



**Bringing the African Perspective to
the ICC Reform Discussion
Occasional Papers No. 1-3**



Occasional Papers | September 2023

**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
2022-2023**

**Edited by
the Center for International Law and Policy in Africa
(CILPA)**

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.

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.

Center for International Law and Policy in Africa
145 Circular Road
Freetown
Sierra Leone
info@cilpa.org
www.cilpa.org

ACKNOWLEDGMENTS

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.

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.

CILPA would also like to thank the consultants, for their diligent work throughout the project, and for ultimately delivering the thought-provoking papers contained in the first Occasional Paper series published by CILPA. We are dedicated to ensuring the knowledge produced is accessible and available as open source. The papers also had the benefit of being workshopped in Freetown, Sierra Leone in October 2022. In this regard we would like to thank all the expert participants that helped provide the authors feedback on their initial drafts and suggested areas for improvement. Special appreciation goes out to the workshop's lead discussants: Mr. Abubakar Koroma (University of Makeni); Prof. Charles C. Jalloh (CILPA and Florida International University) Mr. Ibrahim S. Yillah (Trust Fund for Victims at the ICC) and; Dr. Michael Kanu (Permanent Mission of Sierra Leone to the United Nations). The workshop program and list of participants is annexed to this report.

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.

AUTHOR BIOGRAPHIES

Mr. Sètonджи Roland Adjovi is an expert in human rights and international law, publishing and lecturing on both topics. He served on the United Nations Working Group on Arbitrary Detention from 2014-2016. Adjovi has served as senior legal officer with the Registry of the International Criminal Tribunal for Rwanda, as legal assistant for the African Union and as lead counsel in a successful case against Tanzania before the African Court on Human and Peoples' Rights in the matter of *Rev. Christopher R. Mtikila v. the United Republic of Tanzania*. Adjovi earned a bachelor's degree in law and public administration, a master's degree in political science, and a Master of Laws in Human Rights at the University of Paris.

Dr. Geoffrey Lugano is a Lecturer of Political Studies at the Department of History, Archaeology & Political Studies at Kenyatta University, Nairobi, Kenya. He holds a PhD in Politics and International Studies from the University of Warwick, Coventry, United Kingdom (UK), and was previously a Research Fellow at the International Nuremberg Principles Academy. Geoffrey's research is focused on the International Criminal Court (ICC) in its social and political contexts, particularly in African states, and peacekeeping in Africa.

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."

TABLE OF CONTENTS

The International Criminal Court in Africa Project----- 7

 Bibliography----- 11

Background on the ICC and African States’ Relationship----- 12

 1. Introduction ----- 12

 2. Africa in the Current State of Affairs at the ICC ----- 12

 3. Perceptions of the relation between the ICC and Africa ----- 19

 4. African Concerns in the Review Process ----- 42

 5. Conclusion ----- 45

 Bibliography----- 47

 Appendix on African States and the Rome Statute----- 53

Examining the domestic legal framework in select African States that form part of the situational docket of the International Criminal Court -----57

 1. Introduction ----- 57

 2. Pathways in States’ Implementation of the Rome Statute ----- 61

 2.1. *Temporal Dimensions in States’ Implementation of the Rome Statute*----- 63

 2.1.1. Inadequate political will ----- 63

 2.1.2. Local capacity gaps ----- 65

 2.1.3. Rare occurrence of atrocity crimes ----- 66

 2.2. Approaches in States’ Implementation of the Rome Statute ----- 66

 2.2.1. Static or literal transcription in Kenya, Uganda, and Côte d'Ivoire ----- 68

 2.2.2. Dynamic Criminalization in CAR and Sudan ----- 69

 3. National implementation of the provisions of the Rome Statute----- 72

 3.1. *Incorporation, and definition of Article 5 crimes*----- 72

 3.1.1. Article 5 crimes in Kenya, UGANDA, and Côte d'Ivoire----- 73

 3.1.2. Article 5 Crimes in CAR and Sudan----- 74

 3.2. *Elimination of obstacles to investigations and prosecutions*----- 78

 3.2.1. Individual criminal responsibility ----- 78

 3.2.2. Irrelevance of official capacity----- 80

 3.2.3. Statutes of limitation ----- 82

 3.3. *Cooperation with the ICC.* ----- 84

 3.4. *Witness protection*----- 86

 3.5. *Victims’ Centredness*----- 88

 3.6. *Penalties*----- 89

 4. Beyond legal reforms: rival normative frameworks and implications for States’ prosecution of atrocity crimes----- 90

 5. Conclusion ----- 92

 6. Recommendations ----- 94

 Bibliography----- 96

Heard or Ignored: African States Priorities and the Independent Expert Review of the ICC----- 100

 1. Introduction ----- 100

 2. African States, the AU and the ICC ----- 104

 2.1. *Optimistic beginnings*----- 104

 2.2. *A shift in the wind* ----- 105

2.3. <i>Pushback</i> -----	111
3. The Independent expert review -----	113
3.1. <i>Overview</i> -----	113
3.2. <i>African Engagement with the IER Process</i> -----	115
4. African concerns and Reform Priorities -----	118
4.1. <i>Historic concerns</i> -----	119
4.2. <i>Addressing (or Not) African Concerns</i> -----	121
4.2.1. <i>Peace and Justice</i> -----	122
4.3. <i>Complementarity</i> -----	124
4.3.1. <i>Positive complementarity</i> -----	130
4.3.2. <i>Regional complementarity</i> -----	135
4.4. <i>Cooperation</i> -----	139
4.4.1. <i>Immunities</i> -----	140
4.4.2. <i>The Role of the UNSC</i> -----	145
5. Conclusion -----	153
Bibliography-----	155

The International Criminal Court in Africa Project

Ensuring African State Concerns are Not Left Out of the ICC Reform Process

Charles C. Jalloh

The International Criminal Court (ICC) has faced mounting criticism over the past few years as it struggles to fulfil its ambitious mandate in the Rome Statute. Poor quality investigations and prosecutions, controversial judicial decisions, institutional infighting, and a seeming lack of accountability for poor performance appear to have compounded mounting internal and external problems, including low budgets, limited state cooperation and political backlash from powerful States.

In response and based on a proposal of the ICC principals in a May 2019 letter, the Bureau of the ICC Assembly of State Parties (ASP) adopted a resolution on 6 December 2019 in which the States Parties recognized the multifaceted challenges currently facing the ICC and established an Independent Expert Review (IER) process.¹ The IER was billed as an “inclusive State-Party driven process for identifying and implementing measures to strengthen the

Court and improve its performance.”² Under the terms of reference, the IER which was comprised of a representative group of nine independent experts was mandated to carry out a thorough review of the ICC under the three thematic clusters of 1) governance; 2) the judiciary and 3) investigations and prosecutions so as to find “ways to strengthen the ICC and the Rome Statute System in order to promote universal recognition of their significant role in the global fight against impunity and enhance their overall functioning”.³ The ASP also identified four priority issues for the States Parties to directly address through their working groups, i.e., 1) strengthening cooperation; 2) addressing non-cooperation; 3) complementarity and the relationship between national jurisdictions and 4) equitable geographical representation and gender balance. The experts were asked to present “concrete, achievable and actionable recommendations” that would enhance “performance, efficiency and

¹ ICC Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System (December 2019), ICC-ASP/18/Res.7.

