The African Union, the United Nations Security Council and the Politicisation of International Justice in Africa

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Abstract

There are two questions with multiple answers regarding the relationship between Africa and the International Criminal Court. The first is whether the International Criminal Court is targeting Africa and the second is if politics plays any role in the decision to investigate and prosecute crimes within the jurisdiction of the International Criminal Court. For the African Union, the International Criminal Court has become a western court targeting weak African countries and ignoring the atrocities committed by big powers including permanent members of the United Nations Security Council. The accusation by the African Union against the International Criminal Court leads to the argument that the International Criminal Court is currently politicised. This is a charge consistently denied by the prosecutor of the International Criminal Court. The aim of this paper is to discuss the relationship between the United Nations Security Council, the International Criminal Court and the African Union. It articulates the role of the three institutions in the fight against impunity and the maintenance of international peace and security with reference to the African continent. The paper argues that complementarity should be applied to regional organisations and that the relationship between the African Union and the International Criminal Court should be guided by the application of positive complementarity and a nuanced approach to the interests of justice. This offers the International Criminal Court and the African Union an opportunity to develop mutual trust and result-oriented strategies to confront the impunity on the continent. The paper further argues that the power of the United Nations Security Council to refer situations to the International Criminal Court and defer cases before the Court is a primary source of the disagreement between the prosecutor and the African Union and recommends a division of labour between the International Criminal Court and the United Nations Security Council.

Keywords

African Union – International Criminal Court – United Nations Security Council – positive complementarity

1 Introduction

There is a general perception in Africa that the prosecutor of the International Criminal Court (ICC or Court)¹ is targeting the continent while ignoring crimes committed on other continents.² The African Union (AU) has decided not to cooperate with the ICC in the arrest and surrender of President Al-Bashir of Sudan and even contemplated a mass withdrawal from the ICC by African States Parties to the Rome treaty, thereby threatening the existence of the ICC.³ During the summit of heads of states and governments in May 2013, the AU issued a resolution stating that there is a ‘need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard, in conformity with the principles of international law.’⁴ Regarding the cases in Kenya, the AU stated that the indictments pose a threat to ‘on-going efforts in the promotion of peace, national healing and reconcili-

1 The ICC came into existence on 1 July 2002 when the treaty establishing the Court entered into force. See the Statute of the ICC A/CONF.183/9, 37 *International Legal Materials* (1998), 1002–1069 (Rome Statute).

2 H. Richardson, ‘African Grievances and the International Criminal Court: Issues of African Equity under International Criminal Law’, in V. Nmeihelle (ed.), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, The Hague, 2012), 83; A. Ogunfolu and M. Assim, ‘Africa and the International Criminal Court’, 18 (1) *East African Journal of Peace & Human Rights* (2012), 101–116; N. Dyani, ‘Is the International Criminal Court Targeting Africa?: Reflections on the Enforcement of International Criminal Law in Africa’, in V. Nmeihelle (ed.), *Africa and the Future of International Criminal Justice* (Eleven International Publishing, The Hague, 2012), 185; Scott Stearns ‘African Union Says ICC Prosecutions Are Discriminatory’, *Voice of America* (4 July 2011), available online at <http://www.voanews.com/content/article – african-union-says-icc-prosecutions-are-discriminatory-125012734/158424.html> (accessed 2 August 2013).

3 J. Fortin, ‘The Continent versus the Court: African Union Deliberates Withdrawal from the ICC’, *International Business Times* (11 October 2013), available online at <http://www.ibtimes.com/continent-versus-court-african-union-deliberates-withdrawal-icc-1422434> (accessed 24 January 2014).

4 AU Summit Decision on International Jurisdiction, Justice and The International Criminal Court (ICC) Doc. Assembly/AU/13(XXI), Twenty-First Ordinary Session of the Assembly of the Union, 26–27 May 2013, Addis Ababa, Ethiopia.

ation, as well as the rule of law and stability, not only in Kenya, but also in the Region.⁵ Despite Botswana's reservation on the adoption of the decision, it confirms the sentiments of several African leaders concerning the involvement of the ICC in Africa. As at February 2014, 21 cases in eight situations have been brought before the ICC and all of them are from the African continent.⁶ Meanwhile, 122 states parties have ratified the Rome Statute.⁷ The preponderance of African cases under investigation deserves further attention. If the AU's contestation with the ICC is based only on the geographical location of the situations and cases, then the AU's assertions can be said to be correct, as there is currently no other continent with a docket before the ICC. However, the AU has specifically accused the office of the Prosecutor of targeting Africa.⁸ For example, the former Chairperson of the AU, Jean Ping argues that Africa is not against the ICC but against the former prosecutor who is accused of employing double standards.⁹ The election of the new Prosecutor, who is African, has not improved the relationship between the two institutions.¹⁰ The AU has stated that indictments of African leaders are aimed at destabilising the continent.¹¹

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5 *Ibid.*

6 The situations are in Central African Republic, Cote d'Ivoire, Democratic Republic of the Congo, Republic of Kenya, Libya, Mali, Sudan and Uganda. See ICC, 'Situations and cases', available online at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (accessed 24 January 2014).

7 These include 34 African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. See ICC, 'The States Parties to the Rome Statute', available online at http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 2 August 2013).

8 U. Salifu, *AU-ICC relations under the spotlight again*, 11 June 2013, available at <http://www.issafrica.org/iss-today/au-icc-relations-under-the-spotlight-again> (accessed 2 August 2013).

9 Reuters, *African Union accuses ICC prosecutor of bias: Ping says Africa not against the ICC*, 29 January 2011, available online at <http://www.reuters.com/article/2011/01/29/africa-icc-idAFLDE7oSogL20110129> (accessed 22 July 2013); A. Laing, 'International Criminal Court is 'hunting' Africans', *The Telegraph* (27 May 2013), available online at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html> (accessed 22 July 2013).

10 The former prosecutor, Luis Moreno Ocampo from Argentina, was the first prosecutor from June 2003 to June 2012. He was replaced by Fatou Bensouda from The Gambia in June 2012.

11 See Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14 (XI) Assembly of the AU, Eleventh Ordinary Session, 30 June–1 July 2008, Sharm El-Sheikh, Egypt, where the AU argued that '[t]he abuse and misuse of indictments against African leaders have a destabilizing effect that will

The AU further argues that the request by the ICC to arrest and surrender President Al-Bashir is a contravention of Article 98(1) of the Rome Statute.¹² These developments expose the ICC to different kinds of problems. They raise issues of independence regarding the activities of the Prosecutor and the legitimacy of the Court in the manner proceedings are carried out. It does not seem as if Africa entirely rejects the ICC. However, it seems that the prosecutorial choices made by the former prosecutor may have been responsible for the AU's opposition to the activities of the ICC in Africa. In addition, it should be noted that the major cause of contention between the ICC and the AU is the arrest warrant issued against the President of Sudan, Omar Al-Bashir as a result of UNSC referral and which is consistent with the provisions of the Statute.

This paper discusses the relationship between the ICC, the UNSC and the AU. It articulates the roles for each of the three institutions in the maintenance of international peace and security and is divided into six parts. Part two discusses the tensions between the three institutions and how they can work together. The relationship between the ICC and the UNSC is evaluated in part three noting the powers of the UNSC to refer matters to the ICC and also defer matters currently before the ICC. Part four appraises the relationship between the ICC and the AU and argues for the effective implementation of the principle of positive complementarity in the activities of the prosecutor of the ICC. Part five discusses how to build a credible partnership between the ICC and the AU. Part six is the conclusion. The paper makes three distinct arguments. The first is a recommendation for a division of labour between the ICC and the UNSC. As will be seen below, the power of the UNSC to refer situations to the ICC and defer cases before the Court is a primary source of the disagreement between the prosecutor and the AU. Second, the paper argues that the principle of complementarity should be applied to regional organisations and in this instance, the AU. Third, the relationship between the AU and

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negatively impact on the political, social and economic development of States and their ability to conduct international relations.'; See also T. Hansen, 'Africa and the International Criminal Court', in T. Murithi (ed.), *Handbook of Africa's International Relations* (Routledge, New York, NY, 2013), 175; S. Goshu, 'The Drift: ICC and the AU', *The Reporter* (12 June 2013), available online at <http://www.thereporterethiopia.com/index.php/in-depth/indepth-politics/item/598-the-drifticc-and-the-au> (accessed 2 August 2013).

