

“Can These Dry Bones Live?”

In Search of a Lasting Therapy for AU and ICC Toxic Relationship

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Abstract

The competing visions of international criminal justice between the International Criminal Court (ICC) and the African Union (AU) reached a climax with the recent adoption of the AU Protocol enlarging the mandate of the African Court of Justice and Human and Peoples' Rights to cover criminal jurisdiction. The Protocol, inter alia, grants immunity to state officials for atrocious crimes, which clearly conflicts with the ICC Statute's normative framework. This dialectic is bound to deepen an already toxic relationship between the two international players. This article calls for practical reasonableness by all stakeholders in order to revive the diminishing effort at advancing international criminal justice in Africa.

Keywords: Criminal accountability, acta sunt servanda, Conflicts, Arrest warrant, Official immunity.

1 Prefatory Remarks

We have little hope of preventing the worst crimes known to mankind, or reassuring those who live in fear of their recurrence, if African leaders stop supporting justice for the most heinous crimes just because one of their own stands accused.¹

Does Africa believe in international criminal justice? It is necessary to interrogate the evidence before answering this question. If one begins with *jus in bello*, it could be observed that many African states are parties to the four Geneva Con-

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1 K. Annan, 'Africa and the International Court', *New York Times*, 29 June 2009, available at <www.nytimes.com/2009/06/30/opinion/30iht-edannan.html?adxnml=1&adxnmlx=1317845173-fNrNNIEorCaZt5chng9SPA>.

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ventions² and their two Additional Protocols.³ These international humanitarian law (IHL) treaties, *inter alia*, prohibit and punish “grave breaches” committed during armed conflicts.⁴ Many states define and punish these crimes in the military manuals and legislation. Some of these manuals or legislation do not even require violations of IHL to be ‘grave’ or serious in order to amount to war crimes.⁵ Many African states are also parties to many treaties adopted under the auspices of the United Nations (UN) and the Organization of African Unity (OAU)/African Union (AU)⁶ to prohibit and punish some particular crimes of global and regional concerns, such as terrorism, money laundering, corruption, to mention just a few.⁷ As UN member states, African states also actively participated in the processes leading to the establishment of international and internationalized criminal tribunals.⁸

Of course, African states played critical roles in the processes leading to the adoption of the Rome Statute of the International Criminal Court⁹ and the subsequent establishment of the Court. These states were active at the Rome Diplo-

- 2 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 6 UST. 3114, 75 UNTS 31 [“First Convention”]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949, 6 U.S.T. 3217, 75 UNTS 85 [“Second Convention”]; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316, 75 UNTS 135 [“Third Convention”]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287 [“Fourth Convention”].
- 3 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 15 August 1977, 16 ILM 1391 [“First Protocol”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2), 15 August 1977, 16 ILM 1442 [“Second Protocol”].
- 4 See, e.g., First Convention, 1977, Art. 50; First Protocol, 1977, Arts. 11 and 85.
- 5 See J.M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1, Rules (ICRC 2005), Cambridge University Press, New York, 2005, p. 569 (citing, *inter alia*, the military manuals of Nigeria and South Africa).
- 6 The African Union was established in 2002 to replace the Organization of African Unity (OAU). See Constitutive Act of the African Union, adopted on 11 July 2000, entered into force on 26 May 2001, OAU Doc. CAB/LEG/23.15 (2000) [‘AU Act’], Art. 33 (“This Act shall replace the Charter of the Organisation of African Unity”).
- 7 See, in relation to terrorism, International Convention for the Suppression or Terrorist Bombings, 15 December 1997, 37 ILM 249 (1998) [“Terrorist Bombing Convention”]; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 20 UST 2941, 704 UNTS 219 [“Tokyo Convention”]; Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 22 UST 1641 [“Hague Convention”]; and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 24 UST 564 [“Montreal Convention”]. At the regional level, see, e.g., OAU Convention on the Prevention and Combating of Terrorism, OAU Assembly 35th Ordinary Session, OAU Doc. AHG/Dec. 132 (XXXV), 14 July 1999, registered with the UN on 23 July 2003 [“OAU Terrorism Convention”]. The full list of AU treaties, including the ratification status, is available at <www.au.int/en/treaties>.
- 8 Such as the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone’s war crimes.
- 9 See Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 July 1998, entered into force on 1 July 2002, A/CONF.183/9 (as amended) [“ICC Statute”].

matic Conference that negotiated the ICC Statute, meaning that they contributed to its final wordings.¹⁰ Many African states are parties to the ICC Statute¹¹ – more than 30, in fact, thus representing the largest regional bloc among ICC member states. Senegal, an African state, was the first to ratify the Statute on 2 February 1999. Many of these states parties have adopted implementing domestic legislations, including South Africa (2001), Uganda (2006), Senegal (2007), Kenya (2008), Mauritius (2011) and Comoros (2012).¹² Others are in the process of doing so. African states also played a strong role at the ICC Review Conference in Kampala, Uganda, in 2010.¹³ In fact, the AU urged these states to “prepare fully” for that Conference.¹⁴

The recent amendment of the Protocol to the African Court of Justice and Human and Peoples’ Rights to add criminal jurisdiction to the jurisdiction *materiae* of the African Court¹⁵ is also a testament to Africa’s commitment to international criminal justice, at least in principle. The Protocol is meant to “prevent [...] serious and massive violations of human and peoples’ rights” in Africa.¹⁶ The problem is that the Protocol, *inter alia*, gives immunity to state officials for international crimes.¹⁷ This provision is not only at odds with the legal regime under the ICC Statute,¹⁸ but it strengthens the hands of leaders who use impunity as a governance password. It was for this very purpose that the ICC was established – to put an end to impunity for perpetrators of the most serious crimes of concern to the international community and to contribute to the prevention of such crimes.¹⁹

More tellingly, this development has further poisoned the already toxic relationship between the ICC and the AU arising from what the latter perceives as the international victimization of Africa. The development could also have a negative impact on the normative development of international criminal law and enforcement of international criminal justice in Africa. Perhaps, in adopting the Protocol, the AU is making a point to the global community that “Africa has come of age” on these issues and that the continent should be left alone to deal with some of its pathologies, including state impunity. Time will tell whether this deepening

10 African civil society groups also actively participated in the various non-governmental conferences and their outcome documents that were later synthesized into what became the ICC Statute.

