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CENTER FOR INTERNATIONAL LAW & POLICY IN AFRICA

Heard or Ignored: African States Priorities and the Independent Expert Review of the ICC

By Lorraine Smith van Lin

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BRINGING THE AFRICAN PERSPECTIVE TO THE ICC REFORM DISCUSSION

The International Criminal Court in Africa Project: Ensuring African State Concerns are Not Left Out of the ICC Reform Process
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ABOUT THE CENTER FOR INTERNATIONAL LAW AND POLICY IN AFRICA

The Centre for International Law and Policy in Africa (CILPA) is an independent and non-profit think tank, based in Freetown, Sierra Leone, West Africa, which aims to shape discourse and build bridges between research, policy, and practice on issues of international law, and regional law in Africa. It is incorporated as a company limited by guarantee under Sierra Leonean law in accordance with the Companies Act No. 5 2009 (as amended). CILPA's work focuses on critical issues of public and private international law of particular relevance to the continent of Africa. As a research center, CILPA is dedicated to the scientific study of, and promotion of knowledge of international law, and regional law, especially African Union law, and their role as vehicles to advance peace, stability, security, as well as social and economic development.

AUTHOR BIOGRAPHY

Ms. Lorraine Smith van Lin is an international human rights lawyer and dedicated advocate for the rights of victims and women. She is the Founder and Executive Director of Tallawah Justice for Women, a non-profit organization dedicated to connecting, equipping, and amplifying the voices of women grassroots leaders from the Global South. She also works as an independent international human rights consultant with specific focus on victim rights. She has previously served as Director of the International Bar Association's Hague Office and Legal Adviser at Redress. In March 2022, Lorraine was appointed as one of the Patrons of "The Enforcement of the Right to Peace Global Advocacy Programme."

The opinions expressed in this publication are solely those of the authors and do not reflect the views of the Center for International Law and Policy in Africa.

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African States have been at the center of global conversations about the work of the International Criminal Court. Long before the broader States Parties agreed a process to review and reform the ICC, African States had suggested several improvements to the Rome Statute system. It was therefore ironic that the review and reform process, once it was put in place, did not seem to tackle head on the African reform proposals which are critical to the success of the ICC. This research project aims at helping to contribute to addressing this gap. This paper is part of a series of papers on Bringing the African Perspective to the ICC Reform Discussion.

The publication of these Occasional Papers would not have been possible without the support of the Open Society Foundation, whose African Regional Office, based in Dakar, Senegal, funded the Center for International Law and Policy in Africa's (CILPA) project entitled "*The International Criminal Court in Africa Project: Ensuring African State Concerns are Not Left Out of the ICC Reform Process."* Special thanks go to Mr. Pascal Kambale, Ms. Sharon Nakandha and Ms. Oumou Dieng.

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Last but not least, this project was made possible by the hard work and dedication of the CILPA team, under the leadership of the founder Prof. Jalloh who conceptualized this project and was supported in its implementation by Ms. Clea Strydom, project coordinator, assisted by Aglyn Kamara, CILPA's intern in Sierra Leone

The organisation of the workshop in Sierra Leone was supported by the Center for Accountability and the Rule of Law (CARL) in Sierra Leone, in particular, Mr. Ibrahim Tommy and Mr. Edward Conteh, and Aglyn Kamara, a CILPA intern.

Our hope is that the stimulating conversations begun in Sierra Leone and that continues here through this publication, will continue to challenge and inspire all of those who seek to further ensure that African State concerns are not left out of the ICC Reform Process.

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1. Introduction

In 2018 the International Criminal Court (ICC or the Court) celebrated the 20th anniversary of the Rome Statute, its founding instrument. Celebrations held in honour of the Court's achievements and symbolism as a beacon of hope for those who had suffered the gravest crimes of concern to humanity were tempered by the palpable signs that the ICC was failing to meet expectations. States and civil society, including many of its greatest allies, were becoming increasingly frustrated by the lack of tangible results for its many years of operation. Low conviction rates, limited impact in the countries investigated, selective investigations and prosecutions, and reports of a toxic internal working environment with allegations of bullying and harassment gradually contributed to a growing lack of confidence in the institution.[1] Despite an ongoing internal lessons-learnt exercise, initiated in 2011 to address States' concerns about the need for a stocktaking of the institutional framework, operational efficiency and effectiveness of the Court, there was clearly need for an externally driven, independent, comprehensive review and overhaul of the ICC.[2]

By April 2019, four former Presidents of the Assembly of States Parties (ASP) to the ICC, published an open letter entitled, *'The International Criminal Court needs Fixing'* in which they issued an urgent call for an independent assessment of the Court's functioning by a small group of experts.[3] The ex-ASP Presidents decried what they described as a "growing gap between the unique vision captured in the Rome Statute, the Court's founding document, and some of the daily work of the Court."[4] In May of

[1] Coalition for the International Criminal Court, Review of the ICC and Rome Statute System, < https://www.coalitionfortheicc.org/review-icc-and-rome-statute-system > last accessed February 2023

[2] ICC Assembly of States Parties, Establishment of a study group on governance, (December 2010), ICC-ASP/9/Res.2

[3] Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser, Tina Intelman 'The International Criminal Court Needs Fixing' New Atlanticist (24.04.2019) <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/> accessed 02.09.2022.

[4] ibid.

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that same year, the President of the Court sent a letter to the ASP President on behalf of the Court's principals formally calling for an "independent comprehensive expert review of the Court's performance."[5] By resolution, the ASP established an Independent Expert Review (IER) of the ICC to be carried out by 9 experts. The review was aimed at "strengthening the Court and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and enhance their overall functioning."[6]

The review was designed as a bifurcated process with the experts mandated to focus mainly on institutional issues at the Court under three clusters: governance, judiciary, and investigations with States covering broader, non-institutional matters within designated working groups. The experts were expected to prioritise issues with the greatest impact on performance, efficiency and effectiveness of the Court. Their mandate did not therefore specifically include addressing issues of a geo-political nature and the ICC's broader role in the international justice system.

The call for review of the ICC is not new. Several years prior, some African States and the African Union (AU), Africa's regional political governing body, signalled major concerns about what they perceived as the ICC's inconsistent, selective and uneven approach to its investigations and prosecutions.[7] For the first 18 years of its existence, the ICC was almost entirely focused on Africa.[8] Africa constitutes the

[5] ICC Bureau of the Assembly of States Parties, Fifth meeting (June 2019), para 4.

[6] ICC Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System (December 2019) ICC-ASP/18/Res.7.

[7] Assembly/AU/13 (XIII), ASSEMBLY OF THE AFRICAN UNION Thirteenth Ordinary Session 1 – 3 July 2009 Sirte, Great Socialist People's Libyan Arab Jamahiriya, Para 3

[8] Prior to January 2016 when the Pre-Trial Chamber I authorised the Prosecution to commence investigations in Georgia, all the cases under investigation and prosecution before the ICC were from Africa, specifically the Democratic Republic of Congo (DRC); Uganda; the Central African Republic (CAR); Darfur, Sudan; the Republic of Kenya; Libya; Cote D'Ivoire; and Mali. Burundi was later added to the docket when the Prosecutor opened a PE into alleged crimes in April 2016 and was authorised to commence investigations in October 2017. In addition to the African cases and situations, the OTP conducted PEs into situations arising from non-African countries, such as the Plurinational State of Bolivia (closed, February 2022), Colombia (closed, October 2021 after 18 years), Iraq/UK (closed, December 2020), the Registered Vessels of Comoros, Greece and Cambodia (closed, November 2017), the Republic of Korea (closed, June 2014), Honduras (closed, October 2015), Palestine, Venezuela II (ongoing), Afghanistan (investigation authorised), the Philippines (investigation authorised) and Ukraine (investigation commenced). Ukraine is not a State Party to the Rome Statute, but the Ukrainian Government twice accepted the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, under Article 12(3) of the Statute. The first declaration Ukraine accepted ICC jurisdiction concerning alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014. The second declaration was open-ended and extended the period to cover alleged crimes committed throughout the territory of Ukraine from 20 February 2014 onwards. On the 24th of February 2022, following the Russian invasion of Ukraine in a major escalation of the

largest single regional bloc of States to ratify the Rome Statute and African States have been among the ICC's staunchest allies.[9] However, the preponderance of Africans on the Court's case dockets led to allegations that the ICC was disproportionately targeting Africans; a situation which was exacerbated by the issuance of arrest warrants against sitting Heads of States in 4 African countries- Sudan, Cote D'Ivoire, Libya and Kenya - and the United Nations Security Council (UNSC)'s refusal to exercise its Article 16 powers to defer the cases.[10]

The AU and affected States Parties questioned the impact of ICC prosecutions on national and regional peace processes (the peace and justice debate) and stirred discussion about the risk of the ICC being used as a tool of Western hegemonic interests seeking to exercise their neo-colonial powers over the continent.[11] Thus, at the time of the IER, in addition to institutional questions concerning the day-to-day functioning of the Court, the broader legal and geo-political questions of the ICC's role in the international landscape, prosecutorial selectivity, complementarity and the interplay of peace and justice were of great significance to African states.

With the Court commencing investigations outside of Africa, it has become increasingly obvious that many of these issues are not limited to the African context. The opening of investigations in Georgia, Ukraine, Afghanistan, Bangladesh/Myanmar, the Republic of the Philippines, and Venezuela among others – all highlight the uneven political landscape in which the Court operates. At the time of

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Russo-Ukrainian War, Prosecutor Khan announced his intention to request the PTC's authorisation to commence investigations into the situation in Ukraine in keeping with the conclusions of his predecessor, Fatou Bensouda; but expanded his proposed investigations to encompass new alleged crimes within the jurisdiction of his office following the invasion. In an unprecedented response to the Prosecutor's call for State Parties' referral of the situation to facilitate an expedited investigation, 43 States Parties jointly referred the situation in Ukraine to the ICC.

[9] There are 123 ICC member states to the Rome Statute, 33 of which are from Africa, 28 from Latin America and the Caribbean, 25 from Western Europe and other states, 19 from AsiaPacific, and 18 from Eastern Europe. Assembly of States Parties to the International Criminal Court, The States Parties to the Rome Statute, https://asp.icc-cpi.int/states-parties#:~:text=123%20countries%20are%20States%20Parties,Western%20European%20and%20other%20States.> last accessed January 31, 2023.

[10] Despite opening investigations in the situation in the Republic of Georgia in 2016, the first non-African investigation, the majority of cases before the Court for many years were from Africa; and only African defendants have, to date been convicted of core crimes under the Rome Statute. Susana Sacouto, 'The International Criminal Court's New Chief Prosecutor: Challenges and Opportunities' (2021) Konrad Adenauer Stiftung <https://www.kas.de/en/web/newyork/un-agora-blog/detail/-/content/the-international-criminal-court-s-new-chief-prosecutor-challenges-and-opportunities> accessed 23.09.2022.

[11] News 24, 'ICC Targeting Poor, says Kagame,' (July 2008), < https://www.news24.com/news24/icc-targeting-poor-says-kagame-20080731>

the IER and since the submission of the final expert report, in addition to its internal problems, the Court has faced challenges that go to the heart of its *raison d'etre* as both a judicial and geopolitical institution. The challenges faced by the ICC entail "not just technical questions for review by technical experts, but fundamentally political questions about what the Court should consider to be within its mandate."[12] One need only consider the decision of the Pre-Trial Chamber (PTC) in the Afghanistan situation refusing to allow the Prosecutor to investigate on the basis that it would not serve the interests of justice, to understand that it is difficult, if not impossible, to fully separate the institutional aspects of the ICC's operations from its political context.[13] Questions of the sequencing of ICC interventions due to ongoing peace processes are as relevant to Colombia, as they were to the situation in Darfur, Sudan.

This paper aims to critically assess whether the concerns of African States were ignored or dismissed by the IER process at the ICC. The paper will seek to ascertain whether the separation of the review process into 'technical' and 'non-technical' categories to be carried out by the independent experts and the respective ASP working groups, created a gap in which critical issues for which African States had long advocated or proposed reform, were either insufficiently addressed or not dealt with at all.

The paper begins by examining the historically significant role of African States in the establishment of the ICC and the circumstances which lead to a breakdown and dissonance in the relationship between the Court, some African States and the AU. Part I will provide an overview of the IER process including the mandate and work of the independent experts and the working

[12] Todd Buchwald, 'The Path Forward for the International Criminal Court: Questions Searching for Answers' (2020) Case Western Reserve Journal of International Law 52, p 419. <https://scholarlycommons.law.case.edu/jil/vol52/iss1/18> , accessed 05.09.2022.

[13] *Situation in the Islamic Republic of Afghanistan* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan) ICC-02/17 (12.04.2019).The Pre-Trial Chamber found that, notwithstanding the fact all the relevant requirements were met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan were such as to make the prospects for a successful investigation and prosecution extremely limited; See also, ICC, 'ICC judges reject opening of an investigation regarding Afghanistan situation' Press Release ICC-CPI-20190412-PR1448 (12.04.2019). The decision of the PTC was subsequently overturned by the Appeals Chamber. *Situation in the Islamic Republic of Afghanistan* (Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan) ICC-02/17 OA4 (05.03.2020); ICC, 'Situation in the Islamic Republic of Afghanistan' ICC-02/17 <https://www.icc-cpi.int/afghanistan> accessed 04.09.2022

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groups of the Assembly. Within this section, the paper will also closely examine what role, if any, African States played and their level of engagement with the IER process. In Part II, the paper will examine whether the independent review has addressed three of the main concerns of African states namely: complementarity; peace and justice; and cooperation. Assuming that there was indeed an 'ignoring or dismissal' of African concerns in the IER review, this section will seek to ascertain why. It will assess whether there were gaps in the strategy of African States in advancing their reform priorities, in driving or not driving their own agenda within the relevant working group and facilitation of the ASP, and in follow-up.

The author acknowledges that the paper lacks a detailed examination of other very relevant concerns, including those of African civil society organisations on the role and rights of victims at the ICC. This is not an oversight. Those issues, though very important, are beyond the scope of this paper.

2. African States, the AU and the ICC

2.1. Optimistic beginnings

African States were instrumental in the establishment of the ICC with Senegal being the first country to ratify the Rome Statute.[14] Niger and the Republic of Congo were among the 10 instruments simultaneously deposited to make the sixtieth ratification that brought the Rome Statute into force, and Uganda referred the first case to the ICC.[15] Africa's interest and commitment to the establishment of the ICC came from the highest levels of the continent's leadership. Member countries of the Southern African Development Community (SADC) developed 10 principles for an independent, fair and free international court.[16] In a similar vein in February 1998, representatives of 25 African States adopted the 'Dakar Declaration' in a meeting in Dakar, Senegal which affirmed the commitment to establish the ICC. The Dakar Declaration on the ICC was adopted at the 67th Organisation of African Unity (OAU) (now AU) Council of Ministers and at the 34th

[14] United Nations Press Release, 'Senegal First State to Ratify Rome Statute of the International Criminal Court' (03.02.1999) < https://press.un.org/en/1999/19990203.l2905.html> accessed 26.09.2022.

[15] Philomena Apiko, Faten Aggad, 'The International Criminal Court and Africa: What way forward?' (2016) European Centre for Development Policy Management Discussion Paper 21.

[16] Fanny Benedetti, Karine Bonneau, John Washburn, *Negotiating the International Criminal Court: New York to Rome* (Martinus Nijhoff Publishers 2013) p 82.