- 12 See AU Press Release No. 002/2012 on the Decision of the Pre-Trial Chamber I of the International Criminal Court pursuant to Article 87(7) of the Rome Statute on the alleged failure by the Republic of Chad and the Republic of Malawi to comply with the Cooperation Requests issued by the Court with respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of Sudan, available online at <http://www.au.int/en/sites/default/files/PR-%20002-%20ICC%20English.pdf> (accessed 2 August 2013).

the ICC should be guided by the application of positive complementarity and a nuanced approach to the 'interests of justice' provision in the Rome Statute.

2 The Relationship between the ICC and the UNSC

The relationship between the ICC and the UNSC is not easy to define. Both the ICC and the UNSC are concerned with the peace, security and wellbeing of the world.¹³ The ICC is not an organ of the UN and has signed a relationship agreement with the UN to ensure effective cooperation.¹⁴ From the time the idea of an ICC was mooted, permanent members of the UNSC have sought to exert control over its activities. For instance, permanent members of the UNSC insisted that the activation of the jurisdiction of the Court should be subject to the approval of the UNSC. The ILC 1994 Draft Statute reflected this position.¹⁵ A compromise was reached that accommodated both the desires of the UNSC and other delegates that insisted that the Court should be independent of the UNSC.¹⁶ The decision came with a price and is currently having effects on the ICC. This is because the involvement of the UNSC in the activities of the ICC reinforces the argument of unequal power relations between permanent members of the UNSC and other states. A clear example is the inability of the UNSC to refer the Syrian conflict to the ICC due to the veto powers exercised by China and Russia in May 2014.¹⁷ At a minimum, this involvement

13 D. Nsereko, 'The Relationship between the International Criminal Court and the United Nations Security Council', 13 *Zeitschrift für Internationale Strafrechtsdogmatik* (2007), 500–506.

14 Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1.

15 See Article 23 of the ILC 1994 Draft Statute which provides:

‘1. Notwithstanding Article 21, the Court has jurisdiction in accordance with this Statute with respect to crimes referred to in Article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations.

2. A complaint of or directly related to an act of aggression may not be brought under this Statute unless the Security Council has first determined that a State has committed the act of aggression which is the subject of the complaint.

3. No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.’

16 Articles 13 (b) and 16 of the Rome Statute.

17 UN News Centre, 'Russia, China block Security Council referral of Syria to International Criminal Court', 22 May 2014, available online at <http://www.un.org/apps/news/story>.

clearly politicizes the activities of the Court. As commentators have argued, “the role assigned to the UNSC cast shadows on the credibility of the ICC as an independent Court of Law.”¹⁸ In addition, the power of the UNSC to refer matters to the ICC and also defer matters currently before the ICC gives the UNSC indirect control over the activities of the Court. It has been argued that the deferral power of the UNSC in Article 16 of the Rome Statute is “a heavy sacrifice for the power and independence of the Court.”¹⁹

2.1 *Referral of Cases to the ICC*

The UNSC is empowered by the Rome Statute to trigger the jurisdiction of the Court when crimes within the jurisdiction of the court have been committed in the territory of both states parties and non-states parties to the treaty.²⁰ The UNSC has made use of this provision in the cases in Sudan and Libya which were referred to the ICC pursuant to the Chapter VII powers of the UNSC. However, the referral of Darfur conflict in Sudan has raised several issues regarding the immunity of Heads of State and Government and the blanket amnesty provided by UNSC for UN personnel in Sudan.²¹ Furthermore, the US has also used resolutions 1422 (2002) and 1487 (2003) of the UNSC to extend immunity from ICC prosecution to peace-keepers that are from non-States Parties to the Rome Statute and threatened to veto the extension of UN peace-keeping mandates if the resolutions granting US citizens immunity were not adopted.²² The resolution is seen as a compromise to avoid the veto of UN peacekeeping missions by the US government.²³

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asp?NewsID=47860#.U62000BEIU4 (accessed 27 June 2014).

- 18 N. Elaraby, ‘The Role of the Security Council and the Independence of the International Criminal Court’, in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate, Aldershot, 2001), 43.
- 19 M. Politi, ‘The Rome Statute of the ICC: Rays of Light and Some Shadows’, in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate, Aldershot, 2001), 14.
- 20 Article 13(b) of the Rome Statute; S. Williams and W. Schabas, ‘Article 13: Exercise of Jurisdiction’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edn (C.H. Beck, Munich, 2008), 569.
- 21 See para. 6 of UNSC Resolution 1593.
- 22 M. Bergsmo and J. Pejic, ‘Article 16: Deferral of investigation or prosecution’, in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 2nd edn (C.H. Beck, Munich, 2008) 599.
- 23 M. El Zeidy, ‘The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422’, 35 *Vanderbilt Journal*

Article 103 of the UN Charter gives primacy to UN Charter obligations in relation to obligations arising from other international agreements. By virtue of the fact that the UNSC is acting pursuant to Chapter VII of the UN Charter, its actions may still be considered valid though it might undermine the integrity and effectiveness of the ICC. Even if paragraph 6 of UNSC resolution 1593 is valid, it is still arguably incompatible with provisions of the Rome Statute because it creates two different layers of accountability based on membership or non-membership of the Statute.²⁴ The authority granted by the Rome Statute to the UNSC to refer non-states parties to the ICC has raised concerns due to the political nature of the UNSC. In fact it has been alleged that through UNSC referrals, the ICC 'becomes a policy tool to advance the political interests of those states represented on the [UNSC].'²⁵

2.2 *Deferral of Cases before the ICC*

The UN Charter provides a significant role for the UNSC in promoting international peace and security and the creation of the ICC was seen as an extension of that role.²⁶ The 1994 version of the Draft Code of Crimes Against the Peace and Security of Mankind prepared by the ILC made the jurisdiction of the ICC subject to the approval of the UNSC.²⁷ If the provision had been adopted, it would have given the UNSC a considerable influence over the activities of the ICC.²⁸ During the Preparatory Committee meeting in August 1997, Singapore proposed an amendment reversing the structure of the of the ICC-Security Council relationship as initially provided for in the 1994 ILC Draft

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of Transnational Law (2002), 1503–1544; C. Stahn, 'The Ambiguities of Security Council Resolution 1422 (2002)', 14 *European Journal of International Law* (2003), 85–104.

24 Williams and Schabas, *supra* note 20, 572.

25 D. Verduzco and H. Mistry, 'The UN Security Council and the International Criminal Court' Report of the International Law Meeting organised by Chatham House and Parliamentarians for Global Action, 16 March 2012, available online at <http://www.pgaction.org/pdf/activity/Chatham-ICC-SC.pdf> (accessed 19 June 2013).

26 Article 39 of the UN Charter.

27 Article 23(3) of the ILC 1994 Draft Statute for an International Criminal Court provides that '[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides.'

28 E. Wilmhurst, 'The International Criminal Court: The Role if the Security Council', in M. Politi and G. Nesi (eds) *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate, Aldershot, 2001), 40.