² ICC-ASP/18/Res.7. para 4.

³ ICC-ASP/18/Res.7., Annex 1, Terms of Reference for the Independent Expert Review of the International Criminal Court, para 1.

effectiveness.”⁴ The IER presented its report in September 2020, containing 384 recommendations, some of which were intended for short term implementation while others were proposed for the long-term.⁵

When the final IER Report was issued in September 2020, one might have expected the IER to explicitly address some of the key concerns raised by African States Parties to the ICC over the past decade. That does not appear to have been the case, even if some of the recommendations on, for example the work of the Office of the Prosecutor, touched on aspects of interest to African States. The omission of key African concerns is remarkable given the centrality of the continent to the work of the ICC.

On 18 December 2020, the ASP adopted a resolution on the review of the ICC and the Rome Statute system, *inter alia*, establishing a “Review Mechanism.” The Mechanism was tasked with following up on the IER report in terms of planning, coordinating, tracking, and assessing the recommendations with the overarching goal of suggesting ways forward for their

implementation. Organs of the ICC were asked to submit a formal response to the IER report. In February 2021, States Parties selected two state co-facilitators from the Netherlands and Sierra Leone to lead the mechanism process, supported by ad hoc regional focal points from Bangladesh, Chile, and Poland, to develop categorization of the IER recommendations and an action plan for implementation.⁶ The Review Mechanism is to “provide regular updates to all States Parties...on the review process including on any impediments to progress identified.”⁷ The mechanism has progressed its work and occasionally taken input of civil society and governments, regrettably, without meaningful engagement by the wider African States Parties.

In June 2021, following consultations with the various stakeholders, the Mechanism submitted a proposal for a comprehensive action plan with a view to addressing the following issues which have received wider support and has since been endorsed by the Bureau of the Assembly:

- (i) “An allocation of the recommendations to the Court or

⁴ Ibid.

⁵ See Recommendations of the Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report (30 September 2020), available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-

[Final-Report-ENG.pdf](#) (accessed 14 September 2023).

⁶ ICC Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System (18 December 2020), ICC-ASP/19/Res.7.

⁷ Ibid.

relevant Court Organ and to Assembly Mandates...;

- (ii) As regards recommendations directed to the Assembly or both the Court and the Assembly, an allocation to the relevant and appropriate Assembly Mandate or to the Review Mechanism, acting as a focal point for States Parties, where no relevant mandate exists;
- (iii) A prioritization of the recommendations based on annex I of the final report of the Independent Experts, containing a summary of prioritized recommendations; and
- (iv) Timelines for the consideration of the recommendations".⁸

This was followed by updates and eventually a final report for the ASP in December 2021.⁹ On 9 December 2022 the ASP adopted a resolution¹⁰, where it inter alia, took note of the progress achieved so far by the Review Mechanism, underlined the need to safeguard the independence of the ICC throughout the review process and decided to extend the mandate of the Mechanism to continue the work already begun. It also envisaged for the Mechanism

to continue serving as a platform to monitor further action and implementation of the various recommendations while stressing the need to retain an inclusive and transparent consultations process with all States Parties, the three organs of the ICC, civil society, and other relevant stakeholders.¹¹

In light of the various criticisms of the ICC, the review process seems like a welcome opportunity to strengthen the efficiency, credibility, and legitimacy of the ICC system. But for the review process to succeed, it will need to take into account the views of all States from all regions of the world as well legal academia and victims in ICC situation countries. The concerns of key stakeholders, such as the 33 State Parties from the African region which have been among the strongest supporters and also strongest critics of the ICC, are crucial. In fact, African States submitted numerous proposals for reform of the ICC system years before the reform process was put in place. Yet, once the ASP created a formal review process, the extent to which the previous African State proposals were addressed by the IER remains unclear. As was the level of African State and African

⁸ Ibid

⁹ ICC Review Mechanism, Report of the Review Mechanism submitted pursuant to ICC-ASP/19/Res.7, paragraph 9 (7 December 2021), ICC-ASP/20/36.

¹⁰ ICC Assembly of State Parties, Strengthening the International Criminal Court and the Assembly of States Parties (9 December 2022), ICC-ASP/21/Res.2.

¹¹ Ibid.

civil society participation in the ongoing ICC reform discussions. The failure to take into account the African State views on how to improve the ICC system constitute a significant missing piece in the ongoing reform discussions. African states have, more than most regions, been keenly engaged with the ICC since 2002. It would therefore seem reasonable to assume that there is more that can and could be done to align the Court to its initial purpose and vision, not just for African States, but rather for all States. The African experience should be part of that reform conversation.

In light of the above, CILPA, with the funding of the Open Society Foundations' Africa Regional Office, took the opportunity to launch the International Criminal Court in Africa Project. The project's main components included the preparation of a series of papers that seek to highlight the African State party concerns for reform with the aim of identifying key concerns about the distinct phases of the ICC reform process and proposing strategic recommendations to feed into the ongoing ICC reform discourse.

The research and analysis carried out by the consultants formed the basis of a

comprehensive analysis of the success and limitations encountered by the ICC in its ongoing reform process during a two day Workshop in Freetown, Sierra Leone, 7-8 October 2022, bringing together the consultants and invited legal experts from academia, practice, government, and civil society.¹² The Workshop provided an opportunity for all expert participants to reassess, and as necessary, helped provide ideas for revision and finalization of the draft papers; and ultimately, their publication as occasional CILPA policy papers. Though CILPA does not engage in advocacy, the research it produces can feed into such advocacy by other groups, especially African civil society organizations.

¹² See Center for International Law and Policy in Africa, Independent Expert Workshop – Bringing the African Perspective to the ICC Reform Discussion (October 2022), available at

<https://cilpa.org/wp-content/uploads/2023/09/CILPA-ICC-Africa-Workshop-Agenda-Final-.pdf> (accessed 14 September 2023).

Bibliography

Center for International Law and Policy in Africa, Independent Expert Workshop – Bringing the African Perspective to the ICC Reform Discussion (October 2022), available at <https://cilpa.org/wp-content/uploads/2023/09/CILPA-ICC-Africa-Workshop-Agenda-Final-.pdf> (accessed 14 September 2023)

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

ICC Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System (18 December 2020), ICC-ASP/19/Res.7.

ICC Review Mechanism, Report of the Review Mechanism submitted pursuant to ICC-ASP/19/Res.7, paragraph 9 (7 December 2021), ICC-ASP/20/36.

ICC Assembly of State Parties, Strengthening the International Criminal Court and the Assembly of States Parties (9 December 2022), ICC-ASP/21/Res.2.

Recommendations of the Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report (30 September 2020), available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf (accessed 14 September 2023).

Background on the ICC and African States' Relationship

Sètondji Roland Adjovi

1. Introduction

This paper is the outcome of a consultancy for the Center for International Law and Policy in Africa (CILPA). It aims to assess the African concerns vis-à-vis the International Criminal Court (ICC) review process.

On that basis, our task was twofold: first, preparing a research paper on key African concerns focused on providing strategic recommendations about the ICC reform process, and then presenting that paper at a workshop to benefit from the comments of other experts. The workshop took place on 7 and 8 October 2022, and we got substantive comments that have been considered in finalising this research paper.