Assembly of Heads of State and Government of the OAU in Ouagadougou in February and June 1998 respectively.[17] At the meeting of its 24th ordinary session in October 1998 in Banjul, Gambia, the African Commission called on all States Parties to the African Charter on Human and People's Rights to sign and ratify the Rome Statute and to take all necessary legislative and administrative steps to bring their national laws and policies in conformity with the Statute.[18]

The initial optimism and support of African States towards the Court and the Rome Statute system were to a large extent driven by the impact of catastrophic wars and conflicts on the continent including in Rwanda and neighbouring countries, and other civil wars of the 80s and 90s in Liberia, Angola, Sudan and Somalia.[19] At that time, other than in respect of the atrocities committed in Rwanda for which an international tribunal was established, little or no action toward justice followed from these disruptive conflicts.[20] African leaders saw an opportunity in the creation of an international criminal court for a permanent mechanism to address the humanitarian concerns and gross human rights violations the continent was faced with.[21] Thus, African States signed and ratified the Rome Statute *en masse*.[22] African civil society also played a critical role in the push towards the establishment of the ICC and promoting universal acceptance of the Court in Africa.[23] This was particularly important because of the many victims and affected communities who had grown increasingly frustrated with the culture of impunity which pervaded the continent.

2.2. A shift in the wind

The issuance of an arrest warrant against former Sudanese President Omar Al-Bashir prompted a shift in the ICC-Africa relationship.[24] The warrant and

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[17] Ibid.

[18] Rowland J.V. Cole, 'Africa's Relationship with the International Criminal Court: More Political Than Legal', (2013) Melbourne Journal of International Law 14.

[19] Samuel Okpe Okpe, 'Anti-Impunity Norm of the International Criminal Court: A Curse of Blessing for Africa?' (2020) Journal of Asian and African Studies 55:8, p 2.

[20] UN International Residual Mechanism for Criminal Tribunals, 'Legacy Website of the International Criminal Tribunal for Rwanda' <https://unictr.irmct.org/> accessed 05.09.2022.

[21] Okpe, p 2.

[22] Chris Maina Peter, 'Fighting Impunity: African States and the International Criminal Court' in Evelyn A. Ankumah (ed) *The International Criminal Court and Africa* (Intersentia 2016), p 15.

[23] Zoe Cornell, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) Cornell International Law Journal 39:2, p 259. Rowland J.V. Cole, 'Africa's relationship with the International Criminal Court: More Political than Legal' (2013) Melbourne Journal of International Law, p.675

[24] *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Warrant of Arrest for Omar Hassan Ahmad Al Bashir) ICC-02/05-01/09

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ensuing events, catalysed a 'campaign of non-cooperation' among some African States and the AU, which worsened following the summonses issued against former President and Deputy President of Kenya[25] and the indictment of the former President of Libya, Muammar Mohammed Abu Minyar Gaddafi, his son Saif al-Islam Gaddafi and his brother in law, Abdullah al-Sanussi in June 2011.[26]

(04.03.2009); *Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir* (Second Decision on the Prosecution's Application for a Warrant of Arrest) ICC-02/05-01/09 (12.07.2010). Former Sudanese President Omar Al Bashir was indicted before the ICC on five counts of crimes against humanity, two counts of war crimes and three counts of genocide. Arrest warrants were issued in respect of the charges in 2009 and 2010. The charges allege that Al Bashir and other high-ranking Sudanese political and military leaders of the then Sudanese Government agreed upon a common plan to carry out a counter-insurgency campaign against several organised armed groups including the Sudanese Liberation Movement/ Army (SLM/A), the Justice and Equality Movement (JEM) and other armed groups opposing the Government of Sudan in Darfur. A core component of that campaign was the unlawful attack on part of the civilian population of Darfur – belonging largely to the Fur, Masalit and Zaghawa groups – who were perceived to be close to the organised armed groups opposing the Government of Sudan in Darfur. As a non-State Party to the Rome Statute, the situation in Sudan was referred to the ICC by the UNSC under Article 13 of the Statute. See UN Security Council Resolution 1593 (2005) S/RES/1593.

[25] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-01/11-373 (04.12.2012); *The Prosecutor v. Uhuru Murigai Kenyatta* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute) ICC-01/09-02/11-382-Red (29.01.2012). The Kenya situation arising from the Prosecution's investigations into alleged crimes against humanity committed during the 2008 post-election violence, was the first time in which the Prosecutor's propio motu powers were exercised at the ICC. Mr Kenyatta was charged with five counts of crimes against humanity and Mr Ruto was charged with three counts of crimes against humanity. The case against former President Uhuru Kenyatta was withdrawn on 13 March 2015. On 5 April 2016, the Trial Chamber decided by majority that the case against William Samoei Ruto and Joshua Arap Sang (with whom he was jointly charged) was to be terminated. The parties did not appeal the decision. The PTC had previously declined to confirm the charges against Mr. Henry Kiprono Kosgey on 23 January 2012.

[26] International Criminal Court 'Gaddafi Case' <https://www.icc-cpi.int/libya/gaddafi> accessed 01.09.2022; Peter, p. 20. International Criminal Court 'Situation in Libya' <https://www.icc-cpi.int/libya> accessed 01.09.2022. The situation of Libya, another non-State Party to the ICC, was referred to the ICC by the UNSC on February 26, 2011, considering that the widespread and systematic attacks taking place in the country against the civilian population may amount to crimes against humanity. UN Security Council Resolution 1970 (2011) S/RES/1970. An arrest warrant against Gaddafi was issued in June 2011, but proceedings against him were terminated following his death in November of the same year. Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (27.06.2011) ICC-01/11; *Situation in Libya in the Case of The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (22.11.2011) ICC-10/11-01/11. The case against Abdullah Al- Senussi was declared inadmissible in 2013 because "the same case against Mr. Al-Senussi that is before the Court is currently subject to domestic proceedings being conducted by the competent authorities of Libya." *The situation in Libya in the Case of The Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al-Senussi* (Decision on the admissibility of the case against Abdullah Al-Senussi) ICC-01/11-01/11 (11.10.2013), para 311. This decision was confirmed by the Appeals Chamber in 2014. The case against Saif Al Islam Gaddafi was found admissible in 2013, "In this

The indictment of the African leaders sparked a major pushback led by the affected African States Parties supported by the AU to address what they perceived as a threat to peace, security and stability in Africa. The targeted African leaders, their allies and the AU initiated a plan of action to combat the perceived threat from the ICC including through a swathe of declarations beginning at Sirte, Libya in 2009.[27] The strategy – a combination of diplomatic, political and legal action- included Ministerial meetings with clear recommendations for action, AU declarations and requests for deferral to the UN Security Council pursuant to Article 16 of the Rome Statute.

The role played by the AU in ensuing developments should not be underestimated. The AU has increasingly played a key role on the continent in shaping the international justice discourse and is not content to steer these issues from the backseat. This is perhaps best demonstrated by its proactiveness in the creation of the Extraordinary African Chambers in Senegal to try former Chadian President, Hissene Habre.[28] The AU is guided by the provisions of its Constitutive Act, which lists the promotion of peace, security and stability as well as the

admissibility challenge, the Chamber has not been provided with enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libyan and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr. Gaddafi." *In the case of* The *Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al-Senussi* (Decision on the admissibility of the case against Saif Al-Islam Gaddafi) ICC-01/11-01/11 (31 May 2013), para 219. The case was found admissible again after another admissibility challenge in 2019. *In the case of The Prosecutor v. Saif Al-Islam Gaddafi* (Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gadafi under Articles 17(1)(c), 19 and 20(3) of the Rome Statute') ICC-01/11-01/11 (05.04.2019). The Appeals Chamber confirmed this decision in 2020. *In the case of The Prosecutor v. Saif Al-Islam Gaddafi* (Judgment on the appeal of Mr Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi under Articles 17(1)(c), 19 and 20(3) of the Rome Statute'" of 5 April 2019) ICC-01/11-01/11 (09.03.2020) Saif Al Islam Gaddafi is currently at large, and the case remains in pre-trial stage pending his transfer to the seat of the Court. International Criminal Court 'Gaddafi Case' <https://www.icc-cpi.int/libya/gaddafi> accessed 05.09.2022.

[27] On 3 July 2009, in Sirte, Libya, the Assembly of the African Union expressed its deep concern at the indictment issued against Al Bashir, and called on relevant AU organs to speed up the investigations towards the creation of an African Court of Justice and Human and Peoples' Rights with a criminal prosecution mandate. Kamari M. Clarke, Charles C. Jalloh, Vincent O. Nmehielle, 'Introduction' in Charles C. Jalloh, Kamari M. Clarke, Vincent O. Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press 2019) p 9.

[28] Godfrey Musila, The Role of the African Union in International Criminal Justice: Force for Good or Bad, in Evelyn A. Ankumah (ed.) *The International Criminal Court and Africa: One Decade On* (Intersentia 2016) 304

promotion and protection of human and peoples' rights in accordance with the African Charter and other human rights instruments, among its key objectives.[29] In addition to the objectives of the Act, the AU's functions are guided by specific principles including the principle of humanitarian intervention- "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity"; and respect for "democratic principles, human rights and the rule of law and good governance."[30] Thus, as Musila posits, "as the main regional intergovernmental body-especially one that commits itself to the fight against impunity-the idea that the AU necessarily has a role to play in international criminal justice is not difficult to fathom."[31]

During its thirteenth ordinary session in Sirte, the AU Assembly decided that the indictment issued by the ICC against President Omar Al-Bashir had had 'unfortunate consequences' on the "delicate peace processes underway in the Sudan and…continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur."[32] The AU found that the arrest warrant "could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan as a whole and, as a result, may lead to further suffering for the people of the Sudan and greater destabilization with far-reaching consequences for the country and the region."[33] Early the following year, at its fourteenth ordinary session in February 2010, ahead of the ICC Review Conference in Kampala, Uganda, the AU endorsed the recommendations from the Report of the Ministerial Preparatory Meeting of States Parties to the Rome Statute which included the proposal for amendment to Article 16 of the Rome Statute; proposal for retention of Article 13 as is; guidelines for the exercise of prosecutorial discretion by the ICC

[29] Constitutive Act of the African Union, Articles 3(f) and 3(h), < https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf>

[30] Ibid, Article 4(h) and (m)

[31] Godfrey Musila, The Role of the African Union in International Criminal Justice: Force for Good or Bad, in Evelyn A. Ankumah (ed.) *The International Criminal Court and Africa: One Decade On* (Intersentia 2016) 304

[32] Assembly of the African Union, Thirteenth Ordinary Session (July 2009) Assembly/AU/Dec.245(XIII) Rev.1 p 1, para 2.

[33] Assembly/AU/Dec.245(XIII) Rev.1, Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) - Doc. Assembly/AU/13 (XIII), ASSEMBLY OF THE AFRICAN UNION Thirteenth Ordinary Session 1 – 3 July 2009 Sirte, Great Socialist People's Libyan Arab Jamahiriya, Para 3.

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Prosecutor; immunities of Officials whose States are not parties to the Rome Statute: the relationship between Articles 27 and 98; and the proposal concerning the crime of aggression.[34]

Requests for deferral to the UNSC[35] under Article 16 of the Rome Statute yielded no positive results and in the case of Al Bashir, was not even acknowledged.[36] Consequently, the AU reiterated the call to the Member States to disregard the arrest warrant for President Al Bashir and to not cooperate with the Court in his arrest and surrender to the Court.[37] Not all members agreed with this decision. Botswana, for example, reaffirmed that as a State Party to the Rome Statute, it had treaty obligations to fully cooperate with the ICC in the arrest and transfer of Al Bashir.[38]

The impasse between the Court and the AU only deepened following the issuance of a second arrest warrant for Al Bashir in July 2010. Several States, including Chad and Kenya, failed to arrest him while on their territory, a decision which the AU supported as being consistent with various AU Assembly decisions in pursuit of peace and stability in the region.[39] In 2013, in another AU-backed move, Kenya also requested deferral of the ICC investigation and prosecution against Uhuru Muigai Kenyatta and William Samoei Ruto under Article 16 of the Rome Statute.[40] The deferral resolution garnered only 7 of the 9

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[34] Assembly of the African Union, Fourteenth Ordinary Session (31 January – 2 February 2010) Assembly/AU/Dec.268-288(XIV) para. 2

[35] The UNSC has primary responsibility for the maintenance of international peace and security pursuant to Chapter VII of the UN Charter. It has 15 Members, 5 of whom are permanent members (China, France, Russian Federation, the United Kingdom, and the United States) and each Member has one vote. Under the Charter of the United Nations, all Member States are obligated to comply with Council decisions. The UNSC is empowered under Article 13(b) of the Rome Statute, acting under its Chapter VII powers, to refer to the Court situations in which crimes under its jurisdiction have taken place. Under Article 16 of the Statute, the UNSC may defer an investigation or prosecution for one year through a Chapter VII resolution, for reasons relating to the maintenance of international peace and security.

[36] Assembly/AU/Dec.245(XIII) Rev.1 p 2, para 9; Assembly of the African Union, Fourteenth Ordinary Session (February 2010), Assembly/AU/Dec.270(XIV) p 2, para 10; Assembly of the African Union, Sixteenth Ordinary Session (January 2011), Assembly/AU/ Dec.334(XVI) p 1, para 3; Assembly of the African Union, Twenty-Second Ordinary Session (January 2014), Assembly/AU/Dec.493(XXII) p 1, para 5; Charles Chernor Jalloh, 'The African Union, the Security Council and the International Criminal Court' in Charles Chernor Jalloh, Ilias Banketas (eds) *The International Criminal Court and Africa* (Oxford University Press 2017), p 182.

[37] Assembly/AU/Dec.245(XIII) Rev.1 p 2, para 10.

[38] James Nyawo, *Selective Enforcement and International Criminal Law* (Intersentia 2017), p 121.

[39] Internatonal Criminal Court, 'Al Bashir Case' <https://www.icc-cpi.int/darfur/albashir> accessed 24.08.2022. In respect of the AU decision, see Assembly/AU/ Dec.334(XVI) p 1, para 5.

[40] UN Security Council, 'Identical letters dated 21 October 2013 from the Permanent Representative of Kenya to the United Nations aggressed to the Secretary-General and the President of the Security Council' (22.10.2013) S/2013/624.

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votes needed for the resolution to pass and was therefore unsuccessful.[41]

In 2015, the AU established the Open-Ended Committee of Ministers of Foreign Affairs on the International Criminal Court during its 25th ordinary session in Johannesburg, South Africa. The Open Ended Ministerial Committee was tasked with 'developing strategies to implement the various decisions of the Assembly about the ICC and in particular to follow-up the AU's request for the suspension of the proceedings against President Omar al Bashir or withdrawal of the referral by the UNSC, termination or suspension of the proceedings against Deputy President William Samoei Ruto of Kenya and engage with relevant stakeholders until AU concerns and proposals related to the ICC are addressed."[42] In the same resolution, the AU requested the AU Commission to join in the Application under Rule 68 by the Prosecutor of ICC against the Kenyan Deputy President as an interested party for purposes of placing before the Court all the relevant material arising out of the negotiations.[43]

By January 2017, the AU called for a mass withdrawal from the Rome Statute, on the basis that the Court "is selective in its prosecutions and undermines the sovereignty of African states".[44] The withdrawal resolution stated that "from the cases of alleged African warlords to the indictments of African leaders, the predominance of African subjects of international criminal justice has created suspicion about prosecutorial justice." [45] The collective withdrawal resolution also addressed the need for reform and the

[41] Article 27 of the Charter of the United Nations stipulates that resolutions can only be passed with the affirmative vote of nine of the 15 members including the concurring votes of the permanent members. The permanent members (China, Russia, United Kingdom and Northern Ireland, United States and the Russian Federation) can therefore block any resolution by voting against it. UN Security Council 7060th Meeting (15.11.2013) S/PV.7060; Assembly/AU/ Dec.334(XVI) p.1. para 6.; Assembly/AU/Dec.493(XXII) p 1, para 6.