11 For a list of member states to the ICC Statute, see <www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

12 See generally, Coalition for the International Criminal Court, ‘Implementation of the Rome Statute’, available at <www.iccnw.org/?mod=romeimplementation&idudctp=10&show=all#10>.

13 See E. Keppler, ‘Burkina Faso, Niger’s Stand on Gaddafi and ICC Warrant’, *Daily Trust*, 16 September 2011, available at <http://allafrica.com/stories/201109200230.html>.

14 See Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), AU Doc. Assembly/AU/Dec. 245(XIII) Rev. 1 (July 2009) [“Decision on Meeting of African States Parties to ICC Statute”], para. 8.

15 See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by AU Assembly in July 2014 (not yet in force), available at <http://www.au.int/en/treaties> [“AU Court Protocol”].

16 *Id.*, preamble.

17 *Id.*, Art. 46Abis.

18 See ICC Statute, 2002, Art. 27(1).

19 See *id.*, preamble.

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crisis marks a permanent divorce, or a temporary separation, in the hitherto mutually suspicious relationship between the two international institutions.

This article interrogates these and other dialectics in the ICC and AU relationship. It argues that the present tit-for-tat, cat-and-mouse, game will not advance international criminal justice in Africa or, for that matter, anywhere in the world. It calls on all stakeholders – the ICC, AU, UN, *et al.* – to put back their swords into the ploughshares and work to defreeze the ice that pervades the landscape and prevents accountability for impunity. Cooperation, not competition, is the solution to Africa's twin problems of impunity and immunity.

1.1 Cooperation at the Heart of ICC Normative Architecture

It is evident that states parties to the ICC Statute conceived of a court that will largely depend on the collaboration or cooperation of the international community – states and non-state entities – for its effective functioning. Several provisions of the ICC Statute envision such collaboration. A sampling will suffice. The Preamble to the Statute speaks of the necessity of enhancing international cooperation in order to punish “the most serious crimes of concern to the international community as a whole”. Article 2 establishes a special relationship between the ICC and the UN “through an agreement to be approved by the Assembly of States Parties”. Article 4(2) provides that the Court may exercise its functions and powers on the territory of any State Party to the Statute or, “by special agreement”, on the territory of any other State.

For its funding, the Court is dependent on the assessed contributions of States Parties²⁰ – “in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based”.²¹ The Court's expenses also come from funds provided by the UN, “subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council”.²² Article 116 further provides that

the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Cooperation is also evident in the trigger mechanisms under the Statute, which include state referrals. The Statute provides thus:

A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of

20 *Id.*, Art. 115(a).

21 *Id.*, Art. 117.

22 *Id.*, Art. 115(b).

determining whether one or more specific persons should be charged with the commission of such crimes.²³

It is instructive that many of the cases currently being handled by the ICC were referred by states. The ICC Statute also permits the Security Council, in the exercise of its collective security mandate under Chapter VII of the UN Charter, to refer cases to the Court – notwithstanding that some of its (permanent) members have not ratified the ICC Statute; a clear case of the principle “do as I say and not as I do”.

Cooperation and collaboration are envisaged in other areas. For example, the ICC Prosecutor needs the cooperation of states to effect arrest of suspects. Article 59 provides: “A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws [...]” Clearly, in the absence of cooperation, an arrest becomes very difficult, if not impossible, notwithstanding the provisions of the ICC Statute. The Statute permits the Court to request cooperation from states parties²⁴ and to seek assistance from non-states parties²⁵ and even non-governmental organizations.²⁶ States parties are expected to cooperate fully with the Court,²⁷ including surrendering accused persons by the custodial state²⁸ and providing other forms of assistance.²⁹

States also play critical roles in enforcing sentences imposed by the Court.³⁰ One of the guiding principles under the Statute is that “States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with the principles of equitable distribution....”³¹ Further, the conditions of imprisonment shall be governed by the law of the State of enforcement, provided that they are “consistent with widely accepted international treaty standards governing treatment of prisoners”.³²

Given the above provisions, one would expect African states to cooperate with the ICC as a matter of course, but the opposite appears to be the case. ICC–Africa relations have gone off-course, with hostility substituting for cooperation. The reason is not far to seek. Available evidence indicates that all the situations for which warrants of arrest have been issued by the ICC Pre-trial Chambers, or for which prosecutions have commenced or completed, originate in Africa.

Of the total number of indictments made so far, three – Uganda, the Democratic Republic of Congo and the Central African Republic – are state referrals,

23 *Id.*, Art. 14(1).

24 *See id.*, Arts. 87(1) and 89.

25 *See id.*, Art. 87(5).

26 *See id.*, Art. 87(6).

27 *See id.*, Art. 86.

28 *See id.*, Art. 89.

29 *See id.*, Art. 90.

30 *See generally id.*, Pt. 10.

31 *Id.*, Art. 103(3)(a).

32 *Id.*, Art. 106(2). The Statute further provides that, “in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement”. *Id.*

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reflecting the deference that the ICC makes to national criminal justice systems, which is an essential component of complementarity.³³ The Government of Mali added to that number in July 2012, when it requested the Office of the Prosecutor (OTP) to investigate egregious crimes in the course of the civil war in that country.³⁴ Sudan and Libya are Security Council referrals, indicating that the Council sees the ICC as complementing its primary responsibility of maintaining and promoting international peace and security.³⁵ Côte d'Ivoire is a *proprio motu* investigation – the third trigger mechanism under the ICC Statute.³⁶ The Statute permits the OTP to seek “authorisation of an investigation” after analyzing “the seriousness of the indictment received” and concluding that “there is a reasonable basis to proceed with an investigation”.³⁷ Kenya is also seen as a *proprio motu* case, but this is debatable.

