Registrar), 'No Peace without Justice, Roundtable on Implementing Legislation', (July 17, 2009), available at : http://www.icc-cpi.int/NR/rdonlyres/9EA855BC-A495-40AA-B5F8-92F44EO8D695/280578/StatementRegistar2.pdf, (accessed 4 April, 2013)

[56] The Rome Statute, *supra note* 18, articles 87-102

Ngudjolo Chui.[57] A number of African cases before the ICC may signify the African commitment to justice for the most serious crimes.

Upon the entry into force of the Rome Statute, several State Parties have been considering national legislation to enable them not only to surrender suspects to the new Court, but also to assert jurisdiction over various categories of individuals accused of genocide, crimes against humanity and war crimes.[58] Accordingly, some African ICC member States such as Burkina Faso, Central African Republic, Kenya, Senegal, South Africa, and Uganda have enacted comprehensive ICC implementing legislation, although other States have passed legislation implementing some aspects of the Rome Statute, and draft implementing legislation is pending in others.[59] The enactment of national legislation to implement the Rome Statute does not only demonstrate to the Court the extent to which these countries are able and willing to conduct national criminal trials for heinous international crimes, but also reflects those States' acceptance of international criminal law as agreed upon by world leaders in the Rome Statute.[60]

As described under article 87(7) of the Statute, if a State Party fails to cooperate, and if such non-cooperation prevents the Court from exercising its functions and powers under this Statute, "the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." The consequences of non-cooperation will be decided by Assembly of States Parties or the Security Council as the case may be.

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[57] Eugenebakama, State Cooperation: the weak link of the ICC, (14 June 2010), available at: http://www.coalitionfortheicc.org/blog/?p=588&langswitch_lang=en/, (accessed on 4 April, 2013)

[58] Sands, *supra note* 32, p.64

[59] Human Rights Watch, Briefing Paper on Recent Setbacks in Africa Regarding the International Criminal Court November 2010 p.14

[60] Triponel & Pearson , *supra note* 15, pp.69-70

3.3 Confrontation

From the foregoing discussion, we can squeeze that Africa played a significant and constructive role before, during and after the creation of the Court. However, through time in particular following the indictment of President Al Bashir for commission of the core crimes, the early positive attitudes and constructive support of Africa seem to be turning into a growing trend of contention. Thus, it appears that Africa changes its position towards the ICC from cooperation to confrontation. The confrontation revolves around the ICC's perceived prioritization of Africa over other regions, its selection of cases, the potential effect of prosecutions on peace processes and U.S. position on the ICC. Now let us turn to points of controversies between the ICC and Africa.

3.3.1 ICC's Focus on African States

As discussed above, Article 13 of the Rome Statute outlines that the Prosecutor can initiate an investigation on the basis of a referral from any State Party, Security Council, or his/her *proprio motu* power on the basis of information on crimes within the jurisdiction of the Court received from individuals or organizations. To date, 18 cases in 8 situations have been brought before the ICC. The governments of four countries (all parties to the Statute) - Uganda, the Democratic Republic of Congo, the Central African Republic and Mali have referred situations occurring on their territories to the prosecutor. The United Nations Security Council has referred two situations to prosecutor: the situation in Darfur, Sudan and the situation in Libya – both non-States Parties. Two more situations (situation in Kenya and situation in Côte d'Ivoire) have been opened by the prosecutor for investigation upon the authorization of Pre-Trial Division. After a thorough analysis of available information, the ICC Prosecutor has opened and is conducting investigations in all of the above-mentioned situations.

The above facts reveal that all situations under ICC investigations to date are in Africa. So far, no investigation into situation of a country from other region has been conducted by the Prosecutor of the ICC.[61] Put differently, the

[61] In May 16, 2013, Comoros has referred the action of Israeli troops in boarding the flotilla headed to Gaza on 31 May 2010 to the International Criminal Court. The ICC

work of the ICC is so far limited to African countries. Thus, the work of the ICC raises a number of questions. Why does the ICC target Africans? Does the Court have African problems only? Are there not victims of conflict in other regions? To deal with these questions, let us explore the position of African countries, and reaction of the Court and its proponents.