[42] African Union, Decision on the Update of the Commission on the Implementation of Previous Decisions on the International Criminal Court, (June 2015) Assembly/AU/Dec.586(XXV). See also, Withdrawal Strategy Document, Draft 2, para. 5, available at < https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf > last accessed February 2, 2023

[43] ibid

[44] Assembly of the African Union Twenty-Eighth Ordinary Session (January 2017) Assembly/AU/Draft/Dec.1(XXVIII)Rev.2, p 2, para 8; Ronald Chipaike, Nduduzo Tshuma, Sharon Hofisi, 'African Move to Withdraw from the ICC: Assessment of Issues and Implications (2019) Indian Council of World Affairs 75:3, p 335. See also, Withdrawal Strategy Document, Draft 2, para. 6, available at < https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf > last accessed February 2, 2023

[45] African Union 'Draft Withdrawal Strategy Document' (Version 12.01.2017) <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf> accessed 28.08.2022, p 1.

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necessity to enhance Africa's presence in the Court.[46] Not all African States supported the resolution and there was even strong opposition from States such as Nigeria and Botswana.[47] The call for collective withdrawal was ultimately unsuccessful. South Africa and the Gambia withdrew the initial notifications of withdrawal which they had submitted to the UN Secretary-General and to date, only Burundi has officially withdrawn its membership.[48]

2.3. Pushback

Botswana, among other African states, rigorously opposed the anti-ICC rhetoric and non-cooperation decisions from the AU. In its statement during the General Debates in the tenth session of the ASP, Botswana noted that while there was a perception that the ICC unfairly targeted African countries, 'the reality is that atrocious human rights abuses and other crimes that merit ICC's attention, have and continue to be committed in Africa… and in the majority of situations, it is Africans themselves who invite the intervention of the Court".[49] It noted with regret the decision of the AU during its Malabo Summit calling for non-cooperation, describing it as a "serious setback" in the battle against impunity in Africa, which "undermines efforts to confront war crimes and crimes against humanity…committed by some leaders on the continent…and is a betrayal of the innocent and helpless victims of such crimes."[50]

African civil society actors, while not always in agreement with the Court's approaches and among its staunchest critics, have rubbished much of the anti-ICC rhetoric coming from the AU and some States Parties.[51] African civil society organisations have mobilised to bring an action before local courts to force

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[46] Spies, p.431.

[47] Chipaike, Tshuma, Hofisi, p 346.

[48] The Burundi withdrawal took effect on 27 October 2017. However, its withdrawal does not prevent the ICC from exercising jurisdiction over crimes committed on the territory of Burundi or by its nationals from 1 December 2004 to 26 October 2017. Erika de Wet, 'The rise and demise of the ICC relationship with African states and the AU' in Annalisa Ciampi (ed) *History and International Law* (Edward Elgar Publishing 2019), p 194-195.

[49] Keynote Address by His Excellency, Seretse Khama Ian Khama, President of the Republic of Botswana during the Opening Plenary of the 10th Session of the Assembly of the States Parties to the International Criminal Court, New York (12 December 2011), < https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP10/Statements/ASP10-ST-Botswana-ENG.pdf > accessed February 8, 2023

[50] ibid

[51] ICTJ, 'Kenya/African Union, Reaffirm Support for the ICC,' (November 25, 2011) < https://www.ictj.org/news/kenyaafrican-union-reaffirm-support-icc> last accessed February 2023; Coalition foot the ICC, 'African Civil Society Demands Justice,' < https://www.coalitionfortheicc.org/node/1101> last accessed February 2023; Max Du Plessis, 'The International Criminal Court that Africa Wants,' Institute for Security Studies (2010), < https://www.files.ethz.ch/isn/137504/Mono172.pdf> last accessed February 2023.

government officials to arrest President Al Bashir or to prevent his entry into their country despite an outstanding arrest warrant.[52] Civil society organisations with the backing of some Western-led international NGOs have also played a crucial role in bringing the voices of victims to the fore.[53]

The ICC also pushed back against the anti-ICC campaign, by publicly refuting the accusations of unfairly targeting Africa and working to resolve the impasse through legal and diplomatic means. Prosecutor Bensouda, a Gambian, publicly rejected claims that the ICC was targeting Africa, stressed the fact that African victims supported the Court's work and praised what she described as a growing commitment on the continent to the rule of law and accountability for atrocity crimes.[54] Then ICC President Sang Yong Song, invited African countries to make formal amicus curiae submissions under Rule 103 of the Rules of Procedure and Evidence before the chambers to register any case-specific concerns.[55] In November 2013, the ASP convened a historic "Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation" which included interventions by Ms. Djenaba Diarra, the AU's acting Legal Counsel and Professor Charles Jalloh on behalf of the AU.[56]

The serious implications of prolonged tensions between the Court and its largest regional bloc prompted the Court's principals and the ASP to recognise the crucial need to engage with the AU, including through seeking to establish a liaison office in Addis Ababa. Thus, during its 20th session, the ASP acknowledged the need to "pursue efforts aimed at

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[52] Angela Mudukuti, Complementarity and Africa: Tackling International Crimes at the Domestic Level, in Evelyn A. Ankumah (ed.) *The International Criminal Court and Africa: One Decade On* (Intersentia 2016) p 500 (discussing The Bashir Case (SALC v. Minister of Justice and Others).

[53] African Centre for Justice and Peace Studies, '31 NGOs send memorandum to African State Parties attending the ICC's Assembly of States Parties,' < https://www.acjps.org/31-ngos-send-memorandum-to-african-state-parties-attending-the-iccs-assembly-of-states-parties/> last accessed February 2023; Coalition for the ICC, 'Zambia: Ensure justice for victims, stay with the ICC', <https://www.coalitionfortheicc.org/fr/node/1582> last accessed February 2023.

[54] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The ICC is an independent court that must be supported', < https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-icc-independent-court-must-be> accessed February 6, 2023

[55] Charles C. Jalloh, The ICC Reform Process and the Failure to Address the African State Concerns on the Sequencing of Peace with Criminal Justice Under Article 53 of the Rome Statute, 54 N.Y.U. J. Int'l L. & Pol. 809 (2022)

[56] ICC Assembly of States Parties, Special segment as requested by the African Union: "Indictment of sitting Heads of State and Government and its consequences on peace and stability and reconciliation", Informal Summary by the Moderator, (27 November 2013), ICC-ASP/12/61

intensifying dialogue with the AU and to strengthen the relationship between the Court and the AU." The ASP welcomed the Court's "regular engagement in Addis Ababa with the AU and diplomatic missions in anticipation of establishing its liaison office, and called upon all relevant stakeholders to support strengthening the relationship between the Court and the AU."[57]

3. The Independent expert review

3.1. Overview

In December 2019, the ASP adopted, by consensus, a resolution for the review of the ICC and the Rome Statute system.[58] The preambular paragraphs of the resolution reaffirmed the crucial role played by the ICC in the global fight against impunity but expressed grave concern about the multifaceted challenges facing the Court and the Rome Statute system. The resolution established a "transparent, inclusive *State-Party driven* process for identifying and implementing measures to strengthen the Court and improve its performance (emphasis added)."[59] The Assembly prepared a draft working paper ('Matrix') which served as the starting point for a comprehensive dialogue and review aimed at strengthening the Court and Rome Statute system. [60] The 'Matrix' was also envisaged as the tool for tracking the progress of the reform process. It did not however set any standards, benchmarks or indicators for measuring the reform outcomes and was simply a non-binding, evolving document.

In January 2020, the ASP appointed 9 independent experts to commence the independent review of the ICC.[61] The ASP adopted a two-pronged approach to the review, with the independent experts assigned to deal with so-called 'technical' matters (governance, judiciary, investigations and prosecutions) and other 'non-technical' matters, such as strengthening cooperation, non-cooperation, complementarity and the

[57] Resolution ICC-ASP/19/Res.6, Strengthening the International Criminal Court and the Assembly of States Parties <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res6-ENG.pdf#page=20> accessed 05.09.2022, para 50.

[58] ICC-ASP/18/Res 7, para 4.

[59] ibid.

[60] ICC Draft Working Paper 'Meeting the challenges of today for a stronger Court tomorrow: Matrix over possible areas of strengthening the Court and Rome Statute system' (2019) para. 3(a).

[61]The experts were: Nicolas Guillou (France), Mónica Pinto (Argentina), Mike Smith (Australia), Anna Bednarek (Poland), Iain Bonomy (United Kingdom of Great Britain and Northern Ireland), Mohamed Chande Othman (United Republic of Tanzania), Richard Goldstone (South Africa-Chair), Hassan Jallow (The Gambia), and Cristina Schwansee Romano (Brazil). ICC Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System (December 2019) ICC-ASP/18/Res.7, para. 6 and 7, Annex I A (1) and (2).

relationship between national jurisdictions and the Court, equitable geographic representation and gender balance to be dealt with by the Bureau of the ASP through its working groups and facilitation.[62] The relevant working groups are: the Working Group on Cooperation (WGC),[63] the Working Group on Non-Cooperation (WG-NC),[64] the Working Group on Amendments (WGA)[65] and the Working Group on Complementarity (WGCom.).[66] The entire review process was expected to be governed by principles of inclusiveness, respect for prosecutorial and judicial independence and a consultative approach.[67]

The ASP made clear to the independent experts that the review was not an isolated event but was part of a wider State Party-driven review process with the Court; thus they were to avoid overlap, seek synergies, and avoid duplication of their recommendations with activities being undertaken by States Parties, some of which were of a political nature.[68] In keeping with this directive, the independent experts consulted the relevant ASP facilitators to better understand the issues under their mandate.[69]

Despite Covid-19 restrictions which impacted access and engagement, the experts held a total of 278 interviews and meetings with 246 current and former officials, staff, and external defence and victim's representatives, heads of organs, the Staff Union Council, 9 States Parties, 12 ASP representatives/bodies, 54 NGOs and 6 academics. They also accepted 130 written submissions. There was however limited engagement with African civil society organisations and victims' groups due to the inability to travel to the field and related technology challenges.[70]

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[62] ICC-ASP/18/Res.7, para 18; See also Terms of Reference for the Independent Expert Review of the International Criminal Court, ICC-ASP/18/Res.7, Annex I, para A.2.

[63] ICC Working Group on Cooperation <https://asp.icc-cpi.int/bureau/WorkingGroups/Cooperation> accessed 05.09.2022.

[64] ICC Working Group on Non-Cooperation < https://asp.icc-cpi.int/non-cooperation> accessed 05.09.2022.

[65] ICC Working Group on Amendments < https://asp.icc-cpi.int/WGA> accessed 05.09.2022.

[66] ICC Working Group on Complementarity < https://asp.icc-cpi.int/complementarity> accessed 05.09.2022.

[67] ICC-ASP/18/Res. 7 para 4.

[68] ICC-ASP/18/Res.7, Annex I (A) (5).

[69] Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report (30 September 2020) <https://asp.icc-cpi.int/Review-Court> accessed 23.08.2022, para 7.

[70] Video presentation of Sharon Nakandha, Center for International Law and Policy in Africa, Challenges & Opportunities for African State and Civil Society Engagement in the ICC Review Process,

On June 30, 2020, the experts released an interim report outlining their working methods, access, interactions with the Court, and input from various stakeholders, in which they pointed out that there were divergent views concerning whether the IER should also consider amendments to the Rome Statute. The experts made it clear that they did not rule out the possibility of making recommendations for amending the Rome Statute, indicating that they planned to make both short- and longer-term proposals and the latter may require "consideration being given to possible amendments to the Rome Statute."[71]

The independent experts presented their final 348-page report containing 384 recommendations in September 2020, signalling the completion of its mandate.[72] Follow-up, planning and coordination of the assessment of the recommendations of the IER was to be carried out by a Review Mechanism established in February 2021, headed by the Netherlands, Sierra Leone and three ad-country focal points.[73] The Review Mechanism has developed a comprehensive action plan (CAP) for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action.[74]

3.2. African Engagement with the IER Process

African States Parties and civil society were generally very supportive of the review process, given their legitimate expectations that the review would address some of the longstanding African-specific concerns. However, the onset of the Covid-19 pandemic which coincided with the review, and its impact on active engagement by

<https://www.youtube.com/watch?v=y2P94MOIx3U&t=4317s> accessed 30.08.2022.

[71] Independent Expert Review on the International Criminal Court and the Rome Statute System, Interim Report, (June 2020), para. 12 https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER%20-%20Interim%20Report%20ENG.pdf , last accessed 05.02.2023

[72] Despite Covid-19 restrictions which impacted access and engagement, the experts held a total of 278 interviews and meetings with 246 current and former officials, staff, and external defence and victim's representatives, heads of organs, the Staff Union Council, 9 states parties, 12 ASP representatives/bodies, 54 NGOs and 6 academics. They also accepted 130 written submissions. See Interim Report There was however limited engagement with African civil society organisations and victims' groups due to the inability to travel to the field and the technology challenges in those areas. Center for International Law and Policy in Africa, Challenges & Opportunities for African State and Civil Society Engagement in the ICC Review Process, <https://www.youtube.com/watch?v=y2P94MOIx3U&t=4317s> accessed 30.08.2022.

[73] ICC Assembly of States Parties Review of the International Criminal Court and the Rome Statute System (2020) ICC-ASP/19/Res.7, para 4.

[74] The "Proposal for a comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action, as appropriate" with slight modifications following consultations with the Assembly mandate holders was adopted by the Bureau of Assembly pursuant to Resolution ICC-ASP/19/Res.7, para 6.

African stakeholders impacted the working methods of the independent experts and by extension the ability for full engagement.

African States Parties engaged in the review process as a regional bloc, submitting interventions through a Chairman, who was appointed at a meeting convened in the Hague, together with the AU legal counsel and led by Zambia. Ambassador Michael Kanu from Sierra Leone was appointed Chair of the African Group on the IER review process on behalf of African States.[75] In relation to the independent experts, two issues were critical for African States parties: firstly, equitable gender and geographic representation of independent experts and unhindered access to confidential materials for them to carry out their work.

The second issue concerned the working methods of the independent experts: African States and civil society were adamant that in order for the process to be equitable, there was a need for effective engagement. The experts were based in The Hague with planned visits to New York and with the outbreak of COVID 19 consultations were mainly limited to online briefings. With the limited representation in The Hague, the expert's Interim Report presented in June 2020, showed that only one African State had met with the experts since the IER's inception.[76] The Africa Group recognised that if African priorities were going to be factored into the work of the experts, there was a need for effective engagement in the IER process.

To ensure inclusivity and effective engagement, the African Group in New York established an open-ended drafting committee to compile all existing proposals submitted by African States Parties in a matrix form which then formed the basis of African States Parties' submissions.[77] This submission synthesised and prioritised the relevant issues to be addressed according to the clusters of the review. The submissions had to be tailored to the clusters set out in the terms of reference of the review. The submission was made in July 2020 and was duly acknowledged by the chair.[78]

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[75] Centre for International Law and Policy in Africa (CILPA), Challenges and Opportunities for African State and Civil Society Engagement in the ICC Review Process, Video Presentation of Ambassador Michael Kanu,(12 January 2022), < https://www.youtube.com/watch?v=y2P94MOIx3U&t=7s> last accessed February 6, 2022

[76] Independent Expert Review on the International Criminal Court and the Rome Statute System, Interim report, (30 June 2020), p.77

[77] CILPA, Video Presentation of Ambassador Kanu

[78] Ibid, presentation of Ambassador Kanu. According to the Ambassador, "*there was an issue as to whether the review should include amendment to the Rome Statute but it was the view of the experts that this was outside of their mandate and this is perhaps why some earlier issues were not addressed by the independent experts in their recommendations." This differs from the indication by the experts that Rome Statute amendments could be considered*

African States Parties welcomed the submission of the final report by the experts and supported the call for assessment of the recommendations for possible implementation, including a process or mechanism to oversee the implementation. However, here again, the crucial issues were the representativeness of the mechanism, inclusivity, transparency, and prosecutorial and judicial independence to ensure legitimacy of the process.[79] There was significant debate on the need for efficiency in the mechanism, but the African States Parties remained resolute on the issue of representation and hence the legitimacy of the process. The composition of the Review Mechanism, namely the appointment of Sierra Leone to co-lead the Mechanism,[80] reflects the compromise that was reached between the issue of legitimacy and efficiency, which were not seen as mutually exclusive.