1.2 ‘Things Fall Apart’

It is inconceivable that many African states parties to the ICC Statute are working (overtime) to undermine the very Court they laboured with other stakeholders in conferences and conventions to birth. The tipping point in the current frosty relationship appears to be the indictment of President al-Bashir. On 21 July 2008 – shortly after the OTP issued a request for indictment against al-Bashir – the AU’s Peace and Security Council (PSC), the AU organ charged with the prevention, management and resolution of Africa’s conflicts, issued a communiqué. The Communiqué expressed the view, *inter alia*, that “in order to achieve long-lasting peace”, it is important to “uphold principles of accountability and bring to justice the perpetrators of gross human rights violations’ in Darfur”.³⁸ However, the PSC declared that “the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace”.³⁹ In order to address the issues of non-impunity and peace “in a mutually reinforcing manner”, the PSC called on the UN Security Council to

defer the process initiated by the ICC, taking into account the need to ensure that the on-going peace efforts are not jeopardized, as well as the fact that, in the current circumstances, a prosecution may not be in the interest of victims and justice.⁴⁰

33 See *id.*, preamble and Art. 1 (providing that the ICC “shall be complementary to national criminal jurisdictions”).

34 ICC Press release, ‘ICC Prosecutor Fatou Bensouda on the Malian State Referral of the Situation in Mali since January 2012’, ICC-OTP-20120718-PR829, available at <www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr829>.

35 See N. Udombana, ‘Pay Back Time in Sudan? Darfur in the International Criminal Court’, *Tulsa J. Comp. & Int’l L.*, Vol. 13, No. 1, 2005, pp. 6, 18.

36 See ICC Statute, 2002, Art. 13.

37 See *id.*, Art. 15.

38 See PSC Communiqué, AU Doc. PSC/Min/Comm(CXLII) (July 2008) [“PSC July Communiqué”], para. 2.

39 *Id.*, para. 10.

40 *Id.*, para. 11(1).

The AU Assembly has also repeatedly urged the UN Security Council to "defer the process initiated by the ICC" against al-Bashir, in accordance with Article 16 of the ICC Statute, which allows the Council to defer cases for one year.⁴¹ It provides thus:

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.

The ICC, on the other hand, takes the position that justice should not be sacrificed on the altar of peace. Thus, the OTP sees its role as essentially that of a prosecutor, not a negotiator, a role that falls within the framework of a criminal trial. A criminal court establishes guilt or innocence in accordance with the law, independent of political or other extraneous factors. In an address delivered in June 2007, the Prosecutor averred: "I was given a clear judicial mandate. My duty is to apply the law without political considerations. I will present evidence to the Judges and they will decide on the merits of such evidence."⁴² He further stated that:

for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground. [...] These proposals are not consistent with the Rome Statute. They undermine the law States Parties committed.⁴³

In response to the ICC Prosecutor's unapologetic and uncompromising stance, the AU resorted to self-help, which is no help. In 2009, the AU Assembly directed the AU Commission to convene, "as early as possible, a meeting of the African countries that are parties to the Rome Statute [...] to exchange views on the work of the ICC in relation to Africa".⁴⁴ Following the meeting, the AU Assembly, at its 2009 Summit in Libya, took an unprecedented, far-reaching, decision urging its member states not to cooperate with the ICC.⁴⁵ In June 2010, the AU Assembly

41 Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, AU Doc. Assembly/AU/Dec. 221(XII) (February 2009) ["Decision on Indictment"], para. 3. Cf. Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc. PSC/AHG/COMM.1(CCVII), 29 October 2009, para. 5.

42 See L. Moreno-Ocampo, Prosecutor of the ICC, 'Building a Future on Peace and Justice', Address at the International Conference in Nuremberg, 24-25 June 2007, available at <www.icc-cpi/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf>.

43 *Id.*

44 Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, AU Doc. Assembly/AU/Dec. 221(XII) (February 2009) ["Decision on Indictment"], para. 5.

45 See Decision on Meeting of African States Parties to ICC Statute, 2009, para. 10.

expressed “its disappointment” that the Security Council has not acted upon its request to defer the proceedings initiated against al-Bashir.⁴⁶ And in July 2011, the AU Assembly further called on its member states not to cooperate in the execution of the arrest warrant and requested the “UN Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country”.⁴⁷

These directives raise some important legal issues worthy of closer examination. One is whether the AU has the authority to direct its member states to negate their treaty obligations by failing to cooperate with the ICC? In other words, can an international organization prise its members to breach their treaty obligations to entities of which that organization is not a member? This question is not merely academic, but has practical legal significance, given the sacred *pacta sunt servanda* principle.⁴⁸

1.2.1 *Trampling on Article 87(7)*

Pursuant to AU decisions and directives, many African states parties to the ICC Statute have refused requests by the ICC to surrender indictees coming within their jurisdiction, though, simultaneously, they keep reaffirming their commitments to the Rome Statute obligations. Chad, Kenya, Djibouti and Malawi are among the culprits.⁴⁹ In December 2011, the ICC Pre-Trial Chamber I rendered two decisions pursuant to Article 87(7) of the Rome Statute, finding that both Malawi and Chad had failed to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar al-Bashir.⁵⁰ And when, on 29 February 2012, the President of the Assembly of states parties met with the Permanent Representative of Chad to express concerns, the latter referred to the decision of the AU to the effect that AU members should not cooperate with the Court for the arrest and surrender of President Omar al-Bashir of Sudan.⁵¹

Nigeria is one of the countries that have trampled on Article 87(7) of the ICC Statute. It is common knowledge that al-Bashir was in Nigeria in July 2013 to

46 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), AU Doc. Assembly/AU/Dec. 296(XV) (July 2010) [“Decision on Progress Report”], para. 4.

47 Decision on the Implementation of the Assembly Decision on the International Criminal Court Doc. EX.CL/670(XIX), AU Doc. Assembly/AU/Dec. 366(XVII) (July 2011) [“Decision on ICC”], para. 6.

48 See Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force 27 January 1980, 1155 UNTS 331 [“Vienna Convention”], Art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”).

49 See, e.g., “Sudan’s Omar al-Bashir in Malawi: ICC Wants Answers”, *BBC News Online*, 20 October 2011, available at <www.bbc.co.uk/news/world-africa-15384163>.