Our research has been built around two key issues: the place of Africa in the current state of affairs at the ICC; and the perceptions of the relation between the ICC and Africa. Reading the ICC review

report, one would be able to notice that those perceptions and the related concerns are not addressed in the process. Hence, we will make some recommendations to correct this perspective once we have presented our findings on the two key issues, before concluding.

2. Africa in the Current State of Affairs at the ICC

There is a misconception about the relationship between Africa and the ICC. This must be rectified from the outset: African States have actively sought positive engagement with the ICC, from drafting to enforcing the Rome Statute.

Indeed, African States had representatives at the table throughout the various stages of drafting the Rome Statute. During the conference in Rome, leading to the convention's adoption in July 1998, only four African States were absent, namely Equatorial Guinea, Gambia, Sahrawi Arab Democratic Republic¹ and Somalia.² Throughout the

¹ Sahrawi Arab Democratic Republic is a Member State of the African Union. However, it is not a Member State of the United Nations. It is not even recognized as a State outside of the

continent. Hence, it could not have been invited to the negotiations.

² Somalia has collapsed as a State for quite some time, especially in the 1990s. That might be the

negotiations, African representatives could put forward ideas and proposals that would serve the interests and concerns of the African States and peoples. Some States, such as those of the Southern African Development Community, played an important role, especially South Africa.³ Whether this was successful or not is a different story with causes which are beyond the scope of this paper.

African States were also very active at the time of entry into force. Senegal was the first country to ratify the Rome Statute on 2 February 1999. At the time of the entry into force on 1 July 2002, 16 African States were already party to the treaty establishing the ICC.⁴ In terms of proportion, one could say that on 1 July 2002, when the Rome Statute came into force, one-third of the States Parties were African. Today, 33 African States are among the 123 State Parties, forming the largest regional group.⁵ And, unless there is evidence presented to the contrary, one must assume that the engagement of the African States, including the ratification,

was voluntary, with various stakeholders at the national level involved, including civil society pushing for such involvement.⁶

Since the entry into force of the Rome Statute, the African States have continued to engage with the Court, with proposals for changes in both substantive and procedural laws, including on many other aspects.

However, before considering the African engagement, it is worth stating that the Rome Statute has already been revised once and amended three times. This indicates that other States have been successful in presenting amendments, suggesting that African States Parties could also succeed if they mobilise around their amendments to build broader coalitions. The African States have so far refrained from ratifying those changes in the convention. Chronologically, here is the situation:

- (i) Only two African States (Botswana and Mauritius) have ratified the amendment to Article 8 adopted on 10

reason for it not to have attended the meeting in Rome in 1998.

³ See M. Glasius, *The International Criminal Court. A Global Civil Society Achievement*, London and New York, Routledge, 2006, pp. 23-24. Available online (<https://library.oapen.org/bitstream/id/0f158280-410b-494a-a8c1-2cf4f32663a9/1006036.pdf>).

⁴ See the list of ratifications in a chronological order on the website of the Court (<https://asp.icc-cpi.int/states-parties/states-parties-chronological-list>).

⁵ See the list of African States which are party to the Rome Statute on the website of the Court (<https://asp.icc-cpi.int/states-parties/african-states>). See also Appendix 1 with the date of signature and ratification or accession.

⁶ C.C. Jalloh, Regionalizing International Criminal Law? *International Criminal Law Review* 9 (2009), 445-499. Available online (https://ecollections.law.fiu.edu/faculty_publications/250).

June 2010⁷ which has not yet entered into force.⁸

(ii) Only one African State (Botswana) has so far ratified the amendment on the crime of aggression adopted on 11 June 2010,⁹ which has entered into force since 17 July 2018.

(iii) None of the African States has ratified the amendment to Article 124 on 26 November 2015,¹⁰ which has not yet entered into force, as of 15 December 2022.

(iv) None of the African States has ratified the various amendments to Article 8 adopted in 2017 and 2019, namely:

- Article 8 (blinding laser weapons) adopted on 14 December 2017¹¹ and entered into force on 2 April 2020;
- Article 8 (weapons, the primary effect of which is to injure by fragments undetectable by x-rays in the human body) on 14

December 2017¹² and entered into force on 2 April 2020;

- Article 8 (weapons which use microbial or other biological agents or toxins) adopted on 14 December 2017¹³ and entered into force on 2 April 2020; and
- Article 8 (intentionally using starvation of civilians) adopted on 6 December 2019¹⁴ and entered into force on 14 October 2021.

African engagement with the Rome Statute will be done through the Working Group on Amendments¹⁵ established by the Assembly of States Parties in 2009. Indeed, out of seven proposals received and listed on the website,¹⁶ two came from African States.¹⁷

The first proposal came from South Africa on 30 November 2009.¹⁸ It suggested two additional paragraphs and reads as follows, with the suggestions in italics:

⁷ ICC, Resolution RC/Res.5.

⁸ See ICC, Resolution ICC-ASP/16/Res.5, 14 December 2017, paragraph 1: “Decides to activate the Court’s jurisdiction over the crime of aggression as of 17 July 2018”.

⁹ ICC, Resolution RC/Res.6.

¹⁰ ICC, Resolution ICC-ASP/14/Res.2.

¹¹ ICC, Resolution ICC-ASP/16/Res.4.

¹² ICC, Resolution ICC-ASP/16/Res.4.

¹³ ICC, Resolution ICC-ASP/16/Res.4.

¹⁴ ICC, Resolution ICC-ASP/18/Res.5.

¹⁵ ICC, Resolution ICC-ASP/8/Res.6.

¹⁶ See the website of the Working Group on Amendments (<https://asp.icc-cpi.int/WGA>).

¹⁷ The other proposed amendments came from Mexico (U.N. Doc. C.N.725.2009), Trinidad and Tobago (U.N. Doc. C.N.737.2009), Norway (U.N. Doc. C.N.439.2015), Belgium (U.N. Doc. C.N.480.2017) and Switzerland (U.N. Doc. C.N.399.2019).

¹⁸ U.N. Doc. C.N.851.2009.TREATIES-10.

Article 16 Deferral of Investigation or Prosecution

1) No investigation of 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 the Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions;

2) *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 for in (1) above.*

3) *Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377(V) of the UN General Assembly.*

The second proposal came from Kenya on 14 March 2014.¹⁹ It is more extensive and reads as follows:

1. Article 63 – Trial in the Presence of the accused

Under the Rome Statute, article 63(2) envisages a trial in absence of the Accused in exceptional circumstances. The Rome Statute does not define the term exceptional circumstances and neither are

there case laws to guide the Court on the same.

Article 63(2) further provides other caveats in granting such trials in circumstances where other reasonable alternatives have provided to be inadequate and for a strictly required duration.

From the above, it is our humble opinion that an amendment to article 63(2) may be considered along the following lines:

“Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and considered, including but not limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of Counsel.

(2) Any such absence shall be considered on a case-by-case basis and be limited to that which is strictly necessary.

(3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial.”

¹⁹ U.N. Doc. C.N.1026.2013.TREATIES-XVIII.1.

2. Article 27 – Irrelevance of official capacity

Article 27(1) provides that “This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a Member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of Sentence.

Further article 27(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.”