While States Parties' representatives were expected to drive the working mechanism, country and regional groups needed to be regularly briefed. As to the assessment of the recommendations and as such assessment gathered pace, the perennial challenge faced by African States, especially those with small delegations, and the amount of work required for effective engagement became an issue. The engagement continued in New York with Cote D'Ivoire. There were time zone challenges with meetings held in The Hague.

As Chair of the Review Mechanism, Ambassador Kanu noted that there are 'major challenges still to be solved and African States still have tremendous responsibility in the assessment of the IER recommendations particularly some of the sensitive issues."[81] The working groups on complementarity and cooperation are also both co-chaired by African States who lead the work of these facilitations.[82] Thus, the working groups present key opportunities for continuous African engagement on the reform priorities and to advance issues of particular relevance to the content.

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in the context of their longer-term recommendations. See Interim Report

[79] Written Statement by the Republic of Kenya, the General Debate of the Assembly of States Parties, 19th Session of the Assembly of States Parties to the Rome Statute, (December 14-16, 2020), "We call upon State Parties to ensure that the follow-up deliberations on the recommendations are conducted in a transparent, inclusive, and holistic manner."

[80] Bureau of the Assembly of States Parties, Twentieth meeting, (5 February 2021), < https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19R/Bureau20.agenda%20and%20decisions-ENG.pdf>.

[81] CILPA, Ambassador Kanu video presentation.

[82] Report of the Bureau on Complementarity, ICC-ASP/20/22 (December 2021), para. I (1). At its second meeting on 6 April 2021, the Bureau appointed Australia and Uganda as ad country focal points for complementarity in both The Hague Working Group and the New York Working Group in the lead-up to the twentieth session of the Assembly.

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4. African concerns and Reform Priorities

Identifying and clearly articulating African concerns and reform priorities is a more complex exercise than appears at first blush. Despite being one continent, Africa, like others, is a study of diversity, with sovereign States which do not always agree. African concerns should not be viewed as those of the entire continent because there may be differences between and among African States, between States and non-States Parties to the Rome Statute, and between States and the AU. According to Jalloh, some of the "more prominent criticisms" of the ICC are those of the AU, which has its own separate legal personality and which may differ from those of individual members.[83] The AU's views are often conflated with the views of its members though it is the latter which officially carries more weight. Furthermore, African civil society may have a completely different perspective on the ICC than States. As Kersten rightly notes:

> "By treating the continent as an indivisible whole, it unnecessarily entrenches polarising divisions between the Court and African governments and communities. In reality, it is clear that within Africa, positions on the ICC vary widely, ranging from fully supportive to harshly critical. Whereas some states see the Court as an integral part of a functioning global system, others see it as a useful means to castigate and stigmatise domestic opponents. Some view it as a threat, whilst others may simply view it as largely irrelevant to their political prerogatives."[84]

For the most part, African States Parties to the Rome Statute, the AU and civil society, do share a commitment to the ideals of the ICC as an institution and its promise of accountability and redress for victims of egregious crimes. But there is also a clear divergence of views among this group concerning the Court's failings and the issues which should be prioritised at any given time, depending on the target of the Court's investigations and prosecutions. Indeed, it is uncontested that despite longstanding investigations against less prominent African nationals, the concerted opposition to the Court by certain States and the AU were only triggered when Heads of State were the focus of investigations. Even in the absence of consensus on all of the key issues concerning the role and

[83] Charles Jalloh, 'The ICC Reform Process and the Failure to Address the African States Concerns on the Sequencing of Peace with Criminal Justice under Article 53 of the Rome Statute', 54 N.Y.U. J. Int'l L. & Pol. 809, p. 823

[84] Mark Kersten, 'Wayamo Foundation Policy Report: Building Bridges and Reaching Compromise Constructive Engagement in the Africa-ICC Relationship' (2018), p 6.

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impact of the ICC on the continent, there are specific matters of pressing concern for African States, which will be discussed below.

4.1. Historic concerns

A study of African States' deliberations in the UN General Assembly between 1993 and 2003, identified and interpreted the most salient African diplomatic concerns about the ICC and categorised them as 1) universality and participation, 2) complementarity, 3) independence and 4) sovereign equality.[85] African States' views on establishing a permanent international criminal court were historically not limited to ending impunity and justice but related to a broader agenda of restructuring international society and addressing structural inequalities.[86] This resulted from the experience of inequality in the post-colonial era including within international organisations such as the UN.[87] Many African diplomats at that time envisioned a Court that focused not so much on ending impunity but one that was about international relations, resetting the global order and contributing to the establishment of a more equal world.[88]

The submissions of the South African delegate on behalf of the sixteen-member SADC, on the opening day of the Rome Conference, succinctly sets out the four main concerns of African States about the ICC at that time:

- '[T]he *Prosecutor should be independent* and have authority to initiate investigations and prosecutions on his or her initiative without interference from States or the Security Council, subject to appropriate judicial scrutiny', and '[t]he *independence* of the Court must not be prejudiced by political considerations';
- '[T]he Court should contribute to furthering the integrity of States generally, as well as the *equality of States* within the general principles of international law';
- '[The Court]… should be an effective *complement* to national criminal justice systems' and 'should also have competence in the event of the inability, unwillingness or unavailability of national criminal justice systems to prosecute those responsible for grave crimes under the

[85] ibid.
[86] Line Engbo Gissel, 'A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003' (2018) European Journal of International Law 29:3, p 725.
[87] ibid, p 727.
[88] In the study Gissel notes that *"Indeed, in contrast to the vision of the ICC by Western states and non-governmental organizations, impunity featured relatively little in the African discussions of the Sixth Committee. In fact, between 1993 and 2003, 19 African countries made only 28 references to a court associated with anti-impunity. Eighty-two per cent of these references were made in November 1998 or thereafter, suggesting that African diplomats adopted the impunity narrative during and after the Rome Conference. Thus, to the African diplomats, the Court initially did not represent the anti-impunity project with which it was later associated."* Gissel, p 744.

Statute, while respecting the complementary nature of its relationship with such national systems'; and,

- 'The Court [is] a necessary element for *peace and security* in the world…' and '[its] establishment … would not only strengthen the arsenal of measure to combat gross human rights gross human rights violations but would ultimately contribute to the attainment of international peace.' (emphasis mine) [89]

Du Plessis and Gevers posit that these four concerns are "the seeds" of African States disillusionment with the ICC today, which were historically rooted in unsuccessful engagements with international courts such as the International Court of Justice (ICJ), Africa's relationship with the international system more broadly and the "long shadow still cast by colonialism over international law."[90] They argue that the African States "were not *naïve* at Rome in 1998. On the contrary, they were well aware of the potential shortcomings of the ICC but supported it nonetheless."[91] The issue, they contend, is that not only have "legitimate concerns of African states either been simply ignored or problematically dismissed; they have materialized over the past two decades not purely by the unfolding of uneven international politics, but also by the actions and inactions of the ICC (and in some cases its supporters)."[92]

The question is whether these 'legitimate concerns' of African states namely: prosecutorial independence; equality of states; complementarity; and peace and justice, were still a priority for African States and the AU at the time of the IER. By the time the IER commenced in 2020, the cases against the African leaders were slowly unravelling or political changes had seen them ousted from power. The case against the Kenyan leaders collapsed and was withdrawn by the Prosecution amid allegations of witness tampering and non-cooperation. [93] Omar-Al Bashir was no longer the President of Sudan, having been overthrown in a military coup after a year of popular protests. Al-Bashir, along with his entire Cabinet, were arrested and the

[89] Max du Plessis, Christopher Gevers 'The Sum of Four Fears: African States and the International Criminal Court in Retrospect' (2019) Opinio Juris <http://opiniojuris.org/2019/07/08/the-sum-of-four-fears-african-states-and-the-international-criminal-court-in-retrospect-part-i/> accessed 23.09.2022.

[90] ibid.

[91] ibid.

[92] ibid.

[93] ICC, Situation in the Republic of Kenya, The Prosecutor v. Uhuru Muigai Kenyatta Case Information Sheet ICC-PIDS-CIS-KEN-02-014/15_Eng (13.03.2015). <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/KenyattaEng.pdf> accessed 03.09.2020.

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government replaced by a Transitional Military Council.[94]

Despite these changes, the AU concerns about the ICC at the commencement of the IER seemed to be as entrenched as ever. In the Declaration on the ICC at its 33rd Ordinary Session in February 2020, the AU reaffirmed the need for all Member States and in particular ICC States Parties to comply with Assembly Decisions.[95] The AU also reiterated its call for Member States to ratify the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol), which extends the jurisdiction of the African Court of Justice, Human and People's Rights to try international and transnational crimes.[96] The AU also utilised the occasion of its 33rd Assembly to express deep concern about the double standard in the Court's case selection process "as evidenced in the decision of PTC II to reject the Prosecutor's request to proceed with investigations into the alleged crimes committed in Afghanistan" and to urge States Parties to the Rome Statute, in particular, African States, "to stand against the increasing politicisation of the Court."

4.2. Addressing (or Not) African Concerns

Thus, despite the shift away from the ICC's primary focus on Africa, many of the 'legitimate concerns' referred to by Du Plessis and Gevers were still pending when the IER commenced and have not been addressed by the review. The issue of peace and justice, for example, has neither been addressed in the 348-page report of the independent experts nor by any of the ASP facilitations. Oumar Ba criticises the report's exclusive focus on the ICC and its institutional culture.[97] The report, he contends, looks extensively at the work and institutional culture at the Court - issues such as management of personnel, selection of cases, specific offices, women, and the ICC – which are important matters that must be addressed.[98] However, he laments the absence of specific focus on what he

[94] BBC World News, 'Sudan coup: Why Omar al-Bashir was overthrown' (15.04.2019) <https://www.bbc.com/news/world-africa-47852496 > accessed 26.09.2022.

[95] Assembly of the African Union, Thirty-Third Ordinary Session (February 2020) Assembly/AU/Dec.789(XXXIII).

[96] The Malabo Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States. African Union, *Protocol on the Statute of the African Court of Justice and Human Rights* (01.07.2008).

[97] Oumar Ba, in Wayamo Foundation, 'Precarity or Prosperity: African Perspectives on the Future of the International Criminal Court' (December 2020) p 37 < https://africanperspectives.wayamo.com/wp-content/uploads/2020/12/Wayamo-KAS-African-Perspectives-on-the-Future-of-the-ICC-WEB-3.pdf> accessed 05.09.2022.

[98] ibid.

terms "the broader questions" namely "the role the ICC plays in the international system," and opines that "two decades later, there is still no attempt to rethink what the ICC can be, rather than what the ICC would be in a world where international justice would be the main concern for all parties involved, including states."[99]

4.2.1. Peace and Justice

One of the fundamental issues of concern to African States is the balancing and sequencing of peace and justice, yet the IER seemed to shy away from the issue. The "peace-justice concern, which also goes to the heart of the ICC's core mandate to investigate and punish atrocity crimes, stems partly from the ICC's involvement in situations of the ongoing conflict in Africa and partly from the controversial interpretation of Article 53 of the Rome Statute by the ICC OTP. This is often referred to as the peace versus justice or peace and justice dilemma."[100]

The OTP sees a difference between the concepts of the interests of justice and the interests of peace and considers that the latter falls within the mandate of institutions other than the Office of the Prosecutor.[101] Distinguishing between its role and that of the UNSC, the OTP stresses that it is the latter which may, under its Article 16 powers, defer investigations and prosecutions where it considers it necessary to maintain international peace and security (Chapter VII UN Charter), but the broader matter of peace and security does not fall within the responsibility of the Prosecutor.[102]

Kersten suggests that there are two broad positions which characterise what has come to be referred to as the peace-justice debate. The first is that there is 'no peace without justice', which speaks to the deterrent role of international justice and its broader contribution to peace processes. The second, that there is 'no justice without peace', argues that an end to hostilities must be prioritised and that accountability may have to wait for peace to be secured before it is pursued, lest it undermine stability. The debate between these two positions has been deeply polarised.[103]

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[99] ibid.

[100] Charles Jalloh, The ICC Reform Process and the Failure to Address the African States Concerns on the Sequencing of Peace with Criminal Justice under Article 53 of the Rome Statute,

[101] ICC Office of the Prosecutor, Policy Paper on the Interests of Justice (2007) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> accessed 27.09.2022, p 1.

[102] ibid, p 8.

[103] Mark Kersten, 'Wayamo Foundation Policy Report: Building Bridges and Reaching Compromise: Constructive Engagement in the Africa-ICC Relationship' (2018) p 18.

While the immediate urgency of a policy position on the peace versus justice debate, at least in relation to the African continent, appears to have diminished, it still remains an issue worth considering in the context of the ICC's intervention in ongoing conflict situations or in fragile post-conflict settings, where a crucial balance and compromise must be struck between peace and reconciliation on the one hand and responsibility and accountability on the other. Phil Clark notes that understanding the nature and effects of prosecutions involves more than an analysis of core legal practices such as investigations, courtroom arguments, and judgments. This also requires a close examination of the political, social, cultural, and economic context in which these legal processes unfold and their intersections with a wide range of other actors and mechanisms.[104]

The Court's initial hard-line stance on its role in ongoing peace processes may need to be revisited. What lessons has the ICC learnt from an interventionist approach in the Darfurian context or in the Ivory Coast? These issues are relevant beyond Africa. The ICC's investigations in Ukraine are being conducted amidst growing support for peace over justice among European citizens who are concerned about a long and protracted war.[105] The ICC, as an instrument of accountability, should be seen as part of a broad swathe of measures available to countries struggling with conflict or at the post-conflict stage. In these contexts, the AU Transitional Justice (TJ) Policy correctly proposes the need for complementarity of the objectives of peace and reconciliation on the one hand, and justice and accountability, as well as inclusive development, on the other.[106] The AU TJ Policy notes that "the promotion and pursuit of the interrelated but at times competing TJ objectives in a transitional setting often necessitate sequencing and balancing."[107] Sequencing under the Policy means that "various TJ measures should be comprehensively planned and complementarily organized in their formulation and programmatically ordered

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[104] Phil Clark, 'The International Criminal Court's Impact on Peacebuilding in Africa', in Terence McNamee and Monde Muyangwa (eds.) *The State of Peacebuilding in Africa: Lessons Learned for Policymaker and Practitioners* (Palgrave Macmillian 2020), p 235.

[105] Ivan Krastev, Mark Leonard, 'Peace versus Justice: The coming European split over the war in Ukraine' European Council on Foreign Relations < https://ecfr.eu/publication/peace-versus-justice-the-coming-european-split-over-the-war-in-ukraine/> accessed 26.09.2022.

[106] African Union Transitional Justice Policy (February 2019) <https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf> accessed 02.09.2022, para 38.

[107] ibid.

and timed in their implementation."[108] Balancing entails "achieving a compromise between the demand for retributive criminal justice and the need for society to achieve reconciliation and rapid transition to a shared democratic future."[109]

As part of their review of the OTP's approach to preliminary investigations (PE), case selection and prioritisation, the independent experts considered the issue of feasibility, defined as operational considerations which would predict the likelihood of a successful investigation or prosecution and result in a conviction.[110] However, the experts should also have recommended that the OTP examine the questions of sequencing and balance at the PE stage, particularly in contexts of ongoing conflict or fragile post-conflict situations. The IER provided the perfect opportunity for the ICC Prosecutor to revisit the interest of justice criteria, not in the abstract, but based on lessons learnt from the Court's experience on the African continent. Beyond the IER, this is an issue that the new Prosecutor should revisit in his planned review of the internal policies of his office.