Many African leaders are currently unhappy with the functioning of the Court as it has merely focused on Africa, and for it has not shared the concerns of African countries. In this regard, the former chairperson of the AU Commission, Jean Ping, complained that it is "unfair that all those situations referred to the ICC so far were African", and "it seems that Africa has become a laboratory to test the new international law."[62] In more or less similar terms, in 2009 Benin's President Boni Yayi said that "we have the feeling that this Court [ICC] is chasing Africa."[63] Similarly, Rwandan president Paul Kagami portrayed the ICC as "a new form of imperialism that seeks to undermine people from poor African countries, and other powerless countries in terms of economic development and politics."[64] Others have further criticized that the Prosecutor has unfairly focused on Africa in investigation due to geopolitical pressure either out of a desire to avoid

Prosecutor has announced that she is opening a preliminary examination of the situation and it now remains to be seen whether this will lead to a proper investigation and perhaps even charges being brought by the ICC against Israeli troops or officials. Israel, of course, is not a party to the Statute of the ICC, but this does not itself mean that the ICC cannot exercise jurisdiction over Israeli nationals or officials. Comoros is a party to the Statute and the main vessel on which the Israeli actions took place, the Mavi Marmara, was registered in Comoros. Under Article 12(2) of the ICC Statute, the Court may exercise jurisdiction not only to nationals of State's party to the ICC statute but also, crucially, where: the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft is a party to the Statute. *See also*, 'Court between A Rock and a Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC', 16 May 2013, available at: http://www.dipublico.com.ar/english/court-between-a-rock-and-a-hard-place-comoros-refers-israels-raid-on-gaza-flotilla-to-the-icc/, (accessed 20 June, 2013).

[62] World Reaction-Bashir Arrest, 4 March 2009, BBC, available at: http://news.bbc.co.uk/2/hi/africa/7923797.stm, (accessed on 4 April, 2013)

[63] M. Tostevin, 'Putting Africa on Trial', 25 January, 2009, available at: http://blogs.reuters.com/africanews/2009/01/25/putting-africa-on-trial/, (accessed on 4 May, 2013)

[64] AFP, Rwanda's Paul Kagami says ICC targeting poor African countries, July 31, 2008

confrontation with major powers or as a tool of western foreign policy.[65] In 2013, a Uhuru Kenyatta voter described the ICC to *the New York Times* as "a tool of Western countries to manipulate undeveloped countries."[66]

The displeasure of Africa with ICC has once again appeared clear at the recent African Union summit held on 26-27 May, 2013. At the conclusion of the AU summit in the press conference, Hailemariam Desalegn, AU chairman and Prime Minster of Ethiopia, said: "African leaders have come to a consensus that the ICC process conducted in Africa has a flaw. The intention was to avoid any kind of impunity…, but now the process has degenerated to some kind of race-hunting."[67] Thus, the ICC has been accused of 'exclusively' targeting Africans, and being a mere tool for western countries.

Against those criticisms, the current prosecutor of the ICC, Fatou Bensouda, has contended that seeking justice for victims on the continent is hardly evidence of discrimination.[68] According to Bensouda, the Court has not targeted Africans, instead simply sought justice for victims of crimes against humanity, including African victims. She further pointed out that "all of the victims in our cases in Africa are African victims, and they are the ones who are suffering these crimes."[69] She contends that the Court is protecting Africans rather than targeting them. The Coalition for the International Criminal Court (CICC) also argued that the ICC is not unfairly focusing on

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[65] Steve Odero, The Politics of International Criminal Justice: the ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis, unpublished, p. 156.

[66] Analyst Questions ICC's Intense Focus on Africa, April 3, 20013, available at: http://www.voanews.com/content/icc-focus-on-africa-questioned/1633694.html, (accessed on 3 April, 2013), Uhuru Kenyatta is indicted for crimes committed following 2007 Kenya national election crisis.

[67] African Union accuses ICC of 'hunting' Africans (27 May, 2013), available at : http://www.bbc.co.uk/news/world-africa-22681894/, (accessed on 2 June, 2013)

[68] David Bosco, 'Why is the International Criminal Court picking only on Africa?', March 29, 2013, available at: http://articles.washingtonpost.com/2013-03-29/opinions/38117212_1_international-criminal-court-african-union-central-african-republic, (accessed on 3 April, 2013). Fatou Mensouda, a Gambian, was elected in December 2011 as a prosecutor of the ICC, and expected to repair the rift between the Court and Africa.