50 See ‘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’, ICC-02/05-01/09-139, 12 December 2011; and ‘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-02/05-01/09-140, 13 December 2011.

51 See Report of the Bureau on non-cooperation, ICC-ASP/11/29, 1 November 2012, para. 6.

attend the AU Special Summit on HIV/AIDS, Tuberculosis and Malaria, held in Abuja. Sudan's strongman left Abuja after the opening ceremonies on 15 July without being apprehended by the Nigerian Government and turned over to the ICC, as required by the ICC Statute. Nigeria ratified the ICC Statute in 2001.

When queried by the ICC,⁵² Nigeria, through the Office of the Attorney General and Minister of Justice, offered a lame, if not an embarrassing, response.⁵³ The Letter reaffirmed Nigeria's

firm commitment to the Rome Statute and her readiness for continued cooperation with the ICC to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and contribute in the prevention of such crimes as well as advancing the rule of law in the world.⁵⁴

It admitted, indeed, that "President Al-Bashir made a brief appearance at the opening of the AU Summit and without delivering any statement left the country".⁵⁵ However, the Letter offered a feeble defence, that "[t]he Federal Government did not invite President Omar H. A. Al-Bashir to undertake a visit to Nigeria"; that he "appeared in ostensibly to attend the special Summit of the African Union [...] held pursuant to the decision of the Assembly of Heads of State and Government of the African Union at its Session in May 2013"; that "Member States do not therefore require the invitation of host Governments to attend such Summits in line with the decision and tradition of the AU Assembly" and that "[a]ll AU Member States are under obligation to comply with the decisions, declarations and resolutions of the AU".⁵⁶ The Letter further stated thus:

The sudden departure of President Al-Bashir [from Nigeria] prior to the official end of the AU Summit occurred at the time that officials of relevant bodies and agencies of the Federal Government of Nigeria were considering the necessary steps to be taken in respect of his visit in line with Nigeria's international obligations.⁵⁷

The Letter concluded by underscoring "Nigeria's continued cooperation and support for the international criminal justice system".⁵⁸

What type of voodoo reasoning is this? Did the Nigerian Government not have prior notice of al-Bashir's visit to the country, even if for the purpose of the AU Summit? Do foreign dignitaries enter Nigeria's airspace without clearance by relevant government agencies? More particularly, were Nigeria's officials, including the Immigration Service, not involved in clearing al-Bashir before and after

52 See Decision of the Pre-Trial Chamber II, ICC-02/05-01/09 of 15 July 2013.

53 See HAGF/ICC/2013/VOL.1/1 of 18 July 2013, addressed to the ICC-OTP.

54 *Id.*

55 See *id.*

56 *Id.*

57 *Id.*

58 *Id.*

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arriving in Nigeria? Where did the aircraft carrying al-Bashir land? Who received him at the airport? Or did al-Bashir appear and disappear at the venue of the Summit like a ghost? Which agency offered him security protection for the brief period he was in Nigeria; or does the AU have a standing and standby police force for such roles? Surely, we are led to believe a lie when we do not see through the eye.

Clearly, non-cooperation by (African) states is complicating ICC's ability to collect evidence for effective prosecution of those indicted by the Court. It even complicates any initiative to engage victims on their right to participate in the legal proceedings. As succinctly stated in a recent report,

If heads of state and government are openly defying the ICC then its role in implementing international criminal justice in Africa will gradually become eroded. In the absence of an international police force willing to arrest alleged perpetrators, the ICC continues to rely on the goodwill of its State Parties and other inter-governmental organisations to function effectively.⁵⁹

1.2.2 *Can the AU Legal Order Override the Pacta Sunt Servanda of States?*

By ratifying the Constitutive Act and other AU instruments, member states recognize the AU legal order, with all its unforeseeable potential developments. Such recognition introduces the AU law into fields previously governed exclusively by municipal law. It permits some AU institutions, such as the AU Assembly, to assume the character of supranational entities. The AU organs could thus exercise their powers in the fields contemplated by the AU treaties, and could require national agencies to refrain from interfering in these fields.⁶⁰

However, this doctrine of limitation of sovereign rights applies only in respect of subject matters covered by the treaties that define the relationship between the particular institution and its members. Indeed, some commentators argue that the transfer of powers to international organs in no way changes the legal status of member states.⁶¹ States "continue, as before, to be subject only to international law, since the constitution of the organization itself remains a treaty".⁶² This opinion finds an echo in the case of *S.S. 'Wimbledon'*,⁶³ where the Permanent Court of International Justice (PCIJ) held that entering into commit-

59 T. Murithi & A. Ngari, 'The ICC and Community-level Reconciliation: In-country Perspectives Regional Consultative Report', *Transitional Justice in Africa Programme*, 2011, p. 14.

60 *See, e.g., Case 6/64, Costa v. ENEL* [1964], ECR 585 [1964], CMLR 425 (1990) (approving the doctrine of limitation of the sovereign rights in respect of Member States of the European Community). *See also Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629. *See generally*, N. Udombana, 'The Institutional Structure of the African Union: A Legal Analysis', *California Western Int'l L.J.*, Vol. 33, No. 1, 2002, p. 69.

61 *See* R. Bindschedler, 'International Organizations, General Aspects', in R. Bernhardt (Ed.), *Encyclopedia of Public International Law*, Vol. 2, 2000, pp. 1289 and 1295.