Statute.²⁹ The adoption of Article 16 has several implications for the work of the ICC. According to one scholar:

The drafting history of article 16 gives rise to at least three comments. First, political considerations were not surprisingly given more weight than legal arguments in the determination of the appropriate role for the [UNSC] in ICC proceedings. Secondly, the [UNSC]'s deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Thirdly, article 16 provides an unprecedented opportunity for the [UNSC] to influence the work of a judicial body.³⁰

Article 16 of the Statute grants the UNSC the power to defer cases before the ICC. The power of the UNSC to defer cases before the ICC is not limited by the process through which the cases were referred to the Court. In deferring cases, the UNSC acts under Chapter VII of the UN Charter which means that there has to be evidence that there is a threat to international peace and security. Article 16 complements Article 17 which deals with issues of admissibility and Article 53 which addresses investigation and prosecution of international crimes. It has been suggested that while the OTP focuses on investigating and prosecuting international crimes, it is the responsibility of the UNSC as a political body to determine when an investigation and prosecution will not serve the interests of justice under Article 16.³¹ This means that if a decision on deferral is to be made, the proper channel is through the UNSC which is a political body with the mandate to maintain international peace and security.³² While this proposition has merit, it is important to note that though the UNSC has the primary responsibility to maintain international peace and security, it does not have an exclusive responsibility in the maintenance of international peace and security in respect to the activities of the ICC.³³ Furthermore, Article 53 of the Statute confers on the prosecutor the power to discontinue cases before the ICC and that responsibility should complement the powers of the UNSC. Recent developments before the Court make it imperative to recon-

29 Bergsmo and Pejic *supra* note 22, at 597.

30 Bergsmo and Pejic *supra* note 22, at 598.

31 K. Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', 22 *Leiden Journal of International Law* (2009), 99–126.

32 *Ibid.*

33 S. Kim, 'Maintaining the Independence of the International Criminal Court: The Legal and Procedural Implications of an Article 16 Deferral Request', 29 *Agenda Internacional* (2011), 175–212.

sider the role of the UNSC in maintaining international peace and security and its impact on the activities of the ICC. The UNSC referred cases in Sudan and Libya to the Court.³⁴

In UNSC resolution 1970, Libya was referred to the ICC.³⁵ The UNSC argues that 'the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'.³⁶ In making the decision to refer the matter to the ICC, the UNSC reiterated the fact that the investigations and prosecution could be delayed by one year if a resolution is adopted to that effect.³⁷ Furthermore, the resolution was unequivocal in relation to the jurisdiction for crimes that may be committed in Libya by nationals that are not States Parties to the Rome Statute while enforcing the UNSC resolution.³⁸ The involvement of the UNSC in the activities of the ICC has had mixed results. The powers of the UNSC under the UN Charter are positive responses to threats to international peace and security. However, the political nature and composition of the UNSC has resulted in its actions and decisions coming under scrutiny and criticisms.³⁹ The relationship between the ICC and the UNSC has affected AU's policy towards the ICC because of the possibility of the UNSC to refer non-state parties of the Statute to the ICC.

3 Between Theory and Practice: the Relationship between the ICC, the UNSC and AU

While there are inherent tensions in the relationships and primary responsibilities of the ICC, the UNSC and the AU, a closer look at the three institutions

34 See UNSC Resolutions 1593 and 1970 referring the situations in Sudan and Libya to the ICC.

35 The referral includes acts that took place in Libya from 11 February 2011. See Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting on 26 February 2011, available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement> (accessed 17 January 2012).

36 Paragraph 6 of UNSC resolution 1970.

37 Paragraph 12 of UNSC resolution 1970.

38 See para. 6 of the resolution which provides that 'nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State'.

39 T. Weiss, 'The Illusion of UN Security Council Reform', 26 *Washington Quarterly* (2003), 147–161.

will show that though they are different and distinct in ideology and practice, a common thread binds them. The ICC, the UN and the AU are international organisations. According to the International Law Commission, an international organization is an “organization established by a treaty or other instrument governed by international law and possessing its own international legal personality.”⁴⁰ In addition, they are committed to the maintenance of international peace and security. For instance, the ICC preamble recognizes that international crimes “threaten the peace, security and well-being of the world.”⁴¹ The ICC is an independent permanent court in relationship with the UN and has jurisdiction over the most serious crimes of concern to the international community as a whole.⁴² On the other hand, the UN Charter states that the UNSC has “primary responsibility for the maintenance of international peace and security”, although the UN Charter does not preclude the existence of regional organisations dealing with issues of international peace and security as long as their activities do not contradict that of the UNSC.⁴³ When there is a threat to international peace and security on the African continent, the Constitutive Act of the AU provides that the regional body can intervene in the affairs of a member state pursuant to a decision of the Assembly of Heads of States and Government in respect of grave circumstances, including war crimes, genocide and crimes against humanity.⁴⁴ Member states of the AU can also request intervention from the AU in order to restore peace and security.⁴⁵

From the foregoing, it does seem these organisations share similar mandates when it comes to threats to international peace and security. However, the reality is that the AU currently opposes some of the activities of the ICC in Africa. Although beyond the discussions in this paper, the AU’s opposition to the intervention of the ICC in Africa raises pertinent questions regarding the relationship between Africa and Western countries.⁴⁶ One major contention

40 Article 2 of the Draft Articles on the Responsibility of International Organizations, 2011. This definition was adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10, para. 87).

41 See para. 3 of the Preamble to the Rome Statute.

42 *Ibid.*, para. 8.

43 *Ibid.*

44 Article 4(h) of the AU Act.

45 Article 4(j) of the AU Act.

46 The relationship between Africa and international law is currently debated by scholars and views are polarized. Africa and Third World’s role in international law is subject to different interpretations and several theories leading to the evolution of scholars whose thoughts and ideas have crystalized into what is loosely known as ‘Third World

between the ICC and the AU is the involvement of the activities of the UNSC in the affairs of the ICC to the detriment of the African continent in the referral of cases to the ICC. This article therefore advances the argument that the decision to suspend or defer investigations or prosecutions in the “interests of justice” under Article 53 of the Rome Statute should be a shared responsibility between the ICC and the UNSC. This will involve the UNSC handling issues that emanate from its referrals using Article 16 of the Rome Statute while the prosecutor concentrates on cases arising from States Party referrals or the Prosecutor’s *proprio motu* powers. This will conform to the argument by the prosecutor that the ‘interests of peace’ are political in nature and therefore beyond the mandate of the office. However, this is not to argue that cases referred by States Parties and those opened by the Prosecutor do not pose threats to international peace and security. But cases referred by the UNSC to the ICC are specifically referred because they relate to threats to international peace and security. Therefore, it should be the Security Council who considers referrals in these cases. Such a division of labour between the UNSC and the prosecutor in considering the deferral of cases will ensure that the checks and balances provided by the Rome Statute are used to its optimum and to avoid the UNSC exerting undue influence over the activities of the ICC.