[69] *Id.*

Africa, rather fighting against impunity all over the world.[70] It is thus argued that the ICC has targeted impunity, not African individual leaders.

One commentator has given three explanations why the ICC seems to be targeting Africa. First, since a number of African countries still remain conflict-prone, and since the ICC primarily focuses on situations of armed conflict, those countries have obviously been areas of interest for the Court.[71] Secondly, since a number of African Countries chose to join the Rome Statute, the ICC has got broad jurisdiction over potential crimes committed on their territory.[72] Thirdly, the Security Council has given the ICC more room to operate in Africa by referring two situations of non-States Parties: Sudan and Libya.

In addition to the above explanations, the fact that the national legal systems in Africa are weak has also allowed the ICC to assert its jurisdiction under the principle of complementarity. The ICC as court of last resort assumes jurisdiction over core crimes only when national courts fail to try perpetrators of heinous crimes. Failure to prosecute by national courts allows the ICC to exercise its mandate. In addition to this, the usage of self-referral by some African governments has given the ICC a chance to intervene in African countries. However, some critics argue that those States have been manipulated into making State referrals so as to build the profile of the ICC.[73]

But still one may wonder why the ICC has not gone into other areas of conflict in which it has jurisdiction such as Afghanistan, Syria, Colombia, Iraq, Georgia and Sri Lanka.[74] Besides, why Security Council has not acted even handedly in respect of international criminal justice – willing to send African situations of non-States Parties to the ICC, but unwilling to send similarly deserving situations in respect of Israel, Chechnya and Syria to the

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[70] Africa and the International Criminal Court, available at: http://www.iccnow.org/documents/Africa_and_the_ICC.pdf, (accessed on 3 April, 2013).

[71] Bosco, *supra note* 68

[72] *Id*

[73] Africa and the International Criminal Court: mending Fences, Avocats Sans Frontieres, July 2012, p.8

[74] Africa and the International Criminal Court, *supra note* 70

Court.[75] At this juncture, it is important to note that the ICC could have opened investigations outside of Africa; and the Security Council could also have referred the situations of non-States Parties to the Court, including the situations of Gaza-Israel and Syria.[76]

As described above, the Prosecutor has contended that the ICC is seeking justice for victims of crimes of international concerns. But, a related question is what kind of court has stood up for victims in Africa, but has failed to do so for victims of conflict in other regions. In this connection, it is ironically asked that: "aren't there also victims in Afghanistan; aren't there also victims in Colombia, in Georgia, and other places?"[77] An international court which is standing up for victims should stand up for victims in Africa as well as in other places of the world. There are, therefore, justified concerns of selectivity and partiality in relation to the prosecution of international crimes of concern in Africa, and referrals by the Security Council.

In sum, we can argue that there has been uneven application of international criminal justice – an intense focus on Africa. The ICC may not prosecute leaders of powerful States, or even those States they protect. This being so, Africa seems to have some aversion and to lose confidence in the ability of the Court to deliver a kind of protection in an equitable way as it was designed. However, the danger of this argument is that it shields African dictators and their followers who seek reasons to delay or resist being held responsible under universally applicable standards of justice. Indeed, some African leaders have sought to exploit unevenness of the application of justice

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[75] The UN Security Council has faced immense criticism of impartiality; the Council was at the center of the process that referred the Situations of Sudan and Libya to the ICC. The majority of its permanent members (US, China and Russia) are not a party to the Rome Statute. It is unlikely for the Security Council to refer the Gaza-Israel situation to the ICC. If the case is brought to the attention of the Court, it will be vetoed by US.

[76] Human Rights Activists reported that Israel committed human rights abuses in Gaza in November 2012; and similarly, there has been huge humanitarian crisis in Syria since 2011. The death toll in Syria soared to 100,000 people.