62 *Id.*

63 *See Case of the S.S., 'Wimbledon'*, 1923 PCIJ (Ser. A) No. 1.

ments, far from being incompatible with sovereignty, is actually an attribute of state sovereignty.⁶⁴

The present writer submits that the sovereignty of AU member states is limited only to the extent envisaged by the AU Act and its protocols. The AU, for the time being, does not have its own social order of power. Its law is a law *among* states, not a new constitution for a new political society. Further, when African states negotiated, signed and ratified the ICC Statute, they did so individually as sovereign entities rather than collectively as AU member states. The AU itself is not a party to the ICC Statute; neither was the treaty elaborated under its auspices. Even the UN was merely a facilitator to allow states to reconcile controversies and achieve mutually acceptable results. As Brolmann writes, "in the conclusion of agreements on matters traditionally belonging to the realm of inter-state relations the role of organisations as independent actors is a subordinate one".⁶⁵ Constitutional norms relating to formal sources of the law are essentially state-based.⁶⁶ Therefore, international organizations – like the AU – cannot and "should not be viewed as independent and influential bodies enjoying a separate will, acting on a par with states".⁶⁷

Compliance with a treaty obligation is also a question of law, not politics, based on the *pacta sunt servanda* rule. Of course, states do not often implement treaties merely out of respect for the *pacta sunt servanda* rule, which explains why some treaties sometimes contain specific obligations to facilitate compliance, as the ICC Statute has done. Thus, it appears that notwithstanding the AU's directives, African states parties to the ICC Statute that allow indictees into their territories without arrest are violating their treaty obligations. Since the ICC Statute does not fall within the enforcement authority of the AU, these states do not need the AU to validate or legitimize their treaty obligations.

African states wishing to withdraw from the ICC Statute should follow the procedure laid down in the Statute,⁶⁸ after a proper cost-benefit analysis, than hide under nebulous decisions or resolutions of some AU organs to negate their treaty obligations. The Statute provides that

[a] State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.⁶⁹

64 See generally, J. Klabbers, 'Clinching the Concept of Sovereignty: Wimbledon Redux', *Austrian Rev. Int'l & Eur. L.*, Vol. 3, 1998, p. 345.

65 C. Brolmann, 'The Legal Nature of International Organisations and the Law of Treaties', *Austrian Rev. Int'l & Eur. L.*, Vol. 4, 1999, pp. 85, 86.

66 See G.M. Danilenko, *Law-making in the International Community*, Martinus Nijhoff, Leiden, 1993, p. 194.

67 M. Fitzmaurice, 'Actors and Factors in the Evolution of Treaty-Norms', *Austrian Rev. Int'l & Eur. L.*, Vol. 1, 2000, p. 81.

68 A state party to a treaty may withdraw from the treaty, but such withdrawal must follow the provisions of that treaty. See Vienna Convention, Arts. 42(2) and 54.

69 See ICC Statute, 2002, Art. 127(1).

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Even then, “[a] State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute”.⁷⁰ This makes inordinately good sense, since one cannot eat his cake and have it back.

1.2.3 Immunity for Impunity?

In July 2008, the AU Assembly, meeting in Egypt, adopted a protocol to merge the existing African Court on Human and Peoples’ Rights (Human Rights Court) with the non-existing African Court of Justice “into a single Court” to be known as “The African Court of Justice and Human Rights” (“Merger Court”).⁷¹ More than six years after its adoption, the 2008 Protocol is yet to secure the requisite ratification for it to enter into force. The reason is because many African states are not comfortable with a supranational independent judicial institution that will give binding decisions against states. The Human Rights Court that currently sits in Arusha, Tanzania, exists largely in name. It is incapacitated by many deficiencies, including the requirement for an optional declaration by a respondent state accepting suits against it by non-state entities. The result is that Africans are yet to feel the Court’s impact since it was inaugurated in 2006.

Meanwhile, at its 2009 Summit in Libya, the AU Assembly requested the AU Commission, in consultation with the African Human Rights Commission and the African Human Rights Court, “to examine the implications of the [Merger] Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010”.⁷² By 2012, Government Experts and Ministers of Justice/Attorneys General on Legal Matters, meeting in Addis Ababa, Ethiopia, came up with a *Draft Protocol*.⁷³ That Draft went through several revisions before the final version that the AU Assembly adopted in July 2014.⁷⁴

In principle, the UN Charter allows for “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”.⁷⁵ The subsequent regional arrangements in several fields derive their normative basis from the Charter’s provision. Indeed, international criminal law is part of a trend

70 See *id.*, Art. 127(2).

71 See Protocol on the Statute of the African Court of Justice and Human Rights, adopted in July 2008 (not yet in force), AU Doc Assembly/AU/13(XI) (2008) [“Merger Protocol”], Art. 2. The Statute of the African Court of Justice and Human Rights is annexed to the Merger Protocol [“Merger Statute”].

72 Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction DOC. Assembly/AU/3(XII), AU Doc. Assembly/AU/Dec. 213(XII) (February 2009) [“Decision on Principle of Universal Jurisdiction”], para. 9. Cf. Decision on Meeting of African States Parties to ICC Statute, 2009, para. 5; and Decision on the Implementation of the Assembly Decision on the International Criminal Court Doc.EX.CL/670(XIX), AU Doc. Assembly/AU/Dec. 366(XVII) (July 2011) [“Decision on ICC”], para. 6.

73 See *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, Exp/Min/IV/Rev. 7 (May 2012).

74 AU Court Protocol.

75 Charter of the UN 1945, Art. 52(1).

towards internationalizing domestic public policy. Much of this has already occurred at the regional level.⁷⁶ Actually, regionalizing international criminal law has been unexplored and underdeveloped, but some view it as an idea whose time has come.

Although some commentators see regionalism in criminal law as a threat to the still evolving legal order and that it could weaken the carefully constructed consensus that lies at the heart of the ICC Statute,⁷⁷ others think differently. Proponents of regionalism insist that creating permanent regional criminal tribunals at this early stage of the international system for criminal law will ensure greater coherence with the system. Such an exercise is also seen as a commitment to the rule of law in international relations. Burke-White argues that regional international criminal justice offers states political advantages while decreasing the sovereignty cost of membership in international criminal law enforcement bodies.⁷⁸ The existence of such a mechanism could make states more willing to enter into and deepen their relationships at the regional, rather than global, level.⁷⁹

Another factor that makes regionalism attractive is that limited resources will obviously limit the reach of the ICC. So far, the OTP has been able to investigate only a very small fraction of communications it receives, and those are mainly in Africa. Such a limited reach and outreach is clearly insufficient to narrow the impunity gap, making it imperative for regional actions to complement the ICC.⁸⁰ A regional court could also fill the gap between national criminal prosecutions and the ICC; avoid the set-up problems of *ad hoc* tribunals and the shortcomings of the ICC.⁸¹