4.3. Complementarity

The issue of complementarity was considered by both the independent experts and the ASP working group on complementarity. The independent experts considered complementarity as part of their broader assessment of investigations and prosecutions under Cluster 3. The experts found that "complementarity questions arise in relation to two aspects of the OTP's approach to PEs: the legal and factual analysis of complementarity for the assessment of jurisdiction; and the engagement by the OTP in positive complementarity activities".

At the same time, the ASP working group was mandated to commence consultations and report to the Assembly on the issue of complementarity, and the relationship between national jurisdictions and the court. The working group was guided by the matrix with the objective of strengthening the ongoing "dialogue on complementarity, providing further clarity and predictability, while respecting prosecutorial and judicial independence". Effort was made by both the experts and the working group to avoid overlap in their respective mandates.

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[108] ibid.

[109] ibid.

[110] IER Report, para. 634 (and accompanying footnote); 643-645; 651-655; R228. In relation to feasibility at the case selection and prioritisation stage, see para. 658, 661 and 662,676 and recommendation R 244.

The complementary regime of the ICC not only defines the relationship between the Court and national legal systems but also determines the judicial forum that should have jurisdiction in any given case. Under the Rome Statute framework, national jurisdictions have the primary responsibility to investigate and prosecute international crimes including those within the jurisdiction of the ICC, and the ICC acts as a court of last resort, intervening only if there is no ongoing investigation or prosecution or the State is unwilling or genuinely unable to investigate or prosecute.

The OTP has indicated that its approach to complementarity is not to compete with national States for jurisdiction, but rather to encourage and facilitate genuine national proceedings where possible and "a consensual division of labour" between the ICC and the national courts where appropriate.[111] This encouragement and facilitation of national proceedings are reflected in the office's initial approach to the notion of 'positive' complementarity, which has evolved over time.[112]

The OTP has a responsibility to select which situations to investigate, to conduct investigations in the selected situations, and to identify and prosecute individual cases arising out of those investigations.[113] The normative framework for initiating investigations is set out in Article 53(1)(a)-(c) of the Rome Statute. It provides that the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction);admissibility (complementarity and gravity); and the interests of justice.[114] Article 15 of the Statute provides for the Prosecutor to initiate investigations *propio motu* (of his own accord) on the basis of information on crimes within the jurisdiction of the Court.

Herein lies the challenge. There is an inherent tension between legality and discretion. While there are clear statutory criteria for the OTP's selection of situations and cases within situations to investigate and prosecute, much of it remains within the discretionary purview of the Prosecutor.

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[111] ICC, 'Paper on some policy issues before the Office of the Prosecutor' (2003) <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> accessed 27.09.2022.

[112] ibid.

[113] Sacouto.

[114] ICC Office of the Prosecutor, 'Policy Paper on Preliminary Examinations' (2013) < https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> accessed 19.09.2022.

Conversely, if the Prosecutor had limited discretion, it would call his independence into question. Given this tension, it is not surprising that the OTP's approach to PEs, situation and case selection has raised difficult questions about selectivity and bias (why one situation or case and not another, why one side of a conflict and not another); feasibility (how many situations should be open at one time); resources (particularly in relation to positive complementarity); and timing (how long should situations remain open in the PE phase and when should investigations be closed).

The experts' analysis of the OTP's approach to the situation and case selection and prioritisation may be considered under the rubric of two essential components of procedural justice: consistency and impartiality.[115] In relation to the issue of consistency, the experts found that "when the OTP conducts its admissibility assessment during the PE stage, it appears to do so also prospectively or on a continuing basis, in some instances waiting for years for national authorities to demonstrate their 'willingness and ability'."[116] By applying the admissibility test prospectively, the OTP appeared to be exceeding its mandate, conducting what amounted to 'human rights monitoring', or playing a 'watchdog role'.[117] The experts cited the Afghanistan and Nigeria situations where crimes continue to be committed after the opening of a PE, extending the duration of the PE for a number of years. In others such as Guinea or Colombia, the OTP had been monitoring the national proceedings for many years, without being able to come to a conclusion on their genuineness or sufficiency.[118] The Colombia PE was closed by Prosecutor Khan 17 years after it was first opened.[119]

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[115] Birju Kotecha, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) Journal of International Criminal Justice 18:1, p 117.

[116] IER Report, para 723.

[117] ibid, para 724.

[118] ibid. The PE in Guinea was closed on the 28th of September 2022 and the ICC Prosecutor and the Guinean Government signed a Memorandum of Understanding under the complementarity framework, undertaking to work actively and collaboratively to further the principle of complementarity and ensure accountability for international crimes committed in Guinea in the context of the 28 September 2009. See Memorandum of Understanding between the Republic of Guinea and the Office of the Prosecutor of the International Criminal Court, (28 September 2022), < https://www.icc-cpi.int/sites/default/files/2022-09/2022-09-29-mou-icc-guinea-ns-eng.pdf>

[119] ICC, *Colombia: preliminary examination* <https://www.icc-cpi.int/colombia> accessed 05.02.2022. An MOU was also signed in the Colombian context: 'Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia',<https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211

The experts decried the "lack of time limits for states to produce evidence of concrete, tangible, and progressive steps being taken by them during the PE stage, and that there were no benchmarks or criteria for the states to satisfy in order to convince the OTP to close a PE."[120] They noted that the absence of time limits was not always a negative thing as some States genuinely struggle with financial and personnel constraints in seeking to comply with OTP requests. Where a specific timeline is set, this could also cause some States "to play the waiting game and intentionally delay assisting the OTP with its complementarity assessment, leaving the OTP unable to effectively progress in certain situations."[121] The experts considered that a "change in approach towards the complementarity test, in combination with meaningful benchmarks, and a tailor-made strategy for each situation, might remedy what has become an untenable situation for the OTP."[122]

The absence of consistency also contributes to perceptions of bias or partiality, one of the OTP's biggest challenges. Ambos describes it as an "enormous challenge for the Court to avoid the impression that it only prosecutes individuals of weak states and thus reproduces the structural inequalities between states existing at the international level."[123] In its Sirte Declaration, the AU expressed deep concern at "the conduct of the ICC Prosecutor" and mandated African States Parties to the Rome Statute at their preparatory meeting to "prepare *guidelines* and a *code of conduct* for the exercise of discretionary powers by the ICC Prosecutor in particular in relation to the exercise of his discretionary powers under Article 15 of the Rome Statute"(emphasis added).[124]

According to Du Plessis and Gevers, some clear examples of bias include the persistent failure of successive Prosecutors "to take action in respect of crimes committed in or concerning Palestine"; and "the refusal to open an investigation into Israel's 2010 attack on the Humanitarian Aid Flotilla bound for Gaza (*MV Mavi Marmara*)," contrary to the assessment of

028-OTP-COL-Cooperation-Agreement-ENG.pdf>

[120] IER Report, para 725.

[121] IER Report, para 726, 727.

[122] Ibid, para 728.

[123] Kai Ambos, Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (2018) International Legal Materials 57:6 , p 1131 - 1145 <https://doi.org/10.1017/ilm.2018.49> accessed 27.09.2022.

[124] Assembly/AU/Dec.245(XIII) Rev.1, Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) – Doc. Assembly/AU/13 (XIII), Assembly of the African Thirteenth Ordinary Session.

the PTC.[125] Early in his mandate, Prosecutor Khan has already come under severe criticism for his approach in the Afghanistan situation, one that was already riddled with contradictions and controversy. His decision to focus the resumed investigations in Afghanistan on crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritise other aspects of this investigation, specifically in relation to alleged crimes committed by the US and its allies, has been criticised by rights groups as caving to US pressure and attacks against the Court and its principals.[126]

While the experts did not expressly address the issue of real or perceived bias by the OTP, they consistently noted gaps in the level of transparency in the OTP's approach to PEs, case selection and charging of alleged perpetrators within cases:

> "The Experts received a number of criticisms and suggestions related to the manner in which the OTP selects and prioritises cases. The lack of recent success in court was seen by some as a consequence of poor case selection. Stakeholders expressed concern at the apparently ad hoc and unpredictable choice of cases by the OTP. Some highlighted the issues regarding unequal investigations into all sides of the conflict (e.g., DRC, Uganda); the time lag between investigating different parties to the conflict (e.g., Cote d'Ivoire (CIV)); the choice of charges which insufficiently represent the underlying crime patterns (e.g. Lubanga), suspects of low hierarchical position (e.g. Al Werfalli), or situations/cases with low feasibility. The need for more transparency regarding the OTP's strategic planning of case selection was also suggested."[127]

As such, the experts made several recommendations concerning the need for a more transparent approach by the OTP including in assessing the degree of responsibility for crimes ('those most responsible') and the hierarchical rank of the accused ('mid- and high-level perpetrators').[128]

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[125] Du Plessis, Gevers.

[126] Centre for Constitutional Rights, 'Resumption of ICC Investigation Into Afghanistan, While Welcome, Should Not Exclude Groups of Victims or Crimes Within Court's Jurisdiction' (28.09.2021) <https://ccrjustice.org/home/press-center/press-releases/resumption-icc-investigation-afghanistan-while-welcome-should-not> accessed 18.09.2022. For the Prosecutor's Press Release on his decision see: OTP Statement, Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan, (27.09.2021), <https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-karim-khan-qc-following-application> accessed 18.09.2021.

[127] IER Report, para 658.

[128] IER Report, R 232.

They suggest that more transparency would improve the prospects of cooperation from States Parties and non-States Parties and assist in mobilising the civil society organisations in situation countries.[129] Schabas posits that the ICC OTP stands out by comparison to other prosecutorial teams at international criminal tribunals in the area of transparency, with several policy papers explaining relatively opaque concepts such as interests of justice, case selection and prioritisation etc. He argues, however, that the policy paper on case selection and prioritisation, for example, "pretends to clarify and inform but in reality it only serves to obscure things, perpetuating the fiction that the process is fundamentally objective rather than one that is inevitably steeped in subjectivity."[130]

This notion of a 'fiction of objectivity' seems set to haunt the OTP, and the ICC more broadly, signalling that despite policy statements and judicial pronouncements, the system of international justice is still plagued by a troubling and deeply entrenched inequality. The international community's outpouring of support (financial and otherwise) for the ICC's intervention in Ukraine while refusing to provide the OTP's requested budgetary allocation to cover its investigations in other situations, sounds an ominous warning that the justice playing field is far from level. Forty-three ICC States Parties have formally requested an ICC investigation into the Ukraine situation, and several have made voluntary contributions and seconded country experts to support the OTP's work on the ground.[131]

The double standard is glaringly obvious. As James Goldston notes:

> "Those fighting for accountability for Russia's Ukraine invasion must be prepared to answer legitimate questions about why this act of aggression and state violence merits a concerted international legal response, whereas others, like the U.S.- and U.K.-led invasion of Iraq, have not. The contrast is stark between the outpouring of state backing for the ICC's probe in Ukraine and muted reactions – and worse – to the Court's examinations of alleged war crimes and crimes against

[129] IER Report, para 737.

[130] William Schabas, 'Feeding Time at the Office of the Prosecutor' (23.11.2016) International Criminal Justice Today <https://www.international-criminal-justice-today.org/arguendo/icc-prosecutors-perpetuation-of-the-fiction-of-objectivity/> accessed 25.09.2022.

[131] ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation' < https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> accessed 25.09.2022.

humanity in Afghanistan, Israel, and Palestine."[132]

The Prosecutor has been at pains to emphasise that any contribution received will be used across all situations, and has sought to absolve his office of any signs of impartiality in relation to situations under investigation.[133] Amnesty International (AI) has however criticised the Prosecutor for the lack of transparency in accepting funding and seconded personnel in the Ukraine situation which they argue "risks allowing states parties to support only those situations which align with their interests."[134] AI contends that this approach "exacerbates the risk of selective justice and leaves the court vulnerable to manipulation by powerful states."[135] In a stinging criticism of the Court, reminiscent of similar sentiments previously expressed by the AU, AI noted that the ICC has "appeared to veer off course in recent years, with recent decisions by the ICC Prosecutor raising concerns that the court may be heading towards a hierarchical system of international justice."[136]

It is clear that the concerns about bias and selectivity in ICC investigations and prosecutions, foreshadowed by African States and the AU remain a problematic part of the ICC's landscape. Yet one wonders, if this is an "inescapable dyad, where the Court cannot win", as Robinson suggests. Under Robinson's theory, the Prosecutor (and the judges) are in a catch-22 scenario where any decision they make could potentially be seen as political.[137] The experts' analysis of the OTP's approach to PEs, case selection and prioritisation and investigations address some aspects of the issue, but as Ba suggests, fails to engage with the broader questions of how perceptions of selectivity and bias can further erode the legitimacy of the ICC and undermine its role as a significant player in the international justice arena.[138]

4.3.1. Positive complementarity

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[132] James Goldston, 'How not to fail on International Criminal Justice for Ukraine' (21.03.2022) Just Security <https://www.justsecurity.org/80772/how-not-to-fail-on-international-criminal-justice-for-ukraine/> accessed 25.09.2022

[133] ICC, 'Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation', < https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states> accessed 25.09.2022.

[134] Amnesty International, 'The ICC at 20: Double standards have no place in international justice' (01.07.2022), <https://www.amnesty.org/en/latest/news/2022/07/the-icc-at-20-double-standards-have-no-place-in-international-justice/ > accessed 25.09.2022.

[135] ibid.

[136] ibid.

[137] Darryl Robinson, 'The Inescapable Dyads: Why the ICC cannot win', *28 Leiden Journal of International Law (2015) 323, Queen's University Legal Research Paper 2015-016*

[138]

The IER dedicated considerable time to the role of the Court in strengthening the effectiveness of domestic legal systems to prosecute international crimes, so-called 'positive complementarity', a matter of significant interest for African States Parties. The interest in this concept appears to centre primarily on the role of the Court in supporting and providing technical assistance for national prosecutions, in order to strengthen the capacity of national authorities to prosecute Rome Statute crimes.

The term 'positive complementarity' does not appear in the Statute but was coined by the OTP in its initial policy papers to mean "a proactive policy of cooperation aimed at promoting national proceedings."[139] The OTP's strategy was to encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance; and involved several activities including providing information collected by the Office to national judiciaries upon their request pursuant to Article 93 (10); sharing databases of non-confidential materials or crime patterns; sharing with local lawyers and investigators expertise and training on investigative techniques or questioning of vulnerable witnesses; and acting as a catalyst with development organisations and donors' conferences to promote support for relevant accountability efforts.[140]

States Parties were not comfortable with what they perceived as an overly expansive role for the Court akin to a development organisation and the issue was strongly debated in the lead-up to the 2010 ICC Review conference. As a compromise between the OTP's approach and the concern of States, the ASP focal points on complementarity to the 2010 ICC Review Conference, Denmark and South Africa, offered a more-tempered definition of positive complementarity: "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, *without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis"* (emphasis added).[141] States were of the view

[139]ICC Office of the Prosecutor, Prosecutorial Strategy 2009-2012, para. 16 < https://www.icc-cpi.int/sites/default/files/OTPProsecutorialStrategy20092013.pdf>

[140] Ibid, para. 17

[141] ICC Assembly of States Parties, 'Report of the Bureau on stocktaking: Complementarity', Resumed Eighth Session, (March 2010), ICC-ASP/8/51.

that the actual assistance offered to national systems "should as far as possible be delivered through cooperative programmes between States themselves, as well as through international and regional organizations and civil society."