The meeting also may consider proposing an amendment to article 27 by inserting in paragraph 3 the words

“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”

3. Article 70 - Offences against Administration of Justice

This particular article presumes that such offences save for 70(1) (f) can be committed only against the Court. Noting the current situation in the Kenyan cases especially Trial Chamber V (b), this article should be amended to include offences by the Court Officials so that it's clear that either party to the proceedings can approach the Court when such offences are committed. It is proposed that paragraph 1 be amended as follows:

“The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person:”

4. Article 112 – Implementation of IOM

Article 112 (4) Assembly of States Parties shall establish such subsidiary bodies as may be necessary including Independent Oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy. This includes the conduct of officers/procedure/code of ethics in the office of the prosecutor. The Office of the Prosecutor has historically opposed the scope of authority of the IOM. Under Article 42 (1) and (2) the Prosecutor has power to act independently as a separate organ of the Court with full authority over the management and administration of the office. There is a conflict of powers

between the OTP and the IOM that is continuously present in the ASP.

It is proposed that IOM be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.

5. Complementarity

The Preamble of the Rome Statute provides “Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,”. In accordance with African Union resolution, an amendment is proposed to the above preambular provision to allow recognition of regional judicial mechanisms as follows:

“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.”

In terms of human resources, it is worth noting that Africans have also occupied high-ranked positions within the Court. First, African Judges have been

sitting at the Court since its inception.²⁰

Then, in the Office of the Prosecutor, two Africans were Deputy Prosecutors,²¹ while one African was a Prosecutor.²² It is important to highlight that Fatou Bensouda was Deputy Prosecutor for nine years before becoming the Prosecutor for another nine years. Then, within the registry, an African held the position of Deputy Registrar for five years.²³ Finally, numerous Africans have been working or have worked at the Court, in all units and sections of the Court, including as counsel.

Finally, regarding the cases before the Court, African States have been active in bringing them before it. In each of the cases before the Court, it can be established that African States have expressed consent, either through ratification (Uganda, the Democratic Republic of the Congo, Central African Republic, Kenya and Mali) or through participation in the decision of the UN Security Council (Darfur/Sudan²⁴ and Libya²⁵) or through a declaration of jurisdiction in favour of the Court (Côte

²⁰ Six African Judges have been elected to the Court so far, in alphabetical order: Reine Alapini-Gansou (Bénin), Solomy Balungi Bossa (Uganda), Chile Eboe-Osuji (Nigeria), Antoine Kesia-Mbe Mindua (Dem. Rep. of the Congo), Sanji Monageng (Botswana), and Miatta Maria Samba (Sierra Leone).

²¹ Fatou Bensouda from 2004 to 2012, and Mame Mandiaye Niang (since 2021).

²² Fatou Bensouda from 2012 to 2021.

²³ Didier Daniel Preira from 2008 to 2012.

²⁴ Resolution 1593 (2005) was adopted by 11 positive votes (Argentina, Bénin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, United Kingdom and United Republic of Tanzania) and 4 abstentions (Algeria, Brazil, China and United States of America).

²⁵ Resolution 1970 (2011) was adopted by 15 positive votes (Bosnia and Herzegovina, Brazil, China, Colombia, France, Gabon, Germany, India, Lebanon, Nigeria, Portugal, Russia, South Africa, United Kingdom and United States of America).

d'Ivoire).²⁶ Even in the situation of Kenya, which was the most complex, it was Kofi Annan, as the mediator appointed by the African Union, who proposed that the matter could be referred to the Court.²⁷ In short, the Prosecutor exercised his *proprio motu* power within the framework of a State Party (consent through ratification) upon invitation by an African appointed as mediator by the African Union.

The main issue is that all pending cases were, at some point in time, African and

non-African cases only came late on the docket of the Court. At the same time, they remained for very long at a lower stage in the criminal justice process.²⁸ In addition, from a theoretical perspective and based on the admissibility criteria, it is easy to imagine that Western States Parties would not have situations landing before the Court, even though the current situation about Afghanistan constitutes a counter-argument.²⁹ However, we will later address this critical issue which has less to do with

²⁶ See the *Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale* dated 18 April 2003 (<https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/FF9939C2-8E97-4463-934C-BC8F351BA013/279779/ICDE1.pdf>).

²⁷ See the press release of the Office of the Prosecutor on 9 July 2009 to that effect, available online (<https://www.icc-cpi.int/news/icc-prosecutor-receives-sealed-envelope-kofi-annan-post-election-violence-kenya>).

²⁸ The first among those situations is Georgia and the authorization was issued in 2016, fourteen years after the Rome Statute entered into force. This is also the only Non-African situation where individuals have been named as accused. See *Situation in Georgia*, ICC-01/15, Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation, 27 January 2016 (<https://www.icc-cpi.int/court-record/icc-01/15-12>). Then followed six others:

(i) *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18, referred by a group of States on 27 September 2018;

(ii) *Situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar*, ICC-01/19, Pre-Trial Chamber II, Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the People's Republic of Bangladesh / Republic of the Union of Myanmar, 14 November 2019 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2019_06955.PDF);

(iii) *Situation in the Islamic Republic of Afghanistan*, ICC-02/17, Appeals Chamber, Judgment on the

appeal against the decision on the authorization of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020

(https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00828.PDF);

(iv) *Situation in the State of Palestine*, ICC-01/18, Pre-Trial Chamber I, Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine", 5 February 2021 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01165.PDF);

(v) *Situation in the Republic of the Philippines*, ICC-01/21, Pre-Trial Chamber I, Decision on the Prosecutor's request for authorization of an investigation pursuant to Article 19(3) of the Statute, 15 September 2021 (https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_08044.PDF); and

(vi) *Situation in Ukraine*, ICC-01/22, referred by 43 States Parties in March and April 2022. In this situation, Pre-Trial Chamber II issued two arrest warrants on 17 March 2023 against Vladimir Vladimirovich Putin (President of the Russian Federation) and Maria Alekseyevna Lvova-Belova (Commissioner for Children's Rights in the Office of the President of the Russian Federation). See the Press Release dated 17 March 2023 (<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>).

²⁹ In the situation in Afghanistan, army members of the United States of America might have committed crimes within the jurisdiction of the Court. It is worth noting that the Pre-Trial

the applicable law than the Court's reality and the Prosecutor's strategy.

Unfortunately, this last piece is arguably one of the main justifications behind the perception that has been extensively mediated, that the Court targets Africa. And we will now analyse this perception further.

3. Perceptions of the relation between the ICC and Africa

Conceptually, Africa is multifaceted without a homogenous perception of the ICC. The African States express a view of the Court which is different from what civil society perceives, which is also different from the perceptions of individual Africans. At the same time, African intergovernmental organisations could develop their own vision. It is therefore essential to be specific as to whose perceptions one is referring to, with the possibility of confusing the view of some African leaders with those of the State's that they are heading.

In the public domain, the view of some African States and/or leaders has been the most heard directly and through the African Union. We will therefore start with that perspective.

It is important to note that the first time any issue was raised was with the Security Council's March 2005 referral of the situation in Darfur, which eventually led to the indictment against a sitting president, Omar Al Bashir. The Government of Sudan embarked on a campaign to challenge the authority of the Court and sought the support of its fellow African States. This was done through the judicial process both at the international and national levels, and through international diplomatic channels such as securing the president's attendance in diplomatic fora on the continent (Chad,³⁰ Malawi³¹ and South Africa,³² in particular).³³ However, it is worth recalling, as noted earlier, when the Security Council adopted Resolution 1593 (2005), none of the three African States opposed the decision: Bénin and Tanzania supported

Chamber denied the request for authorization, and it was only the Appeals Chamber which granted the request, overruling the lower chamber.