4 The Relationship between the AU and the ICC

The ICC, as a judicial institution is concerned mainly with the investigation and prosecution of international crimes set out in the Rome Statute. The ICC is a creation of treaty law and is distinct from the UN and related bodies. The Rome Statute provides for a relationship agreement between the ICC and the UN which would map how the two should cooperate and complement each

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Approaches to International Law (TWAIL). For an exposition on TWAIL see generally, J. Gathii, ‘Alternative and Critical: The Contribution of Research and Scholarship on Developing Countries to International Legal Theory’, 41 *Harvard International Law Journal* (2000), 263–275; K. Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’, 16 *Wisconsin International Law Journal* (1998), 353–416; O. Okafor, ‘Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective’, 43 *Osgoode Hall Journal* (2005), 171–191; B. Chimni, ‘A Just World Under Law: A View From the South’, 22 *American University International Law Review* (2007), 199–220; A. Anghie, ‘TWAIL: Past and Future’, 10 *International Community Law Review* (2008), 479–482.

other in the fight against impunity for international crimes.⁴⁷ The ICC and the AU had embarked on the process of developing a relationship agreement to enhance cooperation and mutual assistance in the fight against impunity as provided for in the Rome Statute.⁴⁸ However, a draft agreement finalized in May 2005 has not been signed due to the current, problematic relationship between the ICC and the AU.⁴⁹ As previously argued, a closer look at the principles and objectives of the AU in relation to the maintenance of peace and security in Africa and the preamble of the Statute suggests that there should be synergy between the two institutions. While the ICC has the jurisdiction to investigate and prosecute individuals for international crimes, the AU has a broad mandate to maintain peace and security while promoting and protecting human rights and democracy on the African continent. In making a determination whether to investigate and prosecute crimes, Article 17 of the Statute requires that the prosecutor assess whether the case is admissible before the Court by assessing the activities of national governments to investigate or prosecute the relevant crimes. However, the Statute does not clearly provide for such a complementary relationship between the ICC and regional organisations except in relation to cooperation issues.

There are several reasons why cooperation between the ICC and the AU is vital for the effective prosecution of international crimes on the continent. As earlier noted, the majority of the cases currently before the ICC are from Africa. Furthermore, cooperation between the ICC and intergovernmental organisations is provided for in the treaty. For example, the Rome Statute provides that '[t]he Court may ask any intergovernmental organisation to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organisation and which are in accordance with its competence or mandate.⁵⁰ In terms of a relationship between the prosecutor and a regional organisation, the Rome Statute further provides that the prosecutor shall seek the cooperation of any state or intergovernmental or arrangement in accordance with its respective

47 See Relationship Agreement between the International Criminal Court and the United Nations. Done at New York on 4 October 2004 and entered into force 4 October 2004, UN Treaty Series, Vol. 2283, available online at http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/1CCASP3Res1_English.pdf (accessed 25 June 2013).

48 See Article 87(6) of the Rome Statute.

49 CICC 'Regional and International Organizations' available online at <http://www.iccnw.org/?mod=agreementsorgs> (accessed 25 June 2013).

50 Article 87(6) of the Rome Statute.

competence and mandate.⁵¹ Furthermore, the prosecutor is under obligation to enter into arrangements or agreements not inconsistent with the Statute, as may be necessary to facilitate the cooperation of a state, intergovernmental organisation or person.⁵²

Although the AU and the ICC have not yet concluded a relationship agreement, the agreement between the ICC and European Union (ICC–EU Agreement) can be instructive in this regard.⁵³ The ICC–EU Agreement provides that '[t]he EU and the Court shall cooperate, whenever appropriate, by adopting initiatives to promote the dissemination of the principles, values and provisions of the Statute and related instruments.'⁵⁴ This means that regional organisations are under obligation to support the work of the ICC by adopting initiatives that support the values and provisions of the Statute. Another important value in the Rome Statute is the principle of complementarity, which provides that states have the primary responsibility to hold their citizens accountable for international crimes.

The application of positive complementarity in the relationship between the ICC and the AU is vital for the effective functioning of the ICC. This is because the ICC will have the opportunity to encourage national judicial systems to carry out investigations and prosecutions of international crimes. The support and assistance of the AU in this regard through a relationship agreement will be vital.

4.1 *UNSC Resolution 1593, Positive Complementarity and the Interests of Justice*

A practical application of the principle of complementarity is referred to as positive, proactive or active complementarity.⁵⁵ This relationship between the States and the ICC is defined as a proactive policy of cooperation aimed at promoting national proceedings.⁵⁶ It is regarded as a managerial concept that governs the relationship between the Court and domestic jurisdictions on the

51 Article 54(3)(c) of the Rome Statute.

52 Article 54(3)(d) of the Rome Statute.

53 Agreement between the 'International Criminal Court and the European Union on Cooperation and Assistance' 10 April 2006, available online at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/L_115/L_11520060428en00500056.pdf (accessed 11 April 2013).

54 Article 6 of the ICC–EU Agreement.

55 B. Olugbuo 'Positive Complementarity and the Fight Against Impunity in Africa', in C. Murungu and J. Biegon (eds.) *Prosecuting International Crimes in Africa* (Pretoria University Law Press, Pretoria, 2011), 256.

56 ICC 'Prosecutorial Strategy 2009–2012', 1 February 2010, available online at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/>

basis of three cardinal principles: the idea of a shared burden of responsibility, the management of effective investigations and prosecutions, and the two pronged nature of the cooperation regime.⁵⁷ It is also defined as a process by which the prosecutor “would actively encourage investigation and prosecution of international crimes within the court’s jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity.”⁵⁸

The complementarity principle of the Rome Statute applies to the relationship between States Parties to the Rome Statute and national governments. However, it is argued that the application of positive complementarity should not be limited only to the relationship between the ICC and national domestic legal systems. Activities carried out by regional and international organisations with the support of the ICC to combat impunity should be regarded as a positive contribution to preventing international crimes. An example of the application of positive complementarity is UNSC resolution 1593 that referred the Darfur conflict to the ICC. The resolution ‘[i]nvites the Court and the [AU] to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity’.⁵⁹ The possibility of conducting proceedings in the region can be given three different interpretations. The first interpretation is that the AU should facilitate the work of the ICC in the investigation and prosecution of international crimes in Africa. This can be achieved using a relationship or through a memorandum of understanding.⁶⁰ The second interpretation is that the AU can carry out investigations and prosecutions of international crimes in Sudan in collaboration with the ICC. The third interpretation is that the ICC and the AU can work out modalities of carrying out *in situ* trials on the continent.

The UNSC referred the Darfur conflict to the ICC acting under Chapter VII of the UN Charter. The UN Charter provides that any action required in carrying out the decisions of the UNSC for the maintenance of international peace

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OTPProsecutorialStrategy20092013.pdf (accessed 19 December 2012); M. Bergsmo, *Active Complementarity: Legal Information Transfer* (Torkel Opsahl, Oslo, 2011), 98.

57 C. Stahn, ‘Complementarity: A Tale of Two Notions’, 19 *Criminal Law Forum* (2008), 87–113.

58 W. Burke-White, ‘Implementing a policy of positive complementarity in the Rome system of justice’, 19 *Criminal Law Forum* (2008), 59–85, at 62.

59 Paragraph 3 of the UNSC resolution 1593 of 2005.

60 Article 87(6) of the Rome Statute

and security shall be taken by all the members of the UN or by some of them, as the UNSC may determine.⁶¹ Furthermore, decisions by the UNSC to deal with threats to international peace and security shall be carried out by the members of the UN directly and through their action in the appropriate international agencies of which they are members.⁶² In the Darfur situation, the AU is singled out in the resolution as the regional organisation to complement the efforts of the ICC and the UNSC in the fight against impunity in Sudan. The resolution encourages the ICC to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur.⁶³ Furthermore, in relation to the interests of justice, the UNSC resolution 1593 contemplates alternative justice mechanisms to complement criminal prosecutions in the resolution of the Darfur conflict. For example, the resolution:

*[E]mphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with [AU] and international support as necessary.*⁶⁴

The UNSC effectively confirmed the indispensable role of the AU in the resolution of the Darfur conflict. The legal significance of a UNSC resolution on the ICC is that the Court has an obligation to carry out the provisions of the resolution and even report back to the UNSC on how the resolution has been carried out. For example, the relationship agreement between the UN and ICC states:

When the Security Council, acting under Chapter VII of the Charter of the United Nations, decides to refer to the Prosecutor pursuant to Article 13, paragraph (b), of the Statute, a situation in which one or more of the crimes referred to in Article 5 of the Statute appears to have been committed, the Secretary-General shall immediately transmit the written decision of the Security Council to the Prosecutor together with documents and other materials that may be pertinent to the decision of the Council. The Court undertakes to keep the Security Council informed in this regard in accordance with the Statute and the Rules of Procedure

61 Article 48(1) of the UN Charter.

62 Article 48(2) of the UN Charter.

63 Paragraph 4 of UNSC Resolution 1593.

64 Paragraph 5 of UNSC resolution 1593.

and Evidence. Such information shall be transmitted through the Secretary-General.⁶⁵

As the UNSC has the power to refer cases to the ICC and defer matters before the ICC, it means that any decision taken by the UNSC acting under Chapter VII of the UN Charter carries weight. It also means that ignoring the AU may not be in the interest of the ICC in the investigation and prosecution of international crimes as the complementary roles envisaged by the UNSC will be in jeopardy.