The problem is, and this is worth emphasizing, that the enlargement of the African Court's *jurisdiction materiae* to cover international crimes – genocide, crimes against humanity, war crimes, *et al.* – is a fallout from the face-off between the AU and the West over the manner of executing international criminal justice. At one of the expert meetings in Kenya convened in 2010 at the instance of the Pan-African Lawyers Union (PALU) to discuss the future protocol, of which the present writer was in attendance, some argued in support of granting immunity to serving state officials for atrocious crimes. Those in support relied on customary international law, which grants 'functional immunity' – or immunity *ratione materiae* – to heads of states and other government officials from being assessed before a foreign court. The immunity is intended to protect the person of the foreign dignitary in order to carry out his or her state functions and to represent that country abroad without any hindrance. This means that, once the person is

76 See J. Hopkins, 'What's Wrong With Regionalising International Criminal Law?', *N.Z. Y.B. Int'l L.*, Vol. 4, 2007, pp. 85-86.

77 See S. Freeland, 'The Internationalization of Justice – A Case for the Universal Application of International Criminal Law Norms', *N.Z. Y.B. Int'l L.*, Vol. 4, 2007, p. 45.

78 W. Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration', *Texas J. Int'l L.*, Vol. 38, 2003, pp. 729, 730-731.

79 See *id.*, p. 731.

80 R.E. Rauxloh, 'Regionalisation of the International Criminal Court', *N.Z. Y.B. Int'l L.*, Vol. 4, 2007, pp. 67-68.

81 See *id.*

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removed from office and no longer represents state interests abroad, he or she may thereafter become subject to criminal prosecution for offences committed during his or her office.⁸²

The question is, in the event of a conflict between general and particular international law, which one prevails? This question is of pressing importance, especially where the claimant to state immunity is not a party to the treaty in question, as is the case with Sudan vis-à-vis the ICC Statute and considering that treaty rules do not necessarily absorb customary law rules.⁸³ The answer, of course, should be that customary law rules prevail in the event of such conflict. The complication is that the Sudan and Libya referrals leading to the indictments and warrant for arrest of their heads of states were issued by the Security Council pursuant to its Chapter VII mandate. In making the referrals, the Council expressly called on all UN member states to cooperate with the ICC⁸⁴, and it is worth stating that Security Council resolutions have *erga omnes* effects on *all* states.

Meanwhile, the AU Court Protocol appears to favour customary law position on state immunity, even if for the wrong motive. It shields state officials from atrocious crimes for which the ICC Statute punishes. It provides thus:

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.⁸⁵

While it is not difficult to determine who a “Head of State or Government” is, the same is not true of “other senior state officials”. The Protocol fails to define this

82 See *Belgian Arrest Warrant Case (Democratic Republic of the Congo v. Belgium)*, 2002 ICJ Rep. 3, paras. 47-55 (holding, *inter alia*, that “the issue against Mr. Abdulaye Yerodia Nombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law”). According to the Court, in immunity *ratione materiae*, no distinction could be drawn between acts undertaken in an official or private capacity). See *id.* See also I. Bantekas, *International Criminal Law*, Hart Publishing, Oxford, 2010, p. 128.

83 See generally, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA) Merits*, 1986 ICJ Rep. 3.

84 See Security Council Res. 1593, UN Doc. S/Res/1593 (31 March 2005) [“Resolution 1593”]; and Security Resolution 1970, UN Doc. S/RES/1970 (2011) [“Resolution 1970”].

85 AU Court Protocol, Art. 46*Abis*. *Contra* ICC Statute, 2002, Art. 27(1) (“This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, and elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence”).

phrase; neither has it identified who will make the decision. Some commentators hope that the Court will exercise sound judgment in individual cases.⁸⁶

Overall, the amended Protocol may be a positive development, especially given its restatement of the principle of accountability for atrocious crimes.⁸⁷ The trouble is that the devil is in the details, even if an angel is in the vision. Article 46*Abis* of the Protocol, which grants immunity for impunity, is an 'A minus' that does not add up. It is inserted in bad faith to spite the ICC and UN Security Council, rather than a real desire to promote international criminal justice in Africa. The international community should not be deceived by this irritating refrain that Africa should be left alone to find 'African solution' to 'African problem'. Appealing to such hackneyed sentiments in a hyper-globalizing 21st century is smoke, nothing but smoke. It is an attempt to deodorize Africa's foul past. African states go with begging bowels before the industrial nations to ask for aid and other forms of resource transfers; yet when these benefactors demand good governance and accountability from them, they shout 'African solution' to 'African problem'! Pray, why does the AU and its member states not find an 'African solution' to poverty or corruption or unemployment or bad governance or HIV/AIDS or, most recently, Ebola?

It is regrettable that while the AU claims to condemn and reject impunity in its previous instruments,⁸⁸ it is, in practice, fervently working to defend the privileges of 0.01% of Africans and to safeguard a system that is essential for its members' salvation, what Laski calls the "beatification of the status quo".⁸⁹ Hypocrisy is the only evil that walks invisible.

With the adoption of the African Court Protocol and the enshrinement of Article 46*Abis*, the AU may have played its last card. There appears to be no new game left in the playbook; and if recent experience – at institution building in Africa – is anything to go by, the Protocol itself may be dead on arrival. Even when the Protocol enters into force – that is, if it does – it will not have a retroactive effect; so the likes of al-Bashir still stand indicted by the ICC. The recent voluntary appearance of President Kenyatta at the ICC shows that, with subtle diplomacy, other 'powerful' state officials indicted by the Court could show up.

Now is the time for the ICC and its Assembly of states parties to step in and restart serious dialogue with the AU aimed at healing old wounds and moving the project of criminal accountability forward. The sacrifice is not as great as it seems; indeed, the difficulty itself is an opportunity.

2.3 *Playing 'Devil's Advocate'*

On a deeper reflection, one could regard these outbursts by the AU as a spontaneous, even contemptuous, reaction against what is increasingly perceived as neo-

86 C. Odinkalu, 'Africa's Immunity Controversy', *Project Syndicate*, 5 September 2014, available at <www.project-syndicate.org/commentary/chidi-a--odinkalu-rebuts-criticism-of-the-african-union-s-decision-to-try-international-crimes-at-home#k9AeQA7PAZfaJZcS.99>.