³⁰ X. Rice, Chad refuses to arrest Omar al-Bashir on genocide charges, *The Guardian*, 22 July 2010 (<https://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>).

³¹ United Nations, *News*, ICC asks Malawi to explain failure to arrest Sudan's President on visit, 19 October 2011 (<https://news.un.org/en/story/2011/10/392102>).

³² M. Simons, South Africa Should Have Arrested Sudan's President, I.C.C. Rules, *The New York Times*, 6 July 2017

(<https://www.nytimes.com/2017/07/06/world/africa/icc-south-africa-sudan-bashir.html>).

³³ T. White, States 'failing to seize Sudan's dictator despite genocide charge', *The Guardian*, 21 October 2018

(<https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant>).

the resolution, while Algeria abstained. Each African State made an independent and sovereign decision in the process, and its vote remains its own and not of the African States as a whole. However, in our view, such a positive vote made it difficult to affirm that the Security Council, including an African State voting so, was biased against the continent.

Then came the situation in Côte d'Ivoire, where the president who was defeated in the armed conflict later ended up before the Court as an accused. This situation notably raised further concerns because of the circumstances of the transfer of former president Laurent Gbagbo to the Court, bearing in mind the role of the former colonial power, France, with a permanent seat in the Security Council and an interest in having the opponent in power. This convoluted relation increased the criticism that the Court has been instrumentalised against an African leader, and by extension, against Africans.

Then came the situation in Kenya, where the Court indicted the successful duo in the presidential election.³⁴ Here, it is important to remember that the suspects became president and vice president only

after the possible charges before the Court became known.

These three situations led to a discourse about the Court being a tool for Western powers against African leaders. This discourse was widely disseminated in the media and public statements. The most significant statement is the one by the President of Kenya before the extraordinary session of the African Union in Addis Ababa in October 2013. Here are some extensive but selected extracts of his speech:

“It gives me special pleasure to join your Excellencies at this Special Summit, where we have assembled to reflect on very significant matters relating to the welfare and destiny of our nations and peoples. I thank you for the honour of addressing you today, because as it happens, I crave my brother and sister Excellencies' views on some issues.

We are privileged to lead the nations of a continent on the rise. Africa rests at the centre of global focus as the continent of the future. Although we have been relentlessly exploited in the past, we remain with sufficient resources to invest in a prosperous future.

Whilst we have been divided and incited against one another before, we are now

³⁴ See the cases within the situation (<https://www.icc-cpi.int/kenya>), especially *Ruto and Sang* case (ICC-01/09-01/11) and *Kenyatta* case

(ICC-01/09-02/11). Both cases were eventually closed without confirming the charges.

united and more peaceful. Even as we grapple with a few regional conflicts, as Africans, we are taking proactive measures to ensure that all our people move together in the journey to prosperity in a peaceful home.

Even though we were dominated and controlled by imperialists and colonial interests in years gone by, we are now proud, independent and sovereign nations and people. We are looking to the future with hope, marching towards the horizon with confidence and working in unity. This is the self evident promise that Africa holds for its people today.

As leaders, we are the heirs of freedom fighters, and our founding fathers. These liberation heroes founded the Organisation of African Unity, which was dedicated to the eradication of ALL FORMS OF COLONIALISM. Towards this end, the OAU defended the interests of independent nations and helped the cause of those that were still colonised.

It sought to prevent member states from being controlled once again by outsider powers. The founding fathers of African Unity were conscious that structural colonialism takes many forms, some blatant and extreme, like apartheid, while others are subtler and deceptively innocuous, like some forms of development assistance. It has been necessary, therefore, for African leaders to

constantly watch out against threats to our peoples' sovereignty and unity.

In our generation, we have honoured our fathers' legacies by guaranteeing that through the African Union, our countries and our people shall achieve greater unity, and that the sovereignty, territorial integrity and independence of our States shall not be trifled with.

More than ever, our destiny is in our hands. Yet at the same time, more than ever, it is imperative for us to be vigilant against the persistent machinations of outsiders who desire to control that destiny. We know what this does to our nations and people: subjugation and suffering.

...

The force of gravity will be compounded and the one going up only loses. The International Criminal Court was mandated to accomplish these objectives by bringing to justice those criminal perpetrators who bear greatest responsibility for crimes.

Looking at the world in the past, at that time and even now, it was clear that there have always been instances of unconscionable impunity and atrocity that demand a concerted international response, and that there are vulnerable, helpless victims of these crimes who require justice as a matter of right. This is

the understanding, and the expectation of most signatories to the Rome Statute.

The most active global powers of the time declined to ratify the Treaty, or withdrew somewhere along the way, citing several compelling grounds. The British foreign secretary Robin Cook said at the time, that the International Criminal Court was not set up to bring to book Prime Ministers of the United Kingdom or Presidents of the United States. Had someone other than a Western leader said those fateful words, the word 'impunity' would have been thrown at them with an emphatic alacrity.

An American senator serving on the foreign relations committee echoed the British sentiments and said, “Our concern is that this is a court that is irreparably flawed, that is created with an independent prosecutor, with no checks and balances on his power, answerable to no state institution, and that this court is going to be used for politicized prosecutions.”

The understanding of the States which subscribed to the Treaty in good faith was two-fold.

First, that world powers were hesitant to a process that might make them accountable for such spectacularly criminal international adventures as the wars in Iraq, Syria, Libya, Afghanistan and other places, and such hideous enterprises as renditions and torture. Such states did not, therefore, consider such warnings as applicable to pacific and friendly parties.

Secondly, it was the understanding of good-faith subscribers that the ICC would administer and secure justice in a fair, impartial and independent manner and, as an international court, bring accountability to situations and perpetrators everywhere in the world. As well, it was hoped that the ICC would set the highest standards of justice and judicial processes.

...

As has been demonstrated quite thoroughly over the past decade, the good-faith subscribers had fallen prey to their high-mindedness and idealism. I do not need to tell your Excellencies about the nightmare my country in particular, and myself and my Deputy as individuals, have had to endure in making this realisation.

Western powers are the key drivers of the ICC process. They have used prosecutions as ruses and bait to pressure Kenyan leadership into adopting, or renouncing various positions.

Close to 70% of the Court's annual budget is funded by the European Union.

The threat of prosecution usually suffices to have pliant countries execute policies favourable to these countries. Through it, regime-change sleights of hand have been attempted in Africa. A number of them have succeeded. The Office of the Prosecutor made certain categorical pronouncements regarding eligibility for

leadership of candidates in Kenya's last general election. Only a fortnight ago, the Prosecutor proposed undemocratic and unconstitutional adjustments to the Kenyan Presidency.

These interventions go beyond interference in the internal affairs of a sovereign State.

They constitute a fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons. They also dovetail altogether too conveniently with the warnings given to Kenyans just before the last elections: choices have consequences. This chorus was led by the USA, Britain, EU, and certain eminent persons in global affairs. It was a threat made to Kenyans against electing my Government.