4.2 *The Policy of Non-Cooperation with the ICC*

The AU has officially endorsed a policy of non-cooperation with the ICC in the arrest and surrender of President Al-Bashir of Sudan, arguing that this decision is consistent with Article 98(1) of the Statute.⁶⁶ The UNSC's inability to act on a deferral request in the case of Al-Bashir has contributed to the AU's current stance.⁶⁷ It should be noted that the AU decisions on non-cooperation and deferral of cases before the ICC are not supported by all AU member states as Botswana and Chad have voiced dissenting opinions.⁶⁸ Regarding the visit of President Al-Bashir to Kenya in August 2010, a High Court in Kenya held that

65 Article 17 of the Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, available online at http://www.icc-cpi.int/nr/rdonlyres/916fc6a2-7846-4177-a5ea-5aagb6d1e96c/o/iccasp3resi_english.pdf (accessed 22 July 2013); See also CICC 'Cooperation with the United Nations', available online at <http://www.iccnw.org/?mod=agreementsun> (accessed 22 July 2013).

66 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) adopted during the Thirteenth Ordinary Session of the AU Summit 1–3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya. Article 98(1) provides that, '[t]he Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.'

67 Para 10 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII) adopted during the Thirteenth Ordinary Session of the AU Summit, 1–3 July 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya.

68 For example, Botswana entered a reservation on the latest resolution adopted by the AU on the ICC. See Decision on International Jurisdiction, Justice and the International Criminal Court (ICC) Doc. Assembly/AU/13(XXI), Assembly/AU/Dec.482(XXI) and Chad entered reservation on the Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII).

Kenya had contravened its legal obligations to arrest President Al-Bashir when he visited the country and issued a warrant for his arrest.⁶⁹ President Al-Bashir visited Malawi during the presidency of Bingu wa Mutharika in October 2011⁷⁰ and Chad under the presidency of Idriss Deby in July 2010 and August 2011.⁷¹ These visits resulted in decisions by the ICC in relation to cooperation between the ICC and states parties regarding Article 87(7) of the Rome Statute.⁷² The Pre-Trial Chamber I of the ICC in December 2011 issued two decisions pursuant to Article 87(7) of the Rome Statute on the failure by the governments of Malawi and Chad to comply with the cooperation requests issued by the ICC regarding the arrest and surrender of Al-Bashir.⁷³

Sudan has consistently denounced the activities of the ICC as undermining its sovereignty and argues that as it is not a State Party to the Rome Statute, it is

69 *The Kenya Section of the International Commission of the Jurists vs. Attorney-General and Others*, [2011] eKLR, *Miscellaneous Criminal Application No. 685 of 2010* Provisional warrant of arrest under section 32 of the International Crimes Act of 2008, available online at http://www.sudantribune.com/IMG/pdf/Kenya_arrest_warrant_01232011.pdf (accessed 28 May 2012).

70 BBC World Service, 'Sudan's Omar al-Bashir in Malawi: ICC wants answers' (20 October 2011), available online at <http://www.bbc.co.uk/news/world-africa-15384163> (accessed 27 June 2013).

71 BBC World Service, 'Sudan's President Bashir defies arrest warrant in Chad' (21 July 2010), available online at <http://www.bbc.co.uk/news/world-africa-10718399> (accessed 27 June 2013); Sudan Tribune, 'EU criticizes Bashir's visit to Chad despite ICC warrant' (8 August 2011), available online at <http://www.sudantribune.com/EU-criticizes-Bashir-s-visit-to,39783> (accessed 27 June 2013).

72 Article 87(7) provides '[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.'

73 The legal principles in the decisions are similar. The Malawi Decision referred to in the Chad Decision will be discussed. See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir of 12 December 2011, ICC-02/05-01/09, available online at <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf> (accessed 22 May 2013); *The Prosecutor v. Omar Hassan Ahmad Al Bashir* Decision pursuant to Article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 of 13 December 2011, available online at <http://www.icc-cpi.int/iccdocs/doc/doc1384955.pdf> (accessed 27 June 2013).

not bound by the activities of the ICC.⁷⁴ However, scholars have argued that by virtue of the fact that the situation was referred to the ICC by the UNSC acting under Chapter VII of the Charter of the UN, Sudan as a member of the UN is bound to cooperate with the ICC.⁷⁵ Though it has been recognized that there is an apparent conflict between Articles 27 and 98 of the Rome Statute, scholars have argued that '[a]rticle 27 is concerned with the question of the Court's jurisdiction, whereas [a]rticle 98 is concerned with international co-operation and judicial assistance.'⁷⁶ The authors further argue that '[i]t is possible that the Court might have jurisdiction over an individual head of state, but that the same individual would have immunity from the proceedings in national courts involved in any attempt to arrest and transfer him.'⁷⁷ Furthermore, some scholars have argued that the contradiction between Articles 27(2) and 98(1) is due to lack of harmonization of the provisions during the negotiations for the adoption of the treaty.⁷⁸ It should be noted that though Pre-Trial Chamber I referred Djibouti, Chad, Kenya and Malawi to the UNSC and the ASP for not arresting Al-Bashir when he visited their countries, there is currently no response from either the UNSC or the ASP on the issue.

4.3 *The ICC and Criminal Chamber of the African Union*

There is currently a contentious relationship between the AU and the ICC. The AU has commenced the process of extending the jurisdiction of the African Court Justice on Human and Peoples Rights (ACJHPR) to adjudicate over inter-

74 See the speech of Elfatih Mohamed Ahmed Erwa after the adoption of the UNSC resolution 1593 on 31 March 2005, available online at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> (accessed 25 June 2013).

75 S. William and L. Sherif, 'The arrest warrant for President al-Bashir: Immunities of incumbent heads of state and the International Criminal Court', 14 *Journal of Conflict and Security Law* (2009), 71–92; D. Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', 7 *Journal of International Criminal Justice* (2009), 333–352; D. Akande, 'The Bashir indictment: Are serving heads of state immune from ICC prosecution?', *Oxford Transitional Justice Research Working Paper Series*, 87–89, available online at http://www.fljs.org/sites/www.fljs.org/files/publications/Justice_in_Africa.pdf (accessed 24 February 2014).

76 A. Dworkin and K. Iliopoulos, 'The ICC, Bashir and the Immunity of Heads of State', available online at <http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of-state/> (accessed 9 May 2012).

77 *Ibid.*

78 J. van der Vyver, 'Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court', 11 *African Human Rights Law Journal* (2011), 683–698.

national crimes committed in Africa.⁷⁹ The proposal, elicited several reactions from different segments of society in Africa and abroad.⁸⁰ While there are supporters of the decision, some scholars argue that the process has not benefited from wider consultations on the viability of the project.⁸¹ Nevertheless, the protocol was adopted during the AU Summit of June 2014.

79 AU, 'Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 15 May 2012', available online at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> (accessed 26 June 2013).