[77] Africa and in the International Criminal Court, *supra note* 70

to undercut accountability by presenting the ICC as a new form of imperialism that should not be supported.[78]

Irrespective of the selectivity and partiality, no one dares to argue that all indicted individuals before the ICC are in clean hands. In fact, most of them have heartlessly messed around with their own people. Thus, they hardly deserve the kind of protection that some African leaders are hoping to provide by shielding Africans from prosecution at the ICC. For that matter, they do not even deserve to be imprisoned in a luxurious prison cell in The Hague while their victims were languished in torturing centers and finally killed. Indeed, this should not be construed to imply the perpetrators of core crimes do not have human rights. Rather, this is simply to mean that they must have been put in prison cell of the respective country in which they would have been put had their national court been able or willing to prosecute them.

3.3.2 The Peace versus Justice Debate

The other point of confrontation between the ICC and Africa relates to the arrest warrant for Sudanese president Omar Al Bashir. On 31 March 2005, as per article 13 of the Rome Statute, the UN Security Council adopted Resolution 1593 to refer the situation in Darfur, Sudan to the ICC by using its discretion for the first time. Following the referral, the Pre-Trial Division of the ICC issued arrest warrants for four Sudanese officials, including the sitting president of Sudan - Omar Al Bashir for war crimes, crime against humanity and genocide.[79]

The issuance of the arrest warrant for President Al Bashir received ambivalent responses among different countries, organizations and groups.

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[78] Human Rights Watch, *supra note* 59, p.7

[79] The ICC Pre-Trial Division I, 'Warrant of Arrest for Omar Hassan Ahmad Al Basher', March 4, 2009. *See also* ICC Press Release, "Warrants of Arrest for the Minister of State for Humanitarian Affairs of Sudan, and a Leader of the Militia/Janjaweed," May 2, 2007. The ICC issued arrest warrants for the former interior minister Ahmad Harun, and for an alleged former Janjaweed leader in Darfur Ali Kushayb in May 2007 for war crimes and crimes against humanity. In May 2009, ICC issued a summons to Abu Garda for war crimes.

For example, many human rights organizations and civil societies have praised the arrest warrant as a crucial step against impunity. While France, Germany, Canada, the United Kingdom, Denmark and the European Union called on Sudan to cooperate, some Arab and Africa leaders, Russia and China expressed their opposition to the arrest warrant.[80] Regional organizations such as the African Union (AU), the Arab League, the Community of Sahel-Saharan States (CEN-SAD), and the Organization of the Islamic Conference (OIC) have further criticized the ICC and called on the UN Security Council for deferral of prosecution by invoking article 16 of the Rome Statute.[81] Article 16 gives the Security Council the exclusive power to defer the ICC investigations and prosecutions for security for one renewable year. For better or worse, the Security Council has failed to act on the request of deferral.

In 2009, the African Union construed the arrest warrant for Al Bashir as a serious threat to the ongoing peace efforts in the Sudan, and consequently directed all African ICC member States to withhold cooperation from the Court in respect of the arrest and surrender of Al Bashir.[82] One year later at its July summit in Kampala, the African Union once again called on African ICC members States not to cooperate in the arrest of President Al Bashir, and

[80] Alexis Arieff *et al,* International Criminal Court Cases in Africa: Status and Policy Issues, Congressional Research Service RL 34665, 2011, p.14.

[81] *Ibid* p.16; Article 16 of the Rome Statute states: "*No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.*" Since the deferral has not been made by the Security Council, the AU presented a proposal for an amendment to article 16 giving the General Assembly the authority to defer an investigation should the Security Council fails to act on such request within six months.

[82] Assembly of the African Union, "Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec.245 (XIII), Sirte, July 3, 2009, para. 10. Since issuing of the arrest warrant for him, Al Basher travelled to non-States parties to the ICC (Egypt, Libya, Ethiopia, Zimbabwe, Qatar, Saudi Arabia and China), and States Parties (Chad, Kenya, and Djibouti). However, Botswana, the only AU member, indicated that it intends to enforce the warrants.

rejected the opening of an ICC liaison office in Addis Ababa.[83] The crux of criticism against the arrest warrant is that the ICC has risked prolonging the violence or endangered fragile peace processes by prosecuting active participants in ongoing conflict or recently settled conflicts.[84] In this regard, Jean Ping, the former chairperson of the AU Commission, stated:

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

Africa's position seems that the search for justice should be pursued in a way that does not jeopardize efforts aimed at promoting lasting peace. The dilemma between peace and justice appears in the course of the exercise of the ICC's mandate. Such dilemma has been particularly prominent in connection with Sudan, Libya, Uganda and Kenya. For example in Uganda, critics criticized the ICC for partly contributing to the unsuccessful Juba Peace talks between the Ugandan government and the Lord Resistance Army when it issued arrest warrants for the latter rebel leaders.[85] Similarly, in Kenya, concerns persist that ICC prosecution could destabilize the fragile political truce that has underpinned the post 2007 government of national unity.[86] In Sudan too, the concern is that the attempt to prosecute Al Bashir in Sudan could complicate the peace processes in Darfur. Such concern was reinforced when the Sudanese government responded to the ICC arrest warrant for the President by expelling aid agencies and threatening peacekeeping troops and non-governmental organizations.[87]

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[83] Assembly of the African Union, "Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)," Assembly/AU/Dec.296 (XV), Kampala, July 27, 2010, paras. 5, 8 and 9

[84] 'Communique of the 142nd meeting of the Peace and Security Council' African Union, 2008.

[85] Africa and the International Criminal Court, *supra note* 70, p.10

[86] Arieff *et al*, *supra note* 80, p.29

[87] *Id*

Supporters of the ICC, on the other hand, argue that the ICC will contribute to Africa's long term peace and stability. In respect of the arrest warrant for Al Bashir, France's representative in Security Council stated that there was no contradiction between justice and peace, but that combating impunity was a condition for lasting peace.[88] The arrest warrant for Al Bashir may, it is argued, open up new opportunities to secure peace in Darfur by putting some pressure on actors on the conflict.[89] On the contrary, the argument goes a lack of accountability for human rights violations will threaten future stability.

To conclude, the peace versus justice issue has become a source of tenuous relationship between Africa and the ICC. While critics argue that the work of the ICC is undermining rather than assisting African efforts to solve its problems, others still contend that the ICC prosecution is a preferred approach, if not a panacea for the malady of impunity. In fact, peace and justice are not always conflicting, rather reinforcing imperatives. But, the question is: which should be compromised in case of conflict between them. Should we make peace at the price of justice? Sometimes, it may be self-defeating if we apply international justice without a careful consideration of political realities of the conflict area. For instance, from a conflict resolution perspective, the arrest warrant for Al Bashir is ill-timed and seen as provocative and carried out in disregard to the objective of sustainable peace in Sudan.[90] Leaders who have committed core crimes against their own people may fight to death, for they have found their exile options substantially diminished since the creation of ICC. Hence, in cases where the ICC prosecution sparks or aggravates conflicts, it may be very important to postpone the prosecution by invoking article 16 of the Rome Statute. The Security Council has the power to defer investigation or prosecution in a resolution adopted under Chapter VII of the Charter of the United Nations.

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[88] Sudan's president 'will face justice'; 'Power does not provide Immunity', ICC prosecutor stresses in Security Council, Security Council 6230th Meeting, Security Council SC/9804, (2009), p.2

[89] Arieff *et al*, *supra note* 80, p.29

[90] Odero, *supra note* 65, p.153

3.3.3 The U.S. Position on the ICC

The United States, along with other members of Security Council referred the situations of non-States Parties (Sudan and Libya) to the ICC, is not a party to the Rome Statute. The Clinton Administration signed the Statute on 31 December 2001, but failed to submit it to the Senate for ratification, as the administration faced objections.[91] According to Article 18 of the Vienna Convention of the Law of Treaties (hereinafter VCLT), a signatory State may not "defeat the object and purpose of a treaty prior to its entry into force" unless it has made clear its intention not to become a party to the treaty. That is to say signature imposes an obligation on a signatory State. In order to avoid the obligation under Article 18 of the VCLT, the United States made clear its intention not to ratify the Statute in a communication to the United Nations Secretariat on 6 May 2002.[92]

United States has allegedly committed gross human rights violations in various areas such as Abu Ghraib and Guantanamo Bay following the campaign of war on terror. Since United States is not a party to the Rome Statute, the ICC cannot open investigation for the alleged crimes unless the Security Council (the only body to subject non-party state to the Court's jurisdiction) refers the situations. Unfortunately, referral by the Security Council has zero possibility due to the veto power of the United States. This is the other reason that Africa has become cynical to the application of international justice even-handedly.