87 *See id.*

88 *See e.g.*, AU Act, 2000, Art. 4(o) (having, as one of its principles, "condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities").

89 H.J. Laski, *Authority in the Modern State*, Yale University Press, New Haven, 1919, p. 283.

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imperialist, hegemonic, world order that seeks to articulate concerns for the rights, freedoms, and aspirations of the “wretched of the earth”. In a 2008 Communiqué, the PSC accused the ICC of “double standards” and remarks that the arrest warrant amounts to a “misuse of indictments against African leaders”.⁹⁰ This view also finds support in scholarly circles; indeed, some commentators suggest that the current international criminal law is imperialistic, given the

oppressive practices by which states may seek to redefine the world in their image, by defining a ‘universal’ in opposition to an ‘other’ – the idea of the ‘dynamic of difference’ – and seeking to bring the other within the universal by way of the ‘civilizing mission’.⁹¹

Tladi argues that the ICC is “a Western imperial master exercising power over African subjects”.⁹² For Odinkalu,

there is a clear double standard in terms of who is charged with international crimes – a discrepancy that extends to advocates of accountability for mass atrocities. For example, the usually vocal advocacy community has failed to respond to credible allegations that the United States and other Western powers are putting pressure on the ICC, to prevent a war-crimes probe of Israel’s operation in the Gaza Strip.⁹³

There may be some truths in these accusations. The first pointer is the complicity of Western states in the conflicts that often results in heinous crimes in Africa and elsewhere. The second is the roguish behaviour and Machiavellian manoeuvres of the five permanent members at the Security Council – Britain, China, France, Russia, and U.S. Their selectivity in holding perpetrators of atrocious crimes accountable gives a lie to the notion of objectivity and creates credibility problems for the ICC. These states do not want their nationals, let alone leaders, to be subject to possible prosecution in the ICC, but they are willing and ready to set the stage for others to face that possibility.⁹⁴ The current indictments, which parades virtually only African suspects at the ICC, raise doubt if a genuine quest for international criminal justice drove the process. *A contrario*, an impression is being created that the ICC is a tool for the collective humiliation of Africa.

90 See, e.g., PSC Communiqué, AU Doc. PSC/Min/Comm(CXLII) (July 2008) [“PSC July Communiqué”], paras. 3 and 7.

91 C. Nielsen, ‘From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law’, *Auckland U. L. Rev.*, Vol. 14, 2008, pp. 81-82.

92 D. Tladi, ‘The African Union and the International Criminal Court: The Baffle for the Soul of International Law’, *S. Afr. Y.B. Int’l L.*, Vol. 34, 2009, pp. 57-58.

93 Odinkalu, 2014 (adding: “Before claiming that the ICC alone should be responsible for prosecuting cases against sitting heads of state, systems must be put in place to ensure political accountability and minimize double standards. Otherwise, the debate over immunity for sitting African leaders risks becoming a debate about securing regime change by external judicial fiat. That is dangerous territory”). *Id.*

94 See D.P. Forsythe, ‘The UN Security Council and Human Rights: Promising Developments, Persistent Problems’ *J. Hum. Rts.*, Vol. 13, No. 3, 2014, pp. 121, 136.

Reacting to those who oppose the ICC for being fixated on Africa, Annan asks: "Is the court's failure to date to answer the calls of victims outside of Africa really a reason to leave the calls of African victims unheeded?"⁹⁵ Of course not! The fact that all the current case dockets are on Africa does not diminish the seriousness of the crimes, but they raise questions of equality before the law. As a principle that regulates members of a society, justice should be applied on the basis of fairness and equality. Thus, when different sets of principles are applied to similar situations – when, for example, one person is condemned for an offence while the other is treated far more leniently for the same offence – such actions dilute not only the meaning of 'equality before the law', but also the fundamental principle of 'non-discrimination' on the basis of geography or other considerations. Truth and justice must be held sacrosanct because they represent the first virtues of human society.⁹⁶ *A fortiori*, law, including international law, should speak on equal force both to the incumbent of the White House as it does the Aborigine and tribal cave dweller. And if international criminal justice is a universal ideal, then the major powers should not take distinctive approaches to justice that reflect their values and interests and seek to universalize such 'Western models'.

Africans, therefore, have a right to ask – and to receive answers to – some puzzling questions: Why are Western countries reluctant to demonstrate equal missionary zeal for justice in respect of grave crimes committed in Iraq, Afghanistan, Pakistan, Chechnya, Gaza and so on? Why is Africa such an attraction as to earn it the unedifying title of "the ICC's favourite customer"?⁹⁷ In 2011, the Security Council quickly authorized military intervention in Libya – pursuant to the Security Council-adopted Resolution 1973 of 2011 – and referred the alleged egregious crimes to the OTP for investigation. Why is the Council playing hide-and-seek on Syria? Are the brutal massacres in Syria of less magnitude than those in Libya? Why are Western countries looking 'the other way' as vicious regimes in other Arab countries murder unarmed civilian protestors? What reasons, if not strategic economic interest, account for the West's reluctance to take action against these brutal regimes? Why should "a body of law that purports to be based on universal values of all humanity [...] be animated by exclusions, notions of civilization, and imperialism"?⁹⁸

The AU's response to the referrals against some African personalities is obviously political, but it may be informed by the politicization of the ICC itself. If the Security Council had authorized a military intervention to stop the heinous

95 Annan, 2009.

96 See J. Rawls, *A Theory of Justice*, rev'd edn 4, Oxford University Press, Oxford, 1999 (arguing that, in a just society, "the rights secured by justice are not subject to political bargaining or to the calculus of social interests"), *id.*

97 C. Igwe, 'The ICC's Favourite Customer: Africa and International Criminal Law', *Comp. & Int'l. L.J. Southern Afr.*, Vol. XLI, No. 2, 2008, p. 294.