My Government's decisive election must be seen as a categorical rebuke by the people of Kenya of those who wished to interfere with our internal affairs and infringe our sovereignty. Now Kenya has undergone numerous problems since its birth as a Republic 50 years ago.

...

When we faced violent disagreements over the 2007 election result, my distinguished predecessor, Mwai Kibaki came to you with a request for help, and you did not stint. You instituted a high-level team of Eminent Persons who came to our assistance. Because of that, we were

able to summon the confidence to speak to each other and agree. As a result, we put in place a 4-point plan, which not only put Kenya back on track, but formed the basis of the most rapid political, legal and social reform ever witnessed in our country.

Through it, we successfully mediated the dispute surrounding the 2007 election and pacified the country. A power-sharing coalition was formed with a mandate to undertake far-reaching measures to prevent future violent disputes, entrench the rule of law, prevent abuses of legal power and entrench equity in our body politic while also securing justice for the victims of the post-election violence. We enacted a new, progressive constitution which instituted Devolution of power and resources, strengthened the protection of fundamental rights, and enhanced institutional and political checks and balances. It also provided the legal foundation for the national economic transformation roadmap, Vision 2030.

...

After the successful mediation of the post-election controversy in 2008, there was disagreement over the best way to bring the perpetrators of post-election violence to account and secure justice for the victims. One proposal was to set up a local tribunal to try the cases, while another was to refer the matter to the ICC. The Mediator who had been appointed by your Excellencies referred the matter to the

ICC when the disagreement persisted. On the basis of this referral, the Prosecutor stated that he had launched investigations which, he claimed, established that 6 persons had committed crimes against humanity. According to the Prosecutor, your Excellencies, I fall among those men.

...

From the beginning of the cases, I have fully cooperated with the Court in the earnest expectation that it afforded the best opportunity for me to clear my name. I have attended court whenever required and complied with every requirement made of me in connection with my case. Other Kenyans charged before that court have similarly cooperated fully. The Government has cooperated to the maximum; the Court itself found that Kenya's Government has fully complied in 33 out of 37 instances, and was only prevented from cooperating 100% by legal and constitutional constraints.

After my election, we have continued to fully cooperate. As earlier stated, we see it as the only means to achieve personal vindication, but also to protect our country from prejudice.

As I address your Excellencies, my deputy is sitting - in person - in that Court. Proceedings continue revealing the evidence against us to be reckless figments and fabrications every passing day. I cannot narrate quite accurately the calculated humiliation and stigma the

prosecution has inflicted on us at every turn, within and outside the proceedings. It is all consistent with a political agenda, rather than a quest for justice.

For 5 years I have strained to cooperate fully, and have consistently beseeched the Court to expedite the cases.

Yet the gratuitous libel and prejudice I have encountered at the instance of the Prosecution seeks to present me as a fugitive from justice who is guilty as charged. All I have requested as President is to be allowed to execute my constitutional obligations as the forensic side of things is handled by my lawyers.

Even as we maintain our innocence, it has always been my position, shared by my deputy, that the events of 2007 represented the worst embarrassment to us as a nation, and a shock to our self-belief. We almost commenced the rapid descent down the precipitous slope of destruction and anarchy. Its aftermath was similarly an unbearable shame. We are a people who properly take pride in our achievements and our journey as a nation. The fact that over that time we had lost direction, however briefly, was traumatising.

...

We certainly do not bear responsibility at any level for the post-election violence of 2007, but as leaders, we felt it incumbent upon us to bear responsibility for

reconciliation and leadership of peace. Our Government wants to lead Kenya to prosperity founded on national stability and security. Peace is indispensable to this aspiration. Reconciliation, therefore was not merely good politics; it is key to everything we want to achieve as a Government.

...

America and Britain do not have to worry about accountability for international crimes.

Although certain norms of international law are deemed peremptory, this only applies to non-Western states. Otherwise, they are inert. It is this double standard and the overt politicisation of the ICC that should be of concern to us here today. It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation "race-hunting". I find great difficulty adjudging them wrong.

What is the fate of International Justice? I daresay that it has lost support owing to the subversive machinations of its key proponents. Cynicism has no place in justice. Yet it takes no mean amount of selfish and malevolent calculation to mutate a quest for accountability on the basis of truth, into a hunger for dramatic sacrifices to advance geopolitical ends. The ICC has been reduced into a painfully

farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers.

This is the circumstance which today compels us to agree with the reasons US, China, Israel, India and other non-signatory States hold for abstaining from the Rome Treaty. In particular, the very accurate observations of John R Bolton who said, "For numerous reasons, the United States decided that the ICC had unacceptable consequences for our national sovereignty. Specifically, the ICC is an organization that runs contrary to fundamental American precepts and basic constitutional principles of popular sovereignty, checks and balances and national independence."

Our mandate as AU, and as individual African States is to protect our own and each other's independence and sovereignty. The USA and other nations abstained out of fear. Our misgivings are born of bitter experience. Africa is not a third-rate territory of second-class peoples. We are not a project, or experiment of outsiders. It was always impossible for us to uncritically internalise notions of justice implanted through that most unjust of institutions: colonialism. The West sees no irony in preaching justice to a people they have

disenfranchised, exploited, taxed and brutalised.”

The speech is critical and pivotal in the discourse of the African States' criticism of the Court. Hence the extensive quote from it. By recalling the ancestors and the fight for independence, President Uhuru Kenyatta suggests that African independence is still at stake. He stated an opinion and pleaded with his fellow Heads of States and Governments to convince them that the ICC is biased against Africa. He was a scapegoat, an innocent victim fighting for what our ancestors had also fought for. Apart from the rhetoric being well written, this speech is far from the truth. Nothing was done for accountability in connection to the post-election violence. Indeed, it is only recently, almost 15 years after the fact, that the first serious prosecution has been initiated.³⁵ In other words, the ICC was right in seeking justice

for the Kenyan victims who were not cared for at the domestic level. Yet, the African Union will adopt the Kenyan President's voice and rhetoric.

Indeed, the African Union as an organisation has added its voice to this type of criticism of the Court through several decisions that it issued over the course of several years, starting before the occurrence of the situation in Kenya, with two aims: prevent the effectiveness of the judicial work and lead a normative change. At the same time, all decisions reiterate the organisation's commitment to fighting impunity, even though no meaningful alternative to the international prosecution is put forward, except through the Malabo Protocol³⁶.

a. Assembly/AU/Dec.221 (XII), February 2009.³⁷ The decision opens with the expression of concern at issuing an indictment against Omar Al Bashir despite his status as President of

³⁵ See the news that some police officers have been charged with violence during the post-2007 election. AFP, 28 October 2022 (<https://www.africanews.com/2022/10/28/kenya-charges-police-officers-over-2017-post-election-violence/>).

³⁶ The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights was adopted on 27 June 2014 in Malabo, Equatorial Guinea ([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](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)). Since then, none of the Member States has ratified it while 15 ratifications

are needed for it to come into force. Under the leadership of President Kenyatta, Kenya had pledged 1 million dollars for the merged court, but Kenya has not ratified the Protocol so far. For further analysis of the Protocol, see C.C. Jalloh, M. Clarke Kamari, O. Nmeielle Vincent (eds.), *The African Court of Justice and Human and Peoples' Rights in Context. Development and Challenges*, Cambridge University Press, Cambridge, 2019, xxv-1167p. Available online: <https://doi.org/10.1017/9781108525343>.