80 M. du Plessis, A. Louw and O. Maunganidze, 'African efforts to close the impunity gap: Lessons for complementarity from national and regional actions', *ISS Paper 241* (November 2012), available online at <http://www.issafrica.org/uploads/Paper241.pdf> (accessed 26 June 2013); Avocats Sans Frontieres, 'Africa and the International Criminal Court: Mending Fences' (July 2012), available online at http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf (26 July 2013); A. Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects', 60 *Netherlands International Law Review* (2013), 27–50; M. Matasi and J. Bröhmer, 'The proposed international criminal chamber section of the African court of justice and human rights: a legal analysis' (20 March 2013), available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236040 (accessed 26 June 2013); M. du Plessis, 'A case of negative regional complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes' (27 August 2012), available online at <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/> (accessed 26 June 2013); F. Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', *AfricaLaw* (23 May 2012), available online at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/> (accessed 26 June 2013); M. du Plessis, 'Implications of the AU decision to give the African Court jurisdiction over international crimes', *ISS Paper No 235* (June 2012), available online at <http://www.issafrica.org/uploads/Paper235-AfricaCourt.pdf> (accessed 3 December 2012); C. Odinkalu, 'Concerning the Criminal Jurisdiction of the African Court – A Response to Stephen Lamony' (19 December 2012), available online at <http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/> (accessed 26 June 2013); S. Lamony, 'African Court Not Ready For International Crimes' (10 December 2012), available online at <http://africanarguments.org/2012/12/10/african-court-not-ready-for-international-crimes-%E2%80%93-by-steven-lamony/> (accessed 26 June 2013); D. Mitnick 'African Union Considers Proposals to Add International Criminal Jurisdiction to the Pan-African Court' *Human Rights Brief* (3 April 2013), available online at <http://hrbrief.org/2013/04/african-union-considers-proposals-to-add-international-criminal-jurisdiction-to-the-pan-african-court/> (accessed 26 June 2013).

81 Viljoen, *supra* note 80.

It has been argued that the idea of establishing the criminal chamber is a direct response to the indictment and prosecution of African state officials either by the domestic courts of some European states⁸² or by the ICC.⁸³ This raises the question whether there is a genuine concern by the AU to fight impunity in the continent. The idea for an African criminal chamber predates the activities of the ICC in Africa, including the threat of indictments by European countries. The Strategic Plan of the AU Commission of May 2004 argues that '[t]he African Court of Justice will adjudicate in civil cases and be responsible for human rights protection and monitoring human rights violations. It will also constitute itself into a real criminal court in the long term.'⁸⁴ The idea for a regional criminal chamber was further discussed during the drafting process of the protocol to merge the African Court of Justice and the African Court on Human and Peoples' Rights in 2005.⁸⁵ The AU Committee of Eminent African Jurists (AU-CEAJ) established in 2006 to make suggestions on the possibility of conducting a trial of the former president of Chad, Hissène Habré in the African continent recommended that the merged African Court should be conferred with criminal jurisdiction.⁸⁶

ICC indictments of African leaders are not the sole pretext for the decision to expand the jurisdiction of the African Court to include criminal matters, but may have motivated the current process. Furthermore, the establishment of a criminal chamber by the AU is a long-term project and will not likely offer relief to those indicted or currently under investigation by the ICC in Africa.⁸⁷

82 Especially France, the United Kingdom, Spain and Belgium.

83 C. Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights', 9 *Journal of International Criminal Justice* (2011), 1067–1088.

84 AU, 'Strategic Plan of the African Union Commission: Vision and Mission of the African Union' (May 2004), available online at <http://www.africa-union.org/root/au/AboutAu/Vision/Volume1.pdf> (accessed 10 April 2013).

85 P. Manirakiza, 'The Case for an African Criminal Court to Prosecute International Crimes Committed in Africa', in V. Nmehielle (ed.), *Africa and the Future of international Criminal Justice* (Eleven International Publishing, The Hague, 2012), 378.

86 Paragraph 39 of the AU-CEAJ report recommended that '[t]he African Court should be granted jurisdiction to try criminal cases. The Committee therefore recommends that the on-going process that should lead to the establishment of a single court at the African Union level should confer criminal jurisdiction on that court. The Committee further recommends that the text should be adopted through the quickest procedures possible.' See Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, available online at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Reporo5o6.pdf (accessed 27 June 2013).

87 D. Deya, 'Is the African Court worth the wait: Pushing for the African Court to exercise jurisdiction for international crimes' (6 March 2012), available online at <http://www.osisa.org/openspace/regional/african-court-worth-wait> (accessed 28 March 2012).

Given the slow pace of ratification, it is unlikely that the protocol will come into force anytime soon. In other words, the claim that it is going to be used to provide impunity in Africa may be exaggerated. However, the recent decision to extend immunity to African heads of states is a worrying sign and a clear of picture of the tensions surrounding the project.⁸⁸

The envisioned African criminal chamber faces several challenges. These include the hurried nature of the drafting process, personnel issues, its relationship with the ICC and crimes under the jurisdiction of the proposed criminal chamber.⁸⁹ For example, not all the crimes under the jurisdiction of the proposed criminal chamber are international crimes.⁹⁰ Supporters of the criminal chamber have acknowledged that all the crimes in the draft protocol are not international crimes, but argue that these crimes threaten peace and security in the African continent necessitating the current move to criminalize them.⁹¹ Furthermore, the UN and the AU have adopted several instruments in relation to all the crimes under the jurisdiction of the criminal chamber.⁹² Whether these efforts will meet the jurisdictional threshold set out in the Rome Statute under the principle of complementarity is one that has to be decided by the judges of the ICC when the issue comes up before them.⁹³

Though the ICC does not explicitly envisage a regional court in terms of complementarity, there is no provision in the Statute that discourages the establishment of regional accountability mechanisms to fight impunity on

88 In May 2014, AU's Ministers of Justice meeting in Addis Ababa recommended that "Article 46A bis of the extension plan be amended to incorporate a clause exempting from prosecution any serving AU Head of State and Government, or anybody acting or entitled to act in such capacity or other senior state officials based on their functions, during their tenure of office." See International Federation for Human Rights "Immunity of Heads of State and Government for International Crimes? The African Union must act with coherence and political courage" 20 June 2014, available online at <http://www.fidh.org/en/15601-immunity-of-heads-of-state-and-government-for-international-crimes-the> (accessed 21 June 2014).

89 M. du Plessis, ISS Paper No 235, *supra* note 80.

90 Article 28B–28N of the draft protocol provides that the Criminal Chamber will have jurisdiction over the following crimes: 'Genocide; Crimes Against Humanity; War Crimes; Unconstitutional Change of Government; Piracy; Terrorism; Mercenarism; Corruption; Money Laundering; Trafficking in drugs; Trafficking in hazardous wastes; Illicit Exploitation of Natural Resources; Aggression; 'Inchoate Offences'/ Modes of Responsibility.

91 D. Deya, 'The Draft Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights – the Sources for the definitions of the crimes' (on file with the author).

92 *Ibid.*

93 Article 19 of the Rome Statute.

the continent.⁹⁴ On this basis, it is argued that '[t]he cooperation inherent in positive complementarity should not necessarily be between the ICC and member states of the Rome Statute only. It should exist between the ICC and regional organisations such as the African Union.'⁹⁵ This position is consistent with Article 52(1) of the UN Charter, which supports the setting up regional justice mechanisms.⁹⁶ The only limitation is that when there is a conflict between the obligations to the regional mechanism and the UN, the obligation to the UN will prevail.⁹⁷

5 Building Credible Partnerships between the ICC and the AU

This section attempts to articulate ideas for an effective relationship between the ICC and the AU that will be mutually beneficial while respecting the mandates and responsibilities of each institution. The AU's lack of cooperation with the ICC raises issues of legitimacy for the institution and hampers the effectiveness of the ICC to investigate and prosecute international crimes in the continent. Cooperation between the ICC and AU is vital for the success of the Court. However, there has not been an articulation of what a credible partnership between the ICC and the AU should be and how beneficial such a relationship will be for both organisations. The ideas include *in situ* trials in Africa, a mixed chamber of the African Court of Justice and Human Rights, establishment of an ICC Liaison office in Addis Ababa, Ethiopia and the conclusion of a relationship agreement between the AU and the ICC.