The OTP's approach to positive complementarity evolved over the years within the framework of its strategic plans. Mindful of the divergence of views among States concerning the concept, with "some stakeholders supporting the idea while others seeing it as an expansion of the Office's role", the OTP decided as part of its strategic goals for 2019-2021 that its priority in relation to positive complementarity would be to: ensure diligent processing of requests; participate where appropriate in coordinated investigative efforts and contribute to the further development of a global network among investigative and prosecutorial bodies for sharing information and experience.[142]

The independent experts focused their assessment on the OTPs institutional approach and practice of positive complementarity in the context of PEs and found that in some situations such as Guinea, Colombia, and Nigeria, the OTP's positive complementarity efforts were not incidental.[143] For instance, in the situations of Colombia and Guinea, the "OTP engaged closely with the authorities of the state concerned, visiting each 15-17 times during the PE process".[144] The experts found that while certain positive developments in terms of accountability efforts had occurred during the period in situations under examination, those PEs were also among the lengthiest.[145] The experts found that there was a prevailing view that during PEs, the OTP engages in activities that are beyond the Prosecutor's mandate and that this is inconsistent with the purpose of PEs.

Within the working group on complementarity, there is broad support for achieving greater clarity and predictability in

[142] ICC OTP, Strategic Plan,
[143] IER Report, para 733.
[144] ibid.
[145] ibid. In a 2018 blog post on EJIL Talk in response to a Human Rights Watch report on Preliminary Examinations at the ICC, Emeric Rogier Head of the Situation Analysis Section, in charge of preliminary examinations, at the OTP, pointed out that the length of preliminary examinations is justified; either because 'the assessment of national proceedings is rendered complex by the information provided (or lack thereof) or because the mechanisms in place require time to actually deliver.' He noted that both the situations in Guinea and Colombia demonstrate that encouraging national proceedings require 'painstaking efforts'. Emeric Rogier, The Ethos of "Positive Complementarity", EJIL:Talk! (December 12, 2018)

the interpretation and application of the principle of positive complementarity, particularly in respect of the relationship between national jurisdictions and the Court.[146] However, more than a decade after the ICC Review Conference, there does not yet seem to be a consensus on the use of the term, with clear differences in definitions adopted by the ASP and Court.[147] States Parties are still broadly in support of the notion of encouraging national prosecutions, but continue to strongly advocate a more horizontal State to State or civil society to State approach to the provision of technical assistance, with a more limited role for the Court. They posit that the Court is "not a development agency" and the OTP should implement 'positive complementarity' by not rushing to judge a State's unwillingness or inability, but rather by "encouraging relevant and genuine national proceedings".[148]

The OTP has announced that it is set to launch a new policy paper on complementarity which sets out a 'more proactive', open approach to its engagement with national authorities, "in a manner consistent with the spirit and provisions of the Rome Statute, while also reinvigorating and changing the nature of the relationship between the Office and national jurisdictions."[149] A large part of this new relationship will involve supporting national authorities that may be able to take on greater responsibility with respect to core international crimes and will be based on four pillars: creating a community for cooperation and complementarity; technology as an accelerant for complementarity; bringing justice closer to communities; and, harnessing cooperation mechanisms at the regional and international level.[150]

There is already evidence of this 'proactive engagement' with national authorities in the Memoranda of Understanding (MOU) between the OTP and Guinea, and the Cooperation Agreement between the OTP and Colombia. The Colombia Agreement is said to renew the commitment of the OTP to Colombia's national accountability processes and makes clear the respective roles of the OTP and Colombian authorities in sustaining the progress made by the

[146] ICC-ASP/18/25, para 28-45.
[147] ICC-ASP/18/25, para 55.
[148] ICC ASP Twentieth Session (December 2021) Report of the Bureau on Complementarity, ICC-ASP/20/22, para 47.
[149] Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague Working Group on Complementarity Second Meeting (30.06.2022), p 2.
[150] ibid.

Special Jurisdiction for Peace.[151] Ambos notes that the Colombia Cooperation Agreement among other things, shows that the new Prosecutor "wants not only to resolve pending tasks, but also to enter into a more positive cooperative relationship with those States that are fundamentally willing and able to conduct national criminal prosecutions and work with his Office to this end."[152] In his view, this breathes new life into the concept known as 'positive complementarity'. [153] Human Rights Watch (HRW) strongly criticised the decision to close the Colombia preliminary examination and to conclude an MOU, raising concerns about its potential to impact victims' ability to secure justice.[154] HRW noted that by concluding an MOU without requiring more from the Colombian government, the ICC prosecutor had failed to capitalise on the leverage that the office previously enjoyed while conducting the PE which had had positive effects on catalysing justice.[155]

The OTP also concluded, in very similar terms, albeit in a very different contextual framework, an MOU with the government of Guinea which effectively paved the way for the national trial of those accused of the crimes in the Conakry Stadium to take place.[156] Similar to Colombia, while both the government and the OTP have agreed to the MOU, the document does not operate to bind the OTP from resuming the PE in the event of any significant change of circumstances. Interestingly, in Article 5 of the MOU, the OTP undertook within its mandate and means, to continue supporting Guinea' s accountability efforts with respect to the events of 28 September 2009, including by contributing to projects and programmes aimed at the provision of knowledge transfer, the exchange of best practices and technical support. Thus, the MOU emphasises that the OTP will provide non-monetary support, given the ASP disapprobation of any resource-intensive positive complementarity activity. Article 4 requires the government of Guinea to

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[151] ICC OTP, 'Cooperation Agreement between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia', (28 October 2021), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf> last accessed February 2023

[152] Kai Ambos, 'The return of "positive complementarity"', EJIL:Talk! (November 3, 2021), < https://www.ejiltalk.org/the-return-of-positive-complementarity/> last accessed February 2023

[153] ibid

[154] Elizabeth Evenson, Juan Pappier, 'ICC Starts Next Chapter in Colombia, Will It Lead to Justice?', EJIL:Talk! < https://www.hrw.org/news/2021/12/16/icc-starts-next-chapter-colombia> last accessed February 2023

[155] Ibid.

[156] ICC OTP, 'Memorandum of Understanding between the Republic of Guinea and the Office of the Prosecutor of the International Criminal Court', (28 September 2022), < https://www.icc-cpi.int/sites/default/files/2022-09/2022-09-29-mou-icc-guinea-ns-eng.pdf>

regularly inform the OTP about progress on the case and to facilitate bi-annual visits and exchanges.

The debate on the OTP's approach to positive complementarity is clearly far from over. While the OTP should be lauded for not unduly prolonging PEs by concluding MOUs in contexts where there is a shared commitment by national authorities, to carry out genuine investigations and prosecutions, the question arises whether the MOUs will give the OTP a perpetual monitoring role over these national prosecutions. In addition, if local authorities conduct investigations and prosecutions but do not focus on matters of priority for the OTP (for example, failing to include sexual and gender-based crimes within the range of charges), it is unclear whether the OTP could step in to address these gaps. Furthermore, where MOUs are signed requiring the protection of victims and witnesses but without any adequate witness protection framework (legislation or infrastructure), how might this impact the efficacy of the proceedings? These are questions which may or may not be addressed by the OTP's policy paper on complementarity.

4.3.2. Regional complementarity

On the other hand, regional complementarity, a matter of interest to African States, has neither been addressed by the independent experts nor the working group on complementarity. The preamble to the Rome Statute as well as Article 1, emphasise that the ICC shall be complementary to *national* criminal jurisdictions. The wording of these provisions thus appear to exclude regional justice mechanisms from the ambit of the ICC's complementarity scheme.

In 2011, Kenya proposed an amendment to the Preamble of the Rome Statute to allow for recognition of regional judicial mechanisms. According to this proposal, the word 'regional' would be added after the word 'national' in the sentence "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".[157] The Kenyan proposal foreshadows a more expansive approach to the complementarity principle than initially envisaged under the Statute. It is clearly a clarion call for the ICC to acknowledge and accept the extended criminal jurisdiction of the African Court of Justice, Human and People's Rights (ACJHR) which came about with the

[157] International Criminal Court Assembly of States Parties Thirteenth Session (2014) Report on the Working Group on Amendments ICC-ASP/13/31, p.17.

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adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) in 2014.[158]

The AU's adoption of the Malabo Protocol in 2014 was viewed by some as yet another sign of rebellion against the ICC.[159] The Protocol extends the jurisdiction of the ACJHR to crimes under international law and transnational crimes.[160] The ACJHR, which has not yet received the requisite number of ratifications, at the time of writing, to come into effect,[161] will now consist of 3 rather than 2 sections: a general affairs, human rights and an international criminal law section. The international criminal law section will serve as an African Criminal Court, drawing extensively on the ICC legal framework, operating within a narrower geographical radius but with a broader jurisdictional reach over an expanded list of crimes.

While the expansion of the jurisdiction of the ACJHR has been seen by some as a rebel Court created by disgruntled African States and the AU to undermine the ICC, legal scholars argue that the idea was long in the making and the conflation of several factors lead to the decision. Jalloh argues that the idea of a regional criminal Court was not 'new' and preparations for a regional Court with criminal jurisdiction had commenced years before the Al Bashir tensions:

> "[F]ar from being only tied to pushback on the ICC, the AU's legal instruments, starting with its founding treaty and several other treaties developed since then, implied there was already emerging a regional legal sensibility and even obligation that the AU States must take robust measures to address gross rights violations and international crimes committed on the continent."[162]

Indeed, from as far back as the drafting of the African Charter for Human Rights in

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[158] African Union, *Protocol on the Statute of the African Court of Justice and Human Rights* (01.07. 2008) <https://www.refworld.org/docid/4937f0ac2.html> accessed 01.09.2022.

[159] Larissa van der Herik, Elies van Sliedregt, 'International Criminal Law and the Malabo Protocol: About Scholarly Reception, Rebellion and Role Models' Grotius Center Working Paper 2017/066-ICL (2017), p.7.

[160] Amnesty International, 'Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court' (2016) <https://www.amnesty.org/en/wpcontent/uploads/2021/05/AFR0130632016ENGLISH.pdf> accessed 15.09.2022, p 5.

[161] African Union, List of Countries Which Have Signed, Ratified/ Acceeded to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (20.05.2019) <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> accessed 01.09.2022.

[162] Charles C. Jalloh, 'Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa' in Charles C. Jalloh, Kamari M. Clarke, Vincent O. Nmehielle (eds) *The African Court of Human and Peoples' Rights in Context* (Cambridge University Press 2019), p 81.

the 1980's, Guinea proposed that an African human rights court should be established to try violations of human rights as well as crimes under international law.[163] Jalloh points out that the unavailability of appropriate national or international judicial forums to prosecute crimes of special concern to Africans was another important catalyst for an African-birthed judicial mechanism to try international crimes.[164] Specifically, determining the appropriate venue for trial of former Chadian President, Hissène Habré, played a crucial role in catalysing the expanded jurisdiction of the African Court to address criminal matters. The Committee of Eminent African Jurists was tasked with considering options available for the Habré trial and measures to address similar cases in the future. The Committee recommended that Habré should be tried in Senegal, and importantly, that a standing mechanism with jurisdiction to try crimes against humanity, war crimes and breaches of the torture convention in Africa should be created to deal with the impunity problem in Africa, since neither the African Court on Human and People's Rights nor the Court of Justice of the AU possessed jurisdiction to hear criminal matters at that time.[165] As Jalloh puts it, "the modern idea for such extension of jurisdiction was born out of the Habré affair."[166] Other powerful catalytic factors included African States and the AU's discomfiture at the manner in which influential States were wielding their powers in relation to universal jurisdiction.[167]

The Malabo Protocol, although clearly influenced heavily by the Rome Statute, does not specifically provide for a complementary relationship between the ICC and the regional criminal tribunal; rather it limits complementarity to the national courts and regional economic courts. It appears that this may have been due to the tension between the AU and the ICC at that time as the original draft of what became the Malabo Protocol actually contained a reference to the ICC which was removed at the request of the Office of Legal Counsel of the AU Commission.[168]

Kenya's proposal raises important questions about the ICC's approach to complementarity. Does a purposive reading of the Statute support the idea that not only

[163] ibid, p.7
[164] ibid.
[165] Jalloh, p 83-84.
[166] ibid, p. 84.
[167] ibid.
[168] Kamari Clarke in Wayamo Foundation, 'Precarity or Prosperity: African Perspectives on the Future of the International Criminal Court' (December 2020) p 37 <https://africanperspectives.wayamo.com/wp-content/uploads/2020/12/Wayamo-KAS-African-Perspectives-on-the-Future-of-the-ICC-WEB-3.pdf> accessed 05.09.2022.

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national but also regional mechanisms are encapsulated by the complementarity provisions? Is it purely a matter of amending the language of the Statute, or is there a much more fundamental concern at stake? Kamari Clarke suggests that the question of regional complementarity is not purely a technical exercise that is solved by amending the ICC Statute to insert the word regional. Instead, she argues that, "what African states have been asking for is not just an amendment to the language where there is a recognition of the regional, but also that the forms of burden-sharing or ways of dealing with conflict and addressing questions of violence is also a collaborative effort where these African bodies are engaged in that regard."[169]

In her view, the approach to collaborative engagement is one-sided and this is reinforced by the approach adopted by the IER in its review which focuses on the ICC's engagement with international, inter-regional, and regional organisations such as the AU, the Organisation of American States, the European Union, with the goal of assisting states to better understand the purpose and value of the Court, thereby building support for its activities."[170] Clarke's concern is that the focus seems to be more on the ways in which regions can support the Court, as opposed to the Court "also engaging dialogically with the needs of regions, that are concerned with justice and approaches to justice -in the case of Africa on African terms, using African justice forms on African terms."[171]

This idea of a genuine burden sharing makes sense. Jackson argues that regional tribunals may be better placed to realise many of the values that underpin complementarity because of their closer proximity to the sites of violence and the communities affected. Further, he contends that if the ICC defers jurisdiction to regional tribunals, this might have a positive impact on its own legitimacy and, consequently, on political support for the institution.[172]

From a conceptual standpoint, amending the Rome Statute to refer to regional and hybrid mechanisms is worth exploring. The international justice landscape is changing with a proliferation of hybrid courts and mixed tribunals, with an emphasis on bringing investigations and prosecutions closer to home. How the ICC

[169] ibid.
[170] ibid.
[171] ibid.
[172] Miles Jackson, 'Regional Complementarity: The Rome Statute and Public International Law' (2016) Journal of International Criminal Justice 14:5 <https://doi.org/10.1093/jicj/mqw045 > accessed 02.09.2022.

engages with these mechanisms within the complementarity framework will be an important determinant of its relevance.

4.4. Cooperation

Unlike its more detailed assessment of complementarity, the IER report does not comprehensively address cooperation and non-cooperation, covering only aspects of these matters that directly relate to operational aspects of the Court's work. Broader geopolitical aspects of the Court's work and their intersect with these issues have been left for consideration by the Bureau's working groups.

The ICC's cooperation provisions are included in Part 9 of the Rome Statute. Article 86 imposes a general obligation on States Parties to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court, while subsequent provisions address the diverse forms of cooperation which the ICC may request from states including the provision of assistance and arrest and surrender of persons.[173] Non-compliance with a cooperation request may trigger Article 87(7) under which the Court is empowered to make a finding of non-cooperation and refer the matter to the ASP.

In addition to examining more operational aspects of cooperation, the expert report points to efforts by the Court to engage with regional organisations such as the AU, the Organisation of American States, the European Union, the Organisation Internationale de la Francophonie and others, "with the aim of helping relevant states better understand the purpose and value of the Court and thereby building support for its activities." [174] The report notes that "nowhere has this been more important, though also challenging, than with respect to the African Union." The experts urged the Court to strengthen and extend those activities, particularly in regions where the OTP is conducting preliminary investigations or has an ongoing investigation.[175]

In their statements during the General Debate of that same Assembly, several African States Parties welcomed the IER and supported the recommendations on cooperation and complementarity. South Africa for example said that:

> "We agree with the conclusion by the Experts that engagement with the AU is of

[173] Rome Statute, Articles 87-93
[174] IER Report, para 379.
[175]The ASP's Working Group on Cooperation (co-lead by Senegal) responsible for follow-up on the cooperation-related recommendations from the IER report, has notably taken a broader approach, addressing voluntary cooperation in addition to judicial cooperation and assistance.