³⁷ See online (<https://archives.au.int/bitstream/handle/123456789/1083/Assembly%20AU%20Dec%20221%20%28XII%29%20E.PDF>). Not sure if this footnote should be this way.

Sudan (paragraph 1) and then links such occurrence with the risk to the peace process (paragraph 2). Yet, the decision condemns the human rights violations in Darfur while calling for the arrest and prosecution of those involved (paragraph 7). These types of sentiments disappear from all later decisions when the Kenyan leadership joins efforts with Sudan.

- b. Assembly/AU/Dec.245(XIII), July 2009.³⁸ From the outset, the decision was clear about Omar Al Bashir's support, expressing "its deep concern" at the indictment issued against the Sudanese President (paragraph 2). Such a political statement shows a level of disregard for the legal process and the interest of the victims that contradict the commitment to fighting impunity. The decision continues with the allegation that such an indictment negatively affects the peace process without any evidence. Today, we are still looking for evidence supporting such an assertion, while the coup against Al Bashir in April 2019 has not led to any deeper collapse of the peace process. Finally, this decision also

reveals the failure of African diplomacy at the United Nations with the unsuccessful lobbying at the Security Council. And it is worth questioning the ability of African diplomats at the United Nations to rally other countries around their interests for success.

- c. Assembly/AU/Dec.270(XIV), February 2010.³⁹ The decision acknowledges the filing of the proposed amendment to Article 16 of the Rome Statute by South Africa on behalf of the African Group. However, this must be linked to what has been stated earlier about the ability of African diplomats to secure support for their proposal because this proposal has yet to be successful to materialise itself into the legal framework. The decision also put forward the idea of immunity for officials of States which are not a party to the Rome Statute, an issue that is again directly linked to Omar Al Bashir.

³⁸ See online (https://archives.au.int/bitstream/handle/123456789/1112/Assembly%20AU%20Dec%20245%20%28XIII%29%20_E.pdf).

³⁹ See online ([https://archives.au.int/bitstream/handle/123456789/1145/Assembly%20AU%20Dec%20270%20\(XIV\)%20_E.PDF](https://archives.au.int/bitstream/handle/123456789/1145/Assembly%20AU%20Dec%20270%20(XIV)%20_E.PDF)).

- d. Assembly/AU/Dec.296 (XV), July 2010.⁴⁰ The concrete and notable aspect of this decision is the refusal to allow the opening of the liaison office by the ICC in Addis Ababa (paragraph 8). However, such an office would be an opportunity to engage with the Court more effectively, and one would have thought that it was in the interest of the AU that such an office was established. As an anecdote, Paragraph 9 deserves to be quoted where the Assembly “expresses [its] concern over the conduct of the ICC Prosecutor, Mr Moreno Ocampo who has been making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of Sudan and other situations in Africa.”
- e. Assembly/AU/Dec.334(XVI), January 2011.⁴¹ Unsurprisingly, the decision lends support to African States which have granted entry to Omar Al Bashir, despite their obligations to the ICC, namely Chad and Kenya (paragraph 5). The decision

has also brought in the Kenyan interest with the support for the request for deferral (paragraph 6). This request further proves how African diplomacy failed to reach its stated goal.

- f. Assembly/AU/Dec. 397(XVIII), January 2012.⁴² The decision reiterates the support of the organisation to States that welcomed Omar Al Bashir, adding Djibouti and Malawi to the list (paragraph 7). Interestingly, the decision produces evidence of the need for more discipline of Member States to comply with the decisions adopted. In this case, it was about the endorsement of a candidate for election as a judge at the ICC, when the Member States did not support the endorsed candidate (paragraph 9). This supports the argument that the decisions adopted by the AU do not always match the interest or the policies of the Member States. Finally, the decision mandates the Commission to seek an advisory opinion from the International Court of Justice (ICJ) (paragraph 10).

⁴⁰ See online (https://archives.au.int/bitstream/handle/123456789/1178/Assembly%20AU%20Dec%20296%20%28XV%29%20_E.pdf). Not sure about these three footnotes, is it enough to just say see online without specifying.

⁴¹ See online (https://archives.au.int/bitstream/handle/123456789/1230/Assembly%20AU%20Dec%20334%20%28XVI%29%20_E.pdf).

⁴² See online (https://archives.au.int/bitstream/handle/123456789/1308/Assembly%20AU%20Dec%20397%20%28XVIII%29%20_E.pdf).

⁴² See online (https://archives.au.int/bitstream/handle/123456789/1308/Assembly%20AU%20Dec%20397%20%28XVIII%29%20_E.pdf).

However, the AU has no authority to seek an advisory opinion, but Member States do through the General Assembly.⁴³ This means that the African Member States of the United Nations need to succeed in convincing a majority that the question is worth putting to the Court. Until now, there has been no progress on that request.

- g. Ext/Assembly/AU/Dec.1, Extraordinary Session of the Assembly of the African Union, 12 October 2013.⁴⁴ The rhetoric is interesting here because a new argument is brought in support of the Kenyan strategy at deflating the ICC prosecution. In paragraph 6, the decision refers to Kenya as a frontline in the fight against terrorism, claiming the prosecution can only be a distraction from such a struggle for its survival. This comes just two to three weeks after the Westgate Mall terrorist attack on 21 September 2013. Then the decision also brought up the relationship between peace and justice, stating that

the prosecution could jeopardise the national reconciliation process (paragraph 7). In paragraph 10, a series of specific measures related to the prosecution of Uhuru Kenyatta and William Ruto follows. It is sufficient to question the ability of the organisation to enforce any of those decisions. In the author's view, this series of measures satisfies the rhetorical aim of the Kenyan leadership but was not intended to be implemented. In that same series, the Assembly also decided to pursue the plan to grant criminal jurisdiction to the African Court leading to the Malabo Protocol.

- h. Assembly/AU/Dec.493(XXII), January 2014.⁴⁵ Paragraph 12 again displays the lack of discipline in complying with the decisions of the continental body. But, more importantly, the Assembly links its decision to extend the jurisdiction of the African Court of Justice and Human Rights to the prosecution of international crimes (paragraph 13). In

⁴³ See Article 96 of the United Nations Charter. It reads as follows:

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and specialized agencies, which may at any time be so

authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

⁴⁴ See online (https://au.int/sites/default/files/decisions/9655_ext_assembly_au_dec_decl_e_0.pdf).

⁴⁵ See online (https://archives.au.int/bitstream/handle/123456789/414/Assembly%20AU%20Dec%20493%20%28XXII%29%20_E.pdf).

other words, the extension of the jurisdiction is an alternative to the prosecution before the ICC. Which should be of concern because how independent would a regional court be vis-à-vis its parent political bodies adopting decisions such as those analysed here? This idea led to the Malabo Protocol.