98 Nielsen, 2008, p. 82.

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crimes in Darfur when the crisis began, as some commentators advocated,⁹⁹ it would have achieved, at least, two ends. First, the authorization would have saved many lives and sent a strong message to al-Bashir that impunity is no longer an option. Second, it would have legitimized any post-conflict measures taken to bring perpetrators of the crimes to justice. Having failed to fulfil its original UN Charter mandate, the Security Council is now using the ICC to reassert its diminished authority – as it did, posthumously, in establishing the ICTR. These after-the-fact measures do not achieve much result or appease Africans; they are like learning geology after a devastating earthquake.

Perhaps, one way of building confidence in the ICC is for the OTP to strive to initiate timely investigations and prosecutions on genuinely grave cases without waiting for referrals from the politically charged Security Council. It is too late in the day to pretend that the Security Council's actions are based solely on legal and rational considerations. Who does not know that action at the Council on any issue depends on the political and economic dynamics, especially, of the permanent members?¹⁰⁰ As Bassiouni remarks, "it is better not to have an ICC than to have it in the service of a political body that has hardly distinguished itself by adherence to the rule of law".¹⁰¹ When the Security Council takes the initiative, it undermines the ICC's legitimacy and undercuts the argument that it is free from bias. Here is why:

The fact that the Security Council can bar ICC activities on particular situations and the possibility that the Security Council can refer situations concerning states not party to the Rome Statute can create a perception that the ICC is a tool of the stronger Western states supporting the Security Council. Since the Security Council makes these decisions based on the political calculations and tradeoffs among the five permanent members, rather than a judicial investigation of the facts of a situation by the ICC, a perception that the interests of the permanent five is the more important determinant is unavoidable.¹⁰²

Finally, it is worth noting that each case that presents itself for investigation is *sui generis*, given the peculiar context and content of the crimes. Choosing which situations to investigate, which senior officials to indict, and which charges to bring is not merely legal; these matters have major political implications.¹⁰³ The

99 See, e.g., N. Udombana, 'When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan', *Hum. Rts. Q.*, Vol. 27, No. 4, 2005, p. 1149 (denouncing the apparent posture of neutrality by the international community to the atrocities in Darfur and calling for military intervention to stop the killings and help the victims).

100 Cf. Forsythe, 2014, p. 135 ("All democratic governments find it difficult to sustain costly foreign involvements when core vital interests do not seem to be at stake").

101 M.C. Bassiouni, 'The ICC – Quo Vadis?', *J. Int'l Crim. Just.*, Vol. 4, 2006, pp. 421-422.

102 A. Ibrahim, 'The International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms', *Eyes on the ICC*, Vol. 7, 2010-2011, pp. 157, 199.

103 See D. Kaye, 'Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight', *Foreign Affairs*, Vol. 90, 2011, pp. 118, 119.

OTP should exercise good judgment in handling referrals and should freeze indictments in deserving cases to make room for the peace process, especially in situations of continuing flux. "Since", according to Fish, "the general deterrent value of the ICC is likely to be small, and its disruptive effect on peace negotiations large, the ICC ought to maintain robust prosecutorial discretion so that it can suspend indictments if credible peace negotiations begin."¹⁰⁴ Drafters of the ICC Statute were keenly aware of these imperatives, which probably explains why they left the provisions regulating jurisdiction "creatively ambiguous".¹⁰⁵

2 Conclusion

The objective that the Rome Statute assigns to the ICC is to end impunity for the perpetrators of the worst crimes known to humanity. Attaining this objective requires the Court to conduct high-quality investigations and prosecutions; to encourage effective domestic responses to the commission of the most serious crimes of concern to the international community as a whole; to be sensitive to the needs of victims of these crimes and to be transparent in its activities. It is vital for the creditability of the entire Rome System that the Court is able to rise to these challenges. It is also vital that states and non-state entities cooperate with the Court to fulfil its mandate.

The long-drawn face-off between the ICC and AU is not helping the cause of international criminal justice in Africa. The ICC itself must not assume that all criticisms of its work are done in bad faith. All stakeholders – including African states parties – have the right to demand improvements to an institution they were integral in creating. Open rebuke is better than secret love. As Max du Plessis rightly noted, "the process of changing and improving an international institution requires meaningful and engaged debate".¹⁰⁶

Finally, international institutions, judicial or otherwise, have significant roles to play in establishing humane and just social orders. It is the absence of democratic accountability that largely accounts for rebellion, conflicts and human suffering in many states. Taking international justice seriously entails taking democracy and good governance seriously. Since there can be no true justice without

104 E. Fish, 'Peace through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions', *Yale L. J.*, Vol. 119, 2009-2010, pp. 1703, 1704 (acknowledging that suspending an indictment "may also render it more difficult to end a conflict once an indictment has been issued by the court"). See A. Greenawalt, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court', *Va. J. Int'l L.*, Vol. 50, 2009-2010, pp. 107, 110-111 (arguing: "While the Court is a criminal tribunal charged with the prosecution of individual suspects, it is also empowered, as a necessary incident of its prosecutorial power, with broad administrative policy discretion to evaluate the adequacy of transitional justice policies undertaken by states in which crimes under the Court's jurisdiction have occurred").

105 D. Newman, 'The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem', *Am. U. Int'l L. Rev.*, Vol. 20, 2005, pp. 293, 320-22 (quoting Philippe Kirsch, the Chair of the drafting committee).

106 M. du Plessis, 'The International Criminal Court that Africa Wants', *Institute for Security Studies*, 2010, p. viii.

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true democracy, the global community has legal and moral obligations to assist weak states achieve the kind of democracy that reinforces the rule of law. And if international criminal justice is a universal ideal, then the major powers ought not to take distinctive approaches to justice that reflect their values and interests.¹⁰⁷ If the two global infrastructures for maintaining peace (the Security Council) and curbing impunity (the ICC) continue to work selectively, neither will advance, let alone entrench, the rule of law. Double standard diminishes faith in international criminal justice and increases anti-ICC sentiments.

107 Cf. A. Bradford & E.A. Posner, 'Universal Exceptionalism in International Law', *Harv. Int'l L.J.*, Vol. 52, 2011, pp. 1, 5.