> utmost importance and should continuously be strengthened and extended, and we welcome the Court's ongoing efforts of engaging with the AU. Silencing the Guns is the major priority for South Africa's present term as AU Chair. We believe continued and enhanced multilateral cooperation is the only way in which guns could be silenced, and in which international criminal law, whether implemented on the international or domestic level, can be operationalised in order to fulfil its function as a full stop at the end of the peace-justice continuum."[176]

Beyond advocating for greater levels of engagement with the AU under the rubric of cooperation, neither the IER nor the working group have comprehensively addressed two large elephants in the room which, at least in the case of Africa, are directly connected to the issue of cooperation, namely: heads of state immunity and the tension between Articles 27 and 98, and the Role of the UNSC.

4.4.1. Immunities

The loud silence of the IER and working group on the issue of immunities is very telling. The issue has been the subject of several judicial decisions including by the Appeals Chamber and may explain why the IER did not feel the need to revisit it. While that may be true, beyond the legal aspects of the decisions, the immunities debate touches upon other significant issues, including: the responsibility of third States and the ICC's cooperation and enforcement regime; the nature and scope of UNSC referrals; and the lack of clarity and follow-up by the UNSC. As Max du Plessis argues:

> "If the Security Council is going to refer situations to the ICC involving a non-state party and implicating a head of state, then […] to close down the space for any point-taking about whether immunities have been lifted for international criminals, the Council ought to express itself clearly and unmistakably about the consequences of its referral for existing rules of international law. Notably, states themselves have affirmed the need for more precise drafting in future referrals to identify obligations regarding cooperation."[177]

It is well known that the controversial stand-off between the ICC and the AU revolved around the approach to the question of immunities of indicted African leaders. While a full discussion on the multiplicity of perspectives on the issue is beyond the scope of this paper, some of the contextual background is worth rehearsing.

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[177] Max du Plessis, 'Exploring Efforts to Resolve the Tension between the AU and the ICC over the Bashir Saga', in Evelyn A. Ankumah (ed.) *The International Criminal Court and Africa: One Decade On* (Intersentia 2016) p 258.

Article 27 of the Rome Statute provides that the provisions of the Rome Statute apply equally to all persons without any distinction based on official capacity. Subsection 1 sets out the categories of leaders who are not exempted from criminal responsibility or reduction of sentence under the Statute including "Head of State or Government, a member of a government or parliament, an elected representative or a government official." Subsection 2 provides that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[178]

Kenya sought to challenge the applicability of Article 27 in the case against former President Kenyatta and Deputy Ruto, proposing in November 2013, the following amendment to Article 27:

> "Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions." [179]

Like the South African proposal on Article 16, the Kenyan proposal is currently before the WGA but has gained little traction. During intersessional meetings of the working group in 2014, Kenya explained that the objective of their proposal was:

> "…not to grant immunity to Heads of State, their deputies and persons acting or entitled to act as such, but only to 'pause' prosecutions during their term of office. It was therefore to be understood as a 'comma' rather than a 'full stop'."[180]

The working group's report noted that several delegations had additional questions and comments with regard to the text of the proposal, notably concerning the meaning of the expressions 'current term of office'.[181] Several delegations also reportedly reiterated the centrality of Article 27 to the Rome Statute and made it clear that they were not willing to modify it.

The collapse of the Kenya cases before the Court appears to have placed a full stop at the end of the proposed amendment. The issue has also not been pursued further by Kenya or other States in the context of the WGA. On the other hand, the lack of interest in pursuing the proposed amendments before the ASP WGA could

[178] ibid.
[179] United Nations, Kenya's Proposal of Amendments, C.N.1026.2013.TREATIES-XVIII.10 (22.11.2013).
[180] ICC-ASP/13/31, Report of the Working Group on Amendments, para 12.
[181] ibid.

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also be due to the inclusion of the controversial Article 46Abis (the immunity provision) in the Malabo Protocol.[182]

On the other hand, the Al Bashir issues raised distinct questions concerning the scope of immunity and the responsibilities of third states under Articles 27(2) and 98(1) of the Rome Statute and State Parties' obligation to comply with the requests of arrest and surrender issued by the Court.[183] The Al Bashir immunities question has been at the crux of many of the non-cooperation decisions issued by the Court, including the important decision of the Appeals Chamber in the *Jordan Referral re Al Bashir appeal.*[184]

Dichotomous approaches to and interpretation of the Article 27 - Article 98 immunity-third States question among ICC judges and external legal experts reflect the lack of consensus on the issue. The Court moved between what has been termed the 'customary law' position in the Malawi and Chad cases and the 'Security Council' approach in the Democratic Republic of Congo PTC decision in its determination of the issues. In its Malawi[185] and Chad[186] decisions, the ICC Pre-trial Chamber

[182] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46A: 'No charges shall be commenced or continued against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office,' <https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf>

[183] Paolo Gaeta, Patryk Labuda, 'Trying Sitting Heads of State: The African Union versus the ICC in the Al Bashir and Kenyatta Cases,' in Charles Chernor Jalloh, Ilias Banteka (eds.) *The International Criminal Court and Africa* (2017) p 139. See also South Africa's submissions after it was summoned to appear before the ICC PTC on April 2017 following its refusal to arrest Al Bashir when he attended the AU summit in South Africa in 2015, where it requested that the Court clarify the relationship between Articles 27 and 98 of the Statute. Situation in Darfur, Sudan in the Case of The Prosecutor v Omar Hassan Ahmad Al Bashir, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, ICC-02/05-01/09-290 (17 March 2017), para 71.

[184] The Prosecutor v Omar Hassan Ahmad Al Bashir, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2, (06.05.2019) < https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_02593.PDF> accessed 05.09.2022.

[185] Situation in Darfur, Sudan, The Prosecutor v. Omar Hassan Ahmad Al Bashir (Corrigendum to the 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 (13.12.2011).

[186] Situation in Darfur, Sudan, 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, (13.12.2011) at para 13, <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_04203.PDF> accessed 25.09.2022.

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decided that third States were not entitled to rely on Article 98(1) as the basis for refusing to comply with cooperation requests from the Court. In their view, customary international law creates an exception to Head of States immunity when international courts seek the arrest of a Head of State for committing international crimes.[187]

The AU strongly criticised the 'customary law' cases as: a) purporting to change customary international law in relation to personal immunity; b) rendering Article 98 of the ICC Statute redundant, non-operational and meaningless and c) making a decision per incuriam by referring to decisions of the AU while ignoring the provisions of Article 23(2) of the Constitutive Act of the AU under which Chad and Malawi are bound as member states to comply with the decisions and policies of the Union.[188]

The 'Security Council Approach' posits that Resolution 1593 referring the situation in Darfur, Sudan, to the ICC implicitly removed the immunity of Al Bashir. The PTC judges in the DRC case which applied this reasoning found that "any other interpretation would render the UNSC decision requiring Sudan to cooperate fully and provide any necessary assistance to the Court, senseless."[189] Subsequently, the Court adopted yet another approach. Abandoning the 'customary law approach', the PTCs in the South Africa and Jordan cases adopted what could be referred to as the 'analogous state party' approach.[190] In both decisions, the PTC ruled that the UNSC referral 1593 had the effect of making Sudan analogous to a state party with all of the attendant obligations.

The diverse findings and decisions of the PTCs have been contested by several academics and challenged by the AU. Gaeta and Labuda contend that Article 98 (1) "restricts the authority of the ICC vis-à-vis States Parties in matters of judicial cooperation when the Court must rely on the enforcement jurisdiction of States Parties to give effect to its decisions to arrest and surrender."[191] In their view, the

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[187] Lorraine Smith-van Lin, 'Non-compliance and the Law and Politics of State Cooperation', in Olympia Bekou and Daley Birkett (eds.) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (2016), p 127.

[188] African Union, Press Release No. 002/2012: On the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of Sudan, 9 January 2012 <https://www.au.int/en/content/press-release-decisions-pre-trial-chamber-i-international-criminal-court-icc-pursuant-articl> accessed 18.09.2022. See also Lorraine Smith-van Lin, p. 128.

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[191] ibid, p 151.

ICC was wrong in requesting States to arrest and surrender Al Bashir in his then capacity as incumbent Head of State of Sudan without first obtaining a waiver from Sudan. Failure to comply with the Court's request in their opinion, was not unlawful.[192] In its amicus submission in relation to the Jordan appeal, the AU argued that the diverse approaches adopted by the PTCs to the Al Bashir immunities/cooperation issue were deeply flawed.[193] The AU contended that it was clear from reading UNSC Resolution 1593 that Sudan could not be considered as analogous to a State Party to the ICC, neither had the Resolution operated to implicitly waive the immunity of former President Al Bashir.

Thus, the decision of the Appeals Chamber in the Jordan referral case was anticipated as an opportunity for authoritative pronouncement by the ICC's highest judicial body on a deeply divided and contentious issue. On May 6, 2019, the Appeals Chamber ruled on the matter, but not in the manner expected by several international law experts. The AC ruled that Jordan had failed to comply with its obligations by not arresting Al Bashir when he was on Jordanian territory on 29 March 2017 on the basis that "neither State practice nor *opinio juris* supported the existence of head of state immunity under customary international law vis-à-vis an international court."[194] The appellate judges found that "the absence of a rule of customary international law recognising Head of State immunity vis-à-vis international courts is relevant not only to the question of whether an international court may issue a warrant for the arrest of a Head of State and conduct proceedings against him or her, but also for the horizontal relationship between States when a State is requested by an international court to arrest and surrender the Head of State of another State. No immunities under customary international law operate in such a situation to bar an international court in its exercise of its own jurisdiction."[195]

Far from settling the issue, the Jordan appeals decision has further divided international legal debates on the immunities question. Akande described the decision as "stunning and apparently deeply misguided…a very dangerous and unwise move for the Court to make."[196]Akande

[192] ibid, p 152.

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[194] *Situation in Darfur, Sudan in the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir* Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09 OA2 (6 May 2019) para 2.

[195] ibid.

[196] Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals' EJIL: Talk! Blog of the European Journal of International Law

noted that it was extremely disappointing to see the reasoning of the PTC in the Malawi decision resurrected in the AC Jordan decision, not least because the "issue at stake was not the immunity of heads of states before international criminal courts; rather, the immunity of Heads of States from arrest by *other states* acting at the request of an international criminal court." [197] Sadat, on the other hand, found the AC decision to be correct as a matter of law and 'unsurprising' in light of six previous decisions handed down by the Court, that President Al Bashir could not benefit from Head of State immunity. [198]

The AU had previously raised the idea of seeking an advisory opinion from the ICJ regarding the immunities of State Officials under international law, which has been seen by some as a constructive step to bring clarity to the issue, but this suggestion has not been pursued.[199] The matter has also not been specifically addressed by the working group on non-cooperation. It does appear that on a matter such as immunities, barring any significant legal pronouncements which may come in the event that the AU decides to pursue an ICJ advisory opinion, the matter is unlikely to be further addressed at the ASP level.

4.4.2. The Role of the UNSC

The IER report and the complementarity working group also shied away from comprehensively dealing with the issue of the relationship between the Court and the UNSC. The role and power of the UNSC vis-à-vis the ICC is one of the thorny matters which contributed to the AU's decision to call for non-cooperation with the Court. While the issue is a dominant concern of African States, it is by no means exclusive to Africa. India also vehemently opposes what it terms the 'politicisation of the Court' through the conferral of referral and deferral powers on the UNSC.[200]

<https://www.ejiltalk.org/icc-appeals-chamber-holds-that-heads-of-state-have-no-immunity-under-customary-international-law-before-international-tribunals/> accessed 18.09.2022.

[197] ibid.

[198] Leila Sadat, 'Why the ICC's Judgment in the Al-Bashir Case Wasn't so Surprising' Just Security', Just Security (July 2019), < https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/>, accessed February 12, 2023. See also Claus Kress, 'Preliminary Observations on the ICC Appeals Chamber's Judgment of 6 May 2019 in the Jordan Referral re Al-Bashir Appeal', Torkel Opsahl Academic Epublisher, (2019), < https://www.toaep.org/ops-pdf/8-kress> accessed February 12, 2023.

[199] Assembly/AU/Dec.397(XVIII) p 2, para 10.

[200] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13 (Vol.11), Rome, (15 June -17 July 1998), p 86, para. 51 <https://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf> ; Devasheesh Bais, 'India and the International Criminal Court,'FICHL Policy Brief Series No. 54 (2016), Torkel Opsahl Academic EPublisher, <

The relationship between the UNSC and the ICC is set out in Articles 13 and 16 of the Rome Statute. Article 13 sets out the conditions for the exercise of the Court's jurisdiction. In relation to the UNSC, it provides at Article 13 (b) that:

> "The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations."

Chapter VII of the UN Charter allows the UNSC to take measures to deal with or avert threats to and breaches of international peace and security and acts of aggression.[201] The UNSC's deferral power is not limited to matters which it has referred to the ICC under its Article 13 powers but applies to any investigation or prosecution before the Court, which constitutes a threat to international peace and security within the meaning of Chapter VII of the UN Charter. This is problematic in and of itself given the potential for political interference in the affairs of a judicial institution and the potential impact on its legitimacy, but it is compounded even further by the way in which power is distributed and exercised by the UNSC, particularly in relation to the veto powers of the permanent members. [202]

The UNSC-ICC relationship is a difficult marriage of convenience. When convenient, the political partner wields its Article 13 powers to deposit situations with the judicial partner and thereafter takes no action to support that partner or even to pay maintenance.[203] The judicial partner is stuck

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https://www.toaep.org/pbs-pdf/54-bais <https://www.toaep.org/pbs-pdf/54-bais>, last accessed February 2023.

[201] To date, the UNSC has referred two cases to the ICC- the situation of Darfur, Sudan for which arrest warrants have been issued against former President Omar Al Bashir and several other suspects. In addition to the warrants against Omar Al Bashir, the ICC issued warrants against Abdel Raheem Muhammad Hussein, Ali Muhammad Ali Abd-Al-Rahman, Ahmad Harun and Abdallah Banda. The case against Saleh Mohammed Jerbo Jamus was terminated in 2013 following his death and the case against Mr. Abu Garda was terminated when the ICC Pre-trial Chamber did not confirm the charges against him. The trial against Ali Muhammad Ali Abd-Al-Rahman is the first case in the Darfur, Sudan situation to be tried before the ICC. Despite changes in the Sudanese regime and apparently greater willingness to cooperate with the ICC, there were no clear indications as to when or if Omar Al Bashir would be handed over to the ICC. For additional information about the Darfur, Sudan cases and situation see the Darfur page on the ICC website at https://www.icc-cpi.int/darfur

[202] Kersten, p 14.

[203] In its Omnibus Resolution in December 2020, the ASP noted with concern that "expenses incurred by the Court due to referrals by the Security Council continue to be borne exclusively by States Parties and that the approved budget allocated so far within the Court in relation to the referrals made by the Security Council amounts to approximately €70 million." See ICC-ASP/19/Res.6, para 42.

with the 'situation' and is responsible for the myriad of challenges associated with complex investigations involving suspects from uncooperative non-States Parties.