Apart from renouncing any obligation under the Rome Statute, the United States further took two hostile measures to the ICC: concluding bilateral immunity agreements and enacting the American Service Members Protection Act. As described under article 98(2) of the Rome Statute, the ICC cannot proceed with a request for surrender if such request requires the requested State to act contrary to its international obligations. Simply put, the ICC is barred from asking for surrender of persons from a State Party that would

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[91] Arieff *et al*, *supra note* 80, p.3

[92] Cryer, *supra note* 4, p.140

require it to act contrary to its international obligations. As discussed in section 3.1, the United States concluded bilateral agreements (also referred as Article 98 agreements) with most States Parties to exempt United States citizens from possible surrender to the ICC.[93] In Africa alone, 42 countries concluded the bilateral agreement with the United States; 26 of them are parties to the Rome Statute.[94] Each party to the bilateral agreement promises that it will not surrender citizens of the other party to the ICC.

Besides, in 2002, the United States enacted a piece of national legislation to preclude cooperation with the ICC. This legislation is referred as the American Service Members Protection Act (also known as the Hague Invasion Act) that provides for a mechanism of penalizing any country that hands over a United States national to the ICC, including military force.[95] The Act also prohibits the United States government from providing material assistance to the ICC in its investigation, arrests, detentions, extraditions, or prosecution.[96]

Both the bilateral immunity agreement and the American Service Members Protection Act undermine the uniform application of international justice, and the principle of equality of sovereign States as outlined in the preamble and article 2 (1) of the United Nations Charter. They also reinforce the position of Africa that the ICC is being used "as a whip by former colonial masters to discipline weaker and poor developing countries in impoverished continents such as Africa."[97]

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[93] Arieff *et al*, *supra note* 80, p.3

[94] *Ibid*, pp. 31-32

[95] US Congress Passes Anti-ICC Hague Invasion Act, Coalition for the International Criminal Court, Press Release, 26 July 2002, available at: http://www.iccnow.org/documents/07.26.02ASPthruCongress.pdf (accessed 3 April, 2013).

[96] Arieff *et al*, *supra note* 80, p.3. The American Service Members Protection Act provides exceptions: Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice to Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

[97] Odero, *supra note* 65, p.158

3.4 Africa's Move to break the Impasse

In the foregoing discussion, we have explored politics of the international criminal justice or the reasons why Africa has a coarse relationship to the ICC. At this juncture, we briefly touch upon the reactions of Africa to the works of the Court in the continent. As pointed out earlier, the Security Council failed to act on the African Union's request for a deferral of prosecution regarding Al Bashir by virtue of article 16 of the Rome Statute. In response to failure of the Security Council, the African Union presented a proposal for an amendment to article 16 of the Rome Statute in a manner that it can give the General Assembly the authority to defer an investigation if the Security Council fails to act on such a request within six months.[98] The proposed amendment to the provision however doesn't succeed.

As discussed, in relation to referral of the situations of non-States Parties to the ICC, the Security Council has faced criticism regarding its impartiality. In this connection, the African Union has called for the reservation of a permanent seat in the Security Council for Africa with veto power so that the continent can be protected from the perceived neocolonialist tendencies of present composition of the Council.[99] This demand is also improbable to happen.

The other reaction of Africa pertains to the proposed criminal jurisdiction of African Court of Justice and Human Rights (hereinafter the African Court). Against the background of the tension between the ICC and Africa, some suggested that it may be time for Africa to develop its own criminal court which could handle the cases of violence without the ICC being involved.[100]

In fact, African Union has indicated its intention to expand the jurisdiction of the African Court to include prosecutions of individuals for genocide, war crimes and crimes against humanity. To that end, a draft

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[98] Plessis, *supra note* 43, p.2

[99] *Ibid* p.159

[100] Analyst Questions ICC's Intense Focus on Africa, available at: http://www.voanews.com/content/icc-focus-on-africa-questioned/1633694.html (accessed 3 April, 2013)

protocol for the proposed criminal jurisdiction of the African Court has been finalized and recommended to the Africa Union Assembly for adoption.[101] Although, the African Union received a proposal to expand the statute of the African Court to include jurisdiction over crimes of international concern, it has not yet decided on the proposal.