94 Abass, *supra* note 80, at 48–49.

95 V. Nmeihelle, 'Taking Credible Ownership of Justice for Atrocity Crimes in Africa: The African Union and the Complementarity Principle of Rome Statute', in V. Nmeihelle (ed.) *Africa and the Future of international Criminal Justice* (Eleven International Publishing, The Hague, 2012), 233.

96 Article 52(1) of the UN Charter provides '[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.' See also Odinkalu, *supra* note 80.

97 See Article 103 of the UN Charter which provides '[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

5.1 *ICC Chamber in Africa (In Situ Trials)*

The ICC can sit at any place other than The Hague, as provided in the Statute.⁹⁸ The prosecutor, defendants or victims of crimes under consideration by the ICC can request a relocation of the seat of the Court from The Hague on a temporary basis.⁹⁹ UNSC resolution 1593 provides that the ICC and the AU should 'discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity'.¹⁰⁰ This means that the ICC can sit on the continent to hear cases and also cooperate with the AU regarding cases before it.

There is no provision in the Rome Statute that prohibits such an undertaking. Having the ICC sit temporarily in Africa will help the court reach out to victims and witnesses, including the ICC's critics.¹⁰¹ Regarding possible venues that can be used for the proceedings, the Court can enter into negotiations with the UN and the governments of Tanzania or Sierra Leone regarding the facilities of the International Criminal Tribunal for Rwanda (ICTR) or the Special Court for Sierra Leone (SCSL). The countries where the crimes were committed can also be considered. The Statute encourages the ICC to enter into different forms of cooperation and assistance from intergovernmental organisations.¹⁰² With the winding down of activities of the SCSL and the ICTR, the possibility of *in situ trials* in Africa should be explored by the ICC.¹⁰³ This suggestion has received support by the recent recommendation of Pre-Trial Chamber V(A) to the ICC Presidency on the possibility of holding parts of the trials on the

98 Articles 3(3) and 62 of the Rome Statute. See also Rule 100 of the ICC's Rules of Procedure and Evidence.

99 G. Strijards, 'Article 3: Seat of the Court', in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (C.H. Beck, Munich, 2008) 75.

100 Resolution 1593 of the UNSC SC/8351 adopted on 31 March 2005.

101 C. Jalloh, 'Regionalizing International Criminal Law?', 9 *International Criminal Law Review* (2009), 445–499.

102 See Article 87(6) of the Rome Statute. See also C. Kreb and K. Prost, 'Article 87: Requests for cooperation – general provisions', in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edn (C.H. Beck, Munich, 2008), 1527.

103 T. Cruvellier, 'From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test', International Center for Transitional Justice and Sierra Leone Court Monitoring Programme (2009), 40, available online at http://www.operationspaix.net/DATA/DOCUMENT/5088~v-From_the_Taylor_Trial_to_a_Lasting_Legacy_Putting_the_Special_Court_Model_to_the_Test.pdf (accessed 31 May 2012).

Kenyan situation inside Kenya or Arusha, Tanzania.¹⁰⁴ The judges of the ICC did not reach the required two-third majority needed for the decision in the case involving William Ruto and Joshua Sang.¹⁰⁵ However, the fact that ICC judges considered the issue seems to indicate a possibility for *in situ* trials in the future.¹⁰⁶

The AU is encouraged to cooperate with the ICC notwithstanding the current face-off as the venues suggested above are not facilities of the AU. One disadvantage of having an ICC Chamber sitting in Africa may be the issue of security and threat to witnesses. For example, ICC personnel citing security issues may decide not to relocate to Africa for proceedings in the region.¹⁰⁷ This was the case when the Pre-Trial Chamber II mooted the idea of holding confirmation of charges hearings in Kenya.¹⁰⁸ The prosecutor opposed the idea citing security concerns in Kenya.¹⁰⁹ It will be recalled that the SCSL had to

104 Paragraph 10 of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*: ICC-01/09-01/11, 'Recommendation to the Presidency on where the Court shall sit for trial' (3 June 2013), available online at <http://www.icc-cpi.int/iccdocs/doc/doc1599761.pdf> (accessed 26 June 2013); M. Pflanz, 'ICC trials for Kenya's new leaders may shift partly back home', *The Christian Science Monitor* (13 June 2013), available online at <http://www.csmonitor.com/World/Africa/2013/0613/ICC-trials-for-Kenya-s-new-leaders-may-shift-partly-back-home> (accessed 26 June 2013).

105 See ICC 'Ruto and Sang case, Trial to open in The Hague' where it was argued that '[t]he Judges, while in principle in favour of bringing the ICC's proceedings closer to the affected communities, concluded that the proceedings in this case shall be held at the ICC's headquarters', available online http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc0109011/Pages/ruto-sang.aspx (accessed 24 July 2013).

106 *Ibid.*

107 In the Ruto and Sang case, the ICC judges discussed issues ranging from '[s]ecurity, the cost of holding proceedings outside The Hague, the potential impact on victims and witnesses and on proceedings in The Hague, the length of the proceedings to be held away from the seat of the Court, as well as the potential impact on the perception of the Court and the impact on the Court's ability to conduct and support other proceedings that are taking place simultaneously at the seat of the Court.'

108 Africa Review, 'Amnesty backs ICC pre-trial hearing in Kenya' (15 June 2011), available online at <http://www.africareview.com/News/Amnesty++backs+ICC+hearing+in+Kenya/-/979180/1181270/-/135ifky/-/index.html> (accessed 31 May 2012).

109 O. Mathenge, 'Ocampo opposes plan for ICC hearings in Kenya', *Daily Nation* (13 June 2011), available online at <http://www.nation.co.ke/News/politics/-/1064/1180358/-/7t84va/-/index.html> (accessed 31 May 2012).

relocate to The Hague due to perceived security concerns of holding Charles Taylor's trial in Sierra Leone.¹¹⁰

5.2 *Mixed Chamber of the African Court of Justice and Human Rights*

Another possible scenario is a mixed chamber of African and international judges in the proposed criminal Chamber of the ACJHPR. This will enhance the legitimacy and objectivity of the criminal chamber. The possibility of this proposal should be explored as it will enable the ACJHPR to assert its independence and impartiality in relation to international criminal prosecutions. Furthermore, resolution 1593 can be interpreted as supporting the AU in setting up a mixed chamber of the ACJHPR to adjudicate international crimes.¹¹¹ The draft protocol amending the merger protocol provides;

The Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.¹¹²

This can be interpreted as not precluding the AU from appointing non-Africans to the ACJHPR. This means that AU member states nominating candidates may be allowed to nominate non-citizens into the chambers of the African Court. Allowing international judges to sit in the criminal chamber in Africa is not a new idea. The SCSL has a mixed chamber comprising of local and

110 J. Easterday, 'The trial of Charles Taylor 1: Prosecuting 'Persons who bear the greatest responsibility'', University of California, Berkeley War Crimes Study Center, 8 (June 2010), available online at http://socrates.berkeley.edu/~warcrime/SL-Reports/Prosecuting_persons_who_bear_the_greatest_responsibility.pdf (accessed 31 May 2012).

111 See para. 3 of Resolution 1593 which provides that the UNSC, '[i]nvites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity'.