It is therefore not surprising that the UNSC's non-acknowledgement of the Bashir deferral request and the refusal to defer proceedings in the Kenyatta case spurred a decade-long impasse which impacted the work of the Court. To the AU, the UNSC is seen as a politicised body which applies double standards, targeting so-called weaker African States by subjecting them to a judicial body which (at least in the case of 3 of its permanent members – the USA, Russia and China) they are not accountable to, and who wield their political privilege to benefit their allies.[204] A classic example is France's proposal that the UNSC refer the situation in Syria to the ICC which failed due to vetoes by Russia and China.[205] A similar issue has been raised about other permanent members of the UNSC, the UK and the US - a non-State party to the ICC- who are said to be ready and willing to assist the Court in pursuing African perpetrators, but block and even aggressively oppose investigations involving actors from their own States.[206]

As Arbour notes, the lack of support for the Syria referral has only served to confirm the suspicion that States with powerful allies among the P5 at the UNSC can act with relative impunity. In her view, "the selective use of ICC referrals by the Council suggests that legal principles are viewed as subservient to political agendas. This selectivity taints the broader work of the ICC, bolstering accusations that the Court has been politicised."[207] To compound matters, the UNSC has provided very little political and financial support to the Court which has negatively impacted its efficiency and effectiveness and placed a strain on its limited resources.[208]

South Africa with the backing of the AU, deposited a proposed amendment to Article 16 of the Rome Statute pursuant to the decision taken during the meeting of African States Parties to the Rome Statute in Addis Ababa from 3-6 November 2009 and reiterated in subsequent AU

[204] UN Security Council 7180th Meeting (22 May 2014) S/PV.7180; Jalloh, p 195.
[205] United Nations Meetings Coverage and Press Releases, 'Referral of Syria to International Criminal Court (22 May 2014) available at <https://press.un.org/en/2014/sc11407.doc.htm> accessed 01.09.2022; Jalloh p 194.
[206] Kamari Maxine Clarke, 'New frontiers in international human rights: Actionable nonactionables and the (non)performance of perpetual becoming' (2022) Journal of Human Rights, 21:2, p 144.
[207] Louise Arbour, 'The Relationship between the ICC and the UN Security Council' (2014) Global Governance 20:2, p 197.
[208] ibid.

Declarations.[209] Under Article 16, the UNSC has the power to defer investigation or prosecution before the ICC:

> 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; this request may be renewed by the Council under the same conditions.

The South African amendment proposed the addition of 2 sub-provisions to Article 16:

1. A State with jurisdiction over a situation before the Court may request the UN Security Council to defer the matter before the Court as provided in subsection (1) (see above)
2. Where the UN Security Council fails to decide on the request by the State concerned within six months of receipt of the request, the requesting Party may request the UN General Assembly (GA) to assume the Security Council's responsibility under Paragraph 1, consistent with Resolution 377 (V) of the UN General Assembly.

African concerns about the controversial role of the UNSC in ICC affairs are not a new phenomenon. According to the Gissel study:

> "Algeria, Cameroon, Gabon, Libya, Sudan and Tanzania were consistently opposed to the idea of giving any powers to the Security Council and advanced four interrelated reasons for their opposition: it threatened the Court's independence; conflated the international separation of powers; dramatically expanded the Council's role and undermined equality before the law."[210]

The study found that Cote D'Ivoire, Guinea, Lesotho, Nigeria, Senegal and Sierra Leone were opposed to Security Council involvement in the work of the Court.[211] However, despite concerns about the risks to the court's independence, they agreed that the Council should play a role. Interestingly, given the 2nd limb of South Africa's current proposal, the study found that at that time, Algeria, Morocco, Guinea, Nigeria, Ethiopia and Sierra Leone felt that it would be appropriate for the UNGA to also have referral powers. Niger proposed that the UNGA should have referral powers if the UNSC was blocked by a veto, and

[209] Assembly of the African Union, Fourteenth Ordinary Session (2009) Assembly/AU/Dec.270(XIV), p 2, para 10.; Assembly of the African Union, Sixteenth Ordinary Session (2011) Assembly/AU/ Dec.334(XVI), p.2, para 13; Assembly of the African Union, Eighteenth Ordinary Session (2012) Assembly/AU/Dec.397(XVIII) p 1, para 3; Assembly of the African Union Twenty-seventh Ordinary Session (2016) Assembly/AU/Dec.616 (XXVII) p 1, para 2.

[210] Gissel, p 740.

[211] Gissel, p 739.

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Cameroon opposed the veto power of permanent members to prevent any selective referrals.[212]

There are undoubtedly problematic aspects to the proposed South African amendment. The 2nd limb suggests a role for the GA if the UNSC fails to respond to a deferral request within a stipulated time. African legal experts have criticised this as exceeding the power of the GA under its constituent instrument, the UN Charter.[213] They argue that the amendment addresses both the relationship between the UN and the ICC as well as that between the UNSC and the GA, which is governed by the UN Charter. In their view, the Rome Statute cannot seek to confer a power to the GA which it does not possess under the UN Charter, unless an amendment to the Charter is also being proposed.[214] Thus, the GA may not be empowered with decision-making powers regarding deferrals of investigations and prosecutions by the ICC since these are binding decisions and under the UN Charter, the GA is not empowered to make binding decisions. Further, they contend, the request for deferral should only be made when the situation in question is a threat to peace and security and it is the UNSC that is given the competence to act on peace and security issues.[215]

Interestingly, however, the war in Ukraine may have turned this argument on its head. Russia's veto of a proposed UNSC resolution condemning its invasion of Ukraine, prompted the GA to invoke the 1950 'Uniting for Peace' resolution to vote overwhelmingly in favour of a resolution condemning the 'Aggression against Ukraine'.[216] Under the Uniting for Peace resolution, the GA is authorised to act where a lack of unanimity of the permanent members of the Security Council prevents it from "exercising its primary role for the

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[212] Gissel, p 740.

[213] Dapo Akande, Max du Plessis, Charles Jalloh, 'An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC' (2010) Institute for Security Studies Position Paper, p 13.

[214] ibid.

[215] ibid.

[216] Un General Assembly, 'Aggression against Ukraine', Eleventh emergency special session, A/ES-11/L.1, (1 March 2022); Shane Darcy, 'Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly', Just Security (March 16, 2022) < https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/> last accessed February 2023. Under previous Uniting for Peace resolutions, the GA has recommended a variety of measures including the imposition of sanctions (See 'Additional measures to be employed to meet the aggression in Korea', < https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/744/47/PDF/NR074447.pdf?OpenElement> and General Assembly Adopts Resolution on Protecting Palestinian Civilians Following Rejection of United States Amendment to Condemn Hamas Rocket Fire, GA/12028 < https://press.un.org/en/2018/ga12028.doc.htm>). In relation to the Ukraine resolution, the GA did not go as far, but nevertheless referred to the invasion as an "act of aggression."

maintenance of international peace and security."[217] Darcy notes that the 'Uniting for Peace' resolution envisages that the GA can "effectively step in where the Security Council fails to act with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."[218]

In relation to the situation in Ukraine, Darcy suggests that the GA should be empowered to act in the face of breaches to the peace and acts of aggression committed by one of its permanent members. Thus, he argues, the GA should be empowered to refer acts of aggression to the ICC, and Article 13 of the Rome Statute amended to allow the GA, acting under the 'Uniting for Peace' resolution, to make referrals to the ICC in order to provide accountability for the crime of aggression.[219] While Darcy's argument, which has also been articulated by Gaynor,[220] concerns issues related to the Ukraine situation and acts of aggression, this debate could be a lens through which to view the African proposal concerning the role of the GA when the UNSC fails to act.

The proposal concerning the UNSC has been on the agenda of the WGA since 2011.[221] At the working group meeting on 5 November 2014, South Africa provided further explanation and information on its proposal. According to the report of the working group, some delegations asked for clarification of certain terms or expressions used in the proposal, such as the exact meaning of "[a] State with jurisdiction over a situation before the Court" and how to interpret the expression "when the United Nations Security Council fails to decide".[222] During that meeting, the questions reportedly led to a fruitful exchange of views within the working group and there was agreement that the proposal raised numerous questions concerning the relationship between the Court and the UN

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[217] Ibid.

[218] Shane Darcy, 'Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly', Just Security (March 16, 2022) < https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/> last accessed February 2023.

[219] Ibid; For a more nuanced approach to the issue, see Michael Ramsden, Uniting for Peace: The Emergency Special Session on Ukraine, Harvard International Law Journal, < https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/>

[220] Ibid; See also Fergal Gaynor, 'General Assembly Referral to the International Criminal Court', in Alexander Heinze and Viviane E. Dittrich (editors), 'The Past, Present and Future of the International Criminal Court, p. 325, <https://www.toaep.org/nas-pdf/5-dittrich-heinze> last accessed February 2023

[221] ICC Assembly of States Parties, Report on the Working Group on Amendments, ICC-ASP/10/32 (09.12.2011).

[222] ICC Assembly of States Parties, Report on the Working Group on Amendments, ICC-ASP/13/31 (07.12.2014).

and between different UN organs. Importantly, there was agreement that further discussions would be necessary after the thirteenth session of the Assembly.[223] There is no indication from subsequent reports of the working group that the issue was discussed further and neither South Africa nor other African States have made any further amendments or additions to the proposal since that time. This begs the question, has the interest of African States in pursuing this proposal waned?

The independent experts' report addresses the UNSC briefly in the context of the UN-ICC relationship, yet only mentions the *referral* powers of the UNSC under Article 13. Nowhere in the report is there mention of the UNSC's *deferral* powers and any of the concerns raised by South Africa or the AU in this regard. At para. 372 of the report, the experts note that:

> "Another factor that complicates the [UN-ICC] relationship is the fact that the Court is a treaty-based organisation that is not universal. Some 70 Member States of the UN are not party to the Rome Statute, including three of the five Permanent Members of the Security Council. It is for this reason that although the Statute anticipates referrals to the Court by the Security Council, this has only happened twice (Darfur in 2005 and Libya in 2011). In recent years, attitudes in the Council to the Court have become distinctly less positive ."[224]

If one argues that the expert's decision not to address the UNSC's deferral powers was attributable to the specificities and limitations of its focus on mainly 'technical matters', it seems reasonable to expect that the matter would be dealt with either by the working group for cooperation or non-cooperation, given their more expansive focus on cooperation matters. At the time of writing, it has not.

At the wider Assembly level, the UNSC-ICC relationship was comprehensively addressed in the Omnibus resolution of the ASP in December 2020, following the issuance of the expert report.[225] There the ASP recognised the need for an enhanced institutional dialogue with the UN including on Security Council referrals. The ASP acknowledged the reports of the then Prosecutor to the UNSC on the Darfur, Sudan and Libya referrals, and noted her repeated requests for effective Security Council follow-up. The Assembly also recognised that ratification

[223] ibid.
[224] IER Report, para. 372.
[225] ICC Resolution ICC-ASP/19/Res.6 Strengthening the International Criminal Court and the Assembly of States Parties, para E32-35, <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res6-ENG.pdf> accessed 05.09.2022.

or accession to the Rome Statute by members of the UNSC "enhances joint efforts to combat impunity for the most serious crimes of concern to the international community as a whole." In general, the Assembly called for cooperation through effective follow-up of situations referred by the Council to the Court and ongoing political and financial support by the UN for expenses incurred by the Court due to referrals of the Council. [226]

The issue of deferrals does not feature in the Omnibus resolution. It is a mystery that the issue has not featured in discussions on cooperation, either as part of the IER, within the working groups (except the working group on amendments) or in wider Assembly discussions; yet the referral powers of the UNSC and the need for support for the ICC has. Why is this the case? Assuming for the sake of argument that African States were not sufficiently consulted by the IER, participation in the working groups is open to all States Parties. Thus, if this issue was still of vital importance to the African States and the AU, it would clearly have been placed on the agenda for follow-up.

It is not clear whether the Article 16 amendment remains a priority for African States and the AU given the political changes in the situations which precipitated these requests for deferral. It could very well be that interest in this proposed amendment has largely diminished.[227] The AU's efforts and attention may now have shifted to its push for broader political reform of the UNSC and not simply an amendment to a single deferral power provision.[228] Ultimately, the lacuna remains concerning the selective application of both the referral and deferral powers of the UNSC and it is

[226] ICC-ASP/19/Res.6.

[227] Akande, du Plessis, Jalloh, p 16-17.; Kersten, p 19.

[228] The common African position on reform of the Security Council is articulated in the Ezulwini Consensus and Sirte Declaration. The UN General Assembly adopted a resolution on follow-up to the Secretary-General's report, *Our Common Agenda*, and began a debate on Security Council reform, with delegates calling for galvanized action to realize long-awaited demands to make the body fit for purpose to face twenty-first century challenges. During the debate, Sierra Leone's delegate, delivered a statement on behalf of the African Group and reiterated demands for no less than two permanent seats with all the prerogatives and privileges of permanent membership, including the right of veto, and five non-permanent seats, for the continent's nations. The common African position, as articulated in the Ezulwini Consensus and Sirte Declaration, remains unchallenged and widely recognized. However, the African Group is disappointed that the Co-Chairs did not fully reference the Ezulwini Consensus and the Sirte Declaration in the Elements Paper, the fundamental pillar of the common African position, and the decisions adopted by African Heads of State and Government. UN Meeting Coverage and Press Releases, Delegates in General Assembly Urge Galvanized Action to Make Security Council More Representative, Fit for Tackling Twenty-first Century Challenges, <https://press.un.org/en/2021/ga12384.doc.htm > accessed 26.09.2022.

an issue that could haunt a future ICC if not resolved.

5. Conclusion

The IER of the ICC has come at a critical juncture in the Court's history. This process, driven by States Parties to the Court, consolidates an extensive process of reform which will shape the institution's future. The independent experts have addressed critical operational issues and proposed recommendations, many of which could lead to a directional shift in the working methods of the Court if implemented. To its credit, the Court has fully engaged with the process and the experts' recommendations and have, in some cases, already begun the process of implementation.

However, the artificial bifurcation of responsibilities between the issues assigned for consideration by the independent experts (technical matters) and the non-technical matters assigned to the ASP's working groups, has resulted in insufficient attention being paid to key issues, some of which were specific proposals for reform that have been on the Court's agenda for several years. Finding a balance between focusing on the technical, internal and operational concerns of the Court's organs and leaving States Parties to address broader policy and political related issues would always have been difficult. However, in light of the landscape in which the ICC currently operates, including conducting investigations in situations involving powerful non-State Parties and in the midst of on-going conflict, such as Ukraine, lessons learnt from the Court's experience in Africa become more relevant than ever.

African situations and cases have played a significant role in shaping the jurisprudence, practice and policies of the Court, and in particular of the ICC OTP. While some matters, such as the Article 27 and 98 tension have been settled by the Appeals Chamber, and are unlikely to be discussed either in the ASP or its working groups, other matters such as the selective application of justice and the appearance of bias in OTP's situation and case selection and prioritisation, have become more pressing than ever. Despite emanating from Africa, these issues are not only African issues. African approaches, for example in relation to sequencing and balancing of accountability mechanisms and those aimed at peace and reconciliation, could provide an important template for the ICC to apply in upgrading certain policy positions on interests of justice and complementarity.

African States have supported the IER process but the concerns raised by the proposals which predated the review, have

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not featured prominently, if at all, in the final report. It is therefore critical that African States fully engage with the ongoing review process, and add their perspectives to discussions within the Review Mechanism and the Bureau's working groups. While there are undoubtedly structural and technical issues such as the small size of many African missions in New York and The Hague, as well as technology challenges which could impact full participation, African leadership of both the Review Mechanism and the WGCom provide an opportunity for African perspectives to infuse the ongoing debates. The ASP needs to ensure that steps are taken to facilitate continuous regional engagement to ensure that there is full inclusivity in the review process. Although the IER did not specifically address all of the concerns or proposals advanced by African States, the AU or African civil society, the process is not yet complete and African States can still ensure that their priorities are heard and not ignored.

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