The recent tension between the ICC, the Security Council and African States no doubt had some influence on the move of Africa to give African Court jurisdiction over international crimes. However, the drafters of the protocol have given reasons other than anti-ICC sentiment for process of expanding the jurisdiction of the African Court. According to them, the reasons are: i) African Union's work on the misuse of the principle of universal jurisdiction; ii) the challenges with Senegal's impending prosecution of the former president of Chad, Hissene Habre; iii) the need to give effect to article 25(5) of the African Charter on Democracy, Elections and Governance, which requires African Union to formulate a new international crime of 'unconstitutional changes of government.'[102] In their view, these are thus the reasons which have motivated the process of expanding the African Court to include jurisdiction over core crimes. However, considering the recent displeasure of African Union with the ICC, the reasons may not be convincing.

4. Concluding remarks

It is clear from the entire discussion that Africa has played a major role for establishment as well as advancement of the ICC. The contribution of Africa to the Court can be expressed in terms of its active participation in the Rome negotiation, ratification of the Rome Statute, the participation of African civil societies in CICC, Africans involvement in assuming high position in the

[101] Max Du. Plessis, Implications of the AU Decision to give the African Court Jurisdiction over International Crimes, Institute for Security Studies, Paper 235, 2012, p.5.

[102] Don Deya, 'Worth the Waite: Pushing for the African Court to Exercise Jurisdiction for International Crimes', International Criminal Justice, Open space Issue 2, February 2012, p.1

Court, self-referrals, and drafting national legislation for implementation of the Rome Statute.

However, regardless of Africa's contribution and cooperation with the ICC, the relationship between the Court and Africa has increasingly escalated into the trend of animosity due to the perceived prioritization of prosecution, selection of cases, the dichotomy between peace and justice, and the U.S. position on the Court. Undeniably, all cases brought before the ICC are so far from Africa. The Court has not gone anywhere outside Africa to open investigations. This makes African governments believe that the Court has exclusively targeted Africa countries. Yet others argue that human rights abuses in Africa are the most serious in the world; and thus the gravity of abuses is certainly a legitimate criterion for selection of cases. Still we may find similarly serious situations outside Africa, but are not brought before the ICC. To bridge the gulf between the ICC and Africa, the Court needs to play an impartial role in conducting investigation in all jurisdictions in which core crimes are alleged to have been committed. The Court also needs to have genuine communication and understanding with African governments and Africa Union in relation to the Court's investigatory and prosecutorial strategies. Otherwise, the current coarse relationship may in the long run affect seriously the works of the ICC in the continent, and may thus lead to an isolation of the Court from the region.

The other point of controversy between the ICC and Africa revolves around the dilemma between peace and justice. The issue was surfaced when the ICC issued the arrest warrant for Al Bashir. Similar concern was voiced with regard to the arrest warrant for President Mohammed Gaddafi when he refused to cede power. In some instances, the aims of peace and justice may conflict. In such instances, if we stick to prosecution to do justice, the conflict may be intensified. In such a case, before we pick prosecution as an automatic solution, we need to even-handedly consider the political realities of the conflict areas. Thus, the Security Council has, as mandated, to defer prosecution for one renewable year if it thinks that prosecution may be a threat to peace and order as per chapter VII of the UN Charter.

The African Union is now on the road towards actualizing regional criminal court by expanding the jurisdiction of African Court of Justice and Human Rights over core crimes. This gesture seems the extension of anti-ICC sentiment. Creating additional venues for accountability is positive in principle. However, there are several legal and practical challenges that the African Union should give a thought. Instead of attempting to create regional criminal courts with all its possible challenges, it would be wise for African governments to strengthen the national courts. As a court of last resort, the ICC would not have operated in Africa to such magnitude had national courts been able or willing to genuinely prosecute perpetrators of core crimes.

To conclude, although the relationship between the ICC and Africa continues to be tenuous, it is important for Africa Union, African governments, the Security Council and the ICC to fight against impunity and to make peace as well. They must also ensure that perpetrators should not shield themselves from the ICC prosecution by using the strained relationship.