112 Article 3 of the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Exp/Min/IV/Rev.7 adopted during the meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters 7 to 11 and 14 to 15 May 2012 Addis Ababa, Ethiopia.

international judges.¹¹³ Some countries in Africa have also benefitted from the expertise and experiences of international judges.¹¹⁴

5.3 *Liaison Office of the ICC at the AU*

The need to have an ICC liaison office at the AU headquarters in Addis Ababa cannot be over emphasized. It will serve as an opportunity for the two institutions to develop synergies of cooperation and mutual assistance.¹¹⁵ The reason for the refusal to grant the request of the ICC to open a liaison office with the AU is attributed to the refusal of the UNSC to defer the cases in Sudan and Kenya using Article 16 of the Statute. However, the decision is not that of the ICC but the UNSC. The AU's decision to suspend the establishment of a liaison office due to the inability of the UNSC to act on a request for deferral should be revisited. The AU should have ways of communicating its displeasure with the UNSC directly. The liaison office affords the AU and the ICC an opportunity to engage in constant consultation and dialogue based on mutual trust.¹¹⁶ It could also permit the victims of crimes within the Statute to receive necessary support and assistance while integrating victims' issues in the activities of the AU. This will require a review of the current mode of operation of the AU in promoting peace and security in the region.

AU member states that are parties to the Statute would benefit from regular updates on issues related to their membership of the ICC and such an official channel in Addis Ababa may prove helpful. The good news is that the AU Summit resolution '[d]ecide[d] to reject for now' the possibility of opening an ICC liaison office at Addis Ababa. This means that the AU is still open to further discussions on this issue.¹¹⁷ It will be a good opportunity for the AU and the

113 Article 2 of the Agreement between the United Nations and the Government of Sierra Leone.

114 D. Terris, C. Romano and L. Swigart, 'Toward a Community of International Judges', 30 *Loyola Los Angeles International and Comparative Law Review* (2008), 419–472; F. Darroch, 'The Lesotho Corruption Trials – A Case Study', 29 *Commonwealth Law Bulletin* (2003), 901–975.

115 Human Rights Watch, 'Observations and Recommendations on the International Criminal Court and the African Union in advance of the 17th African Union Summit (30 June–1 July)' (27 June 2011), available online at <http://www.hrw.org/news/2011/06/27/observations-and-recommendations-international-criminal-court-and-african-union> (accessed 31 May 2011).

116 Jalloh, *supra* note 101, at 448.

117 Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/Au/Dec.270(Xiv) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/Au/10(xv) adopted during the

ICC to have regular briefings and discussions regarding developments on the investigation and prosecution of international crimes in the continent and the opening of the liaison office will be a good way to start the relationship.

5.4 *Relationship Agreement between the AU and the ICC*

As already noted, the ICC currently has relationship agreements with several inter-governmental organisations including the UN and the EU. These agreements aid the ICC in the administration of international justice. The Statute provides for the Court to enter into bilateral agreements that will enhance its work. The AU and the ICC had commenced work on the relationship agreement before the current lull caused by the indictment of President Al-Bashir of Sudan. Human Rights Watch has argued that the relationship agreement should be revisited by the AU and the ICC.¹¹⁸ This is because the process of dialogue between the ICC and the AU required to negotiate the terms of the relationship agreement will help clarify thorny issues that are currently affecting the relationship between the two institutions.¹¹⁹ Some African states parties to the Rome Statute, including situation countries, have signed the Agreement on Privileges and Immunities (APIC) to ensure that the Court effectively carries out its mandate to investigate and prosecute those responsible for international crimes.¹²⁰ The AU should follow suit and ensure that the relationship agreement is completed to enable effective cooperation between the two institutions.

Assembly of the African Union Fifteenth Ordinary Session 25–27 July 2010, Kampala, Uganda, available online at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_25_27_July_2010_BCP_ASSEMBLY_OF_THE_AFRICAN_UNION_Fifteenth_Ordinary_Session.pdf (accessed 26 June 2013).

118 Human Rights Watch, 'Courting History: The Landmark International Criminal Court's First Years' (2008), 222, available online at http://www.hrw.org/sites/default/files/reports/icc0708_1.pdf (accessed 31 May 2012).

119 T. Murithi and A. Ngari, 'The ICC and Community-Level Reconciliation: In-country Perspectives Regional Consultation Report' (Institute for Justice and Reconciliation, Cape Town, 2011), available online at http://www.iccnw.org/documents/IJR_ICC_Regional_Consultation_Report_Final_2011.pdf (accessed 31 May 2012).

120 Coalition for the International Criminal Court, 'Ratification/Accession and Signature of the Agreement on Privileges and Immunities of the Court' 24 January 2012, available online at http://www.coalitionfortheicc.org/documents/APIC_EN_chart_updated_January_2012.pdf (accessed 31 May 2012).

6 Conclusion

Though the relationship between the UN and the ICC is clearly defined, the role of the UNSC in the activities of the ICC has been a cause for concern since the entry into force of the Rome Statute. Because the primary responsibility of the UNSC is to maintain international peace and security, Article 16 of the Rome Statute provides the UNSC the power to defer proceedings before the ICC acting under Chapter VII of the UN Charter. The deferral of proceedings should be limited to UNSC referrals to ensure that the ICC does not become involved with politically charged situations occasioned by the democracy deficit of the UNSC.

Regarding the relationship between the ICC and AU, it is obvious that the faceoff is causing serious credibility problems for the ICC and has to be managed carefully to avoid the sentiments that the Court is established solely to prosecute Africans. The ICC's response should not be restricted to investigating other continents, but must involve the review of its prosecutorial policies to recognise the tension between peace and justice and the potential use of Article 53 to defer proceedings before the ICC that were referred by States Parties and through the *proprio motu* power of the prosecutor. The ICC should also review its prosecutorial policies that limit the role of positive complementarity in the activities of the Court.¹²¹

There are on-going agitations for deferral of ICC cases in Sudan, Kenya and Libya spearheaded by the AU. The AU has also commenced the process of establishing a criminal chamber of the ACJHPR to try Africans indicted for international crimes. These activities may be interpreted as the expression of genuine concern by African governments to tackle impunity in the continent or subtle plans to sustain the status quo and ensure that those accused of international crimes are not held accountable. Despite the fact that the proposed amendment of Article 16 of the Rome Statute was not discussed in Kampala due to logistical issues involved, it is imperative for member states of the AU to follow up with the procedure and participate fully in the Working Group on future amendments. This is because the current relationship between the ICC and the UNSC needs to be redefined to ensure the effective functioning of the Court and the AU's input in this regard will be needed.

Finally, there is need for a shared responsibility between the ICC and the AU in the fight against impunity in the continent. This will involve the ICC considering the holding of *in situ* trials in Africa, while the AU considers the possibility of having international judges in the criminal chamber of the ACJHPR.

¹²¹ Olugbuo, *supra* note 55, at 275.

The AU and the ICC should further discuss ways of ensuring that the ICC liaison office in Addis Ababa is functional and that the relationship agreement between the ICC and the AU is completed as soon as possible to ensure effective collaboration and synergy in efforts aimed at achieving accountability for international crimes in the continent. Addressing impunity requires the ICC and the AU to see each other as partners and not antagonists. Both institutions should endeavour to develop a credible partnership built on mutual trust and understanding rather than the current state of mistrust and suspicion. This is in support of the argument advanced by Max du Plessis that '[t]he fulfilment of the aims and objectives of the ICC on the African continent – in particular through the complementarity regime – are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession, and civil society. Meeting these needs requires commitment to a collaborative relationship between these stakeholders and the ICC.'¹²²

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122 M. du Plessis 'Complementarity and Africa: The Promises and Problems of International Criminal Justice', 17 *African Security Review* (2008), 154–170.