- i. Assembly/AU/Dec.616 (XXVII), July 2016.⁴⁶ In this decision, several developments are of interest. First, in paragraph 3, the Assembly *welcomes* the dismissal of the case against the vice president of Kenya, in total disregard for the victims. It is worth recalling that the fate of the witnesses has been critical, with some killed and others scared enough to recant their testimony. There seems to be hypocrisy with the peers of the Kenyan leaders agreeing to a statement, even though it does not match the reality. Then, in paragraph 5, the Assembly provides a roadmap for the then forthcoming session of the ICC ASP meeting. Still, it is difficult to assess whether African States followed those directions. Indeed, suggestions related

to the strategies for arrest were designed and discussed. Still, this decision of the African Union Assembly does not seem to have any perceptible impact, which should have been recorded in the *Report of the Bureau on Cooperation* submitted three years later.⁴⁷

The above decisions are further reinforced by statements of officials in the same vein. For illustration, here are three such statements.

First, Dr Nkosazana Dlamini Zuma, the former Chairperson of the African Union Commission, made the following welcoming remarks on 12 October 2013 at the extraordinary session dedicated to the relation with the ICC (extracts):

“The violence that erupted in Kenya after the elections in 2007 deeply saddened our continent.

In the spirit and letter of non-indifference, the African Union intervened through the Eminent Persons panel to assist Kenya to bring together all stakeholders to find common ground, and to set it on the path where the people of Kenya could begin to

⁴⁶ See online (https://au.int/sites/default/files/decisions/31274-assembly_au_dec_605-620_xxvii_e.pdf). Same as above.

⁴⁷ ICC Doc. No. ICC-ASP/18/17, 29 November 2019. See particularly paragraphs 14-18.

address the underlying causes of these tragic events.

Following the National Accord that resulted from Kenya's National Dialogue and Reconciliation Process, the country made progress in transforming its police and judiciary, promoting peaceful resolution of conflicts amongst local communities, and introduced a new Constitution that allows greater inclusion in the context of Kenya's diversity. Both President Kenyatta and Vice President Ruto, along with the leadership from all sectors of Kenyan society, played a critical role in bringing together contending groups to find common ground.

In addition, based on the reports presented to the 15th Extraordinary Executive Council by the Kenyan delegation, work is ongoing on investigations and prosecutions of the 2007/2008 post-elections violence and on resettlement of the thousands of Kenyans displaced by the violence.

The peaceful elections that Kenya held in March 2013, with high participation of the populace and the commitment by all parties to resolve disputes through the legal system, is testimony that the country has indeed come a long way since the tragic events of 2007/2008.

There is no question that much more needs to be done to consolidate reconciliation, inclusion, human rights and

social justice in Kenya, but we are of the view that the country is on the right track.

...

The security situation in Kenya remains fragile, as seen in some parts where instability is of ongoing concern, and as experienced with the recent terrorist attack in Nairobi.

We should therefore not allow Kenya to slide back for any reason and the AU is keen to see stability and an improved security situation in Kenya.

This requires the undivided attention of its leadership, to consolidate and create conditions for lasting peace, security and reconciliation. Given the challenges remaining in the country outlined above and the security threats it continues to face, the elected leadership of Kenya must be allowed to serve their term as mandated by the people of the country.

They must be allowed to lead the country in the consolidation of peace, reconciliation, reconstruction, democracy and development as per the will of the Kenyan people, expressed in elections in March this year.

As a Member State, Kenya plays an important role in the promotion of peace and security on the continent in general, and in the Horn of Africa in particular.

...

Kenya, as a State Party to the Rome Statutes, throughout this difficult period has also in word and deed expressed its willingness to cooperate with the International Criminal Court (ICC), even after the elections of President Uhuru Kenyatta and Vice President William Ruto to office.

This is despite national and international customary laws, including in many Western countries, which guarantee sitting Heads of State and Government immunity from prosecution during their tenure of office, more especially when they are democratically elected.

Excellencies, communication between the ICC and the AU has been ongoing. Since the May Summit, we send two letters co-signed by the Chairpersons of the AU and the AU Commission to the ICC, an AU delegation led by the Chairperson of the Executive Council met the President and Prosecutor of the Court in The Hague and the Chairperson of the Commission met the ICC Prosecutor earlier this week.

We would therefore like the United Nations Security Council and the ICC to work with us to ensure that the process of stability, reconciliation, security and peace in Kenya is consolidated.

The UN Security Council and the ICC should work with us to enable the elected leadership of Kenya to fulfil their constitutional obligations, by urgently

considering deferment of the ICC proceedings against the President and Vice President of Kenya, in accordance with Article 16 of the Rome Statutes.

This will also allow the leadership of Kenya to ensure that the country does not slide back into violence and instability.

In our view, this will further give the State Parties time and space to place matters that are of concern to Africa on the agenda of the coming Assembly of State Parties to the Rome Statutes, and to discuss the approach and role of the ICC dispassionately and calmly.

It is critical that we remain within the legal framework of the Rome Statutes.

...

The Assembly decision in May this year also undertook to “seek ways of strengthening African mechanisms to deal with African challenges and problems.” Although more needs to be done, we are recording progress in implementing the African Peace and Security Architecture (APSA) and the African Governance Architecture, at national and continental levels.

We should however do more to strengthen the integrity and capacity of our national and continental Judicial system, including the African Court on Human and People’s Rights, so that the ICC indeed becomes the court of last instance, as intended in the Rome Statutes

and in pursuit of African people’s demand for justice, reconciliation and respect of their human rights and dignity.

Finally, as we mourn the senseless deaths of Africans who perished off the coast of the Lampedusa Island, and countless other similar deaths, we must scale up our investment in Africa’s young men and women, so that they do not have to face such perilous journeys, leaving our shores in search of illusive green pastures.

The chairperson detailed the ideas in the decisions in plain language, focusing on Kenya. However, she also reiterated her commitment to the fight against impunity and international justice. The authors' only criticism of the substance of this other rhetoric is that misleading legal statement about immunities from prosecution for sitting heads of State and government. “

The second relevant statement was made by Mr Hailemariam Desalegn, Prime Minister of Ethiopia, at the opening of the same extraordinary session in October 2013 (extracts):

“It is indeed a pleasure to welcome you all to Addis Ababa for the Extraordinary Summit of Heads of State and Government of the African Union. I wish to acknowledge that your presence today demonstrates your commitment to deliberate on an important issue, which

has been a matter of utmost concern not only for some of our member States but also for the whole of Africa.

Our Ministers met yesterday to prepare the ground work for our meeting and I hope their recommendations will facilitate our discussion on Africa's relations with the International Criminal Court (ICC). They have also elected a new Commissioner for Peace and Security to replace Ambassador Ramtane Lamamra, who was recently appointed as Foreign Minister of Algeria.

...

I wish to note that 34 member States of our Union joined the ICC perhaps fully convinced that the organization would promote the cause of Justice with a sense of impartiality and fairness. The practice so far however, leaves so much to be desired.

On a number of occasions, we have dealt with the issue of the ICC and expressed our serious concern over the manner in which the ICC has been responding to Africa’s considerations. The double standard that both the United Nations Security Council (UNSC) and the ICC have displayed with regards to the AU’s request for deferral for persecution in a number of cases, has been particularly worrisome. While similar requests by other entities were positively received, even under very controversial circumstances, neither the ICC nor the

UNSC have heeded the repeated requests that we have made on a number of cases relating to Africa over the last seven years. It is indeed very unfortunate that the Court has continued to operate in complete disregard of the concerns that we have expressed.

The trend however, is no doubt worrisome and the unfair treatment that we have been subjected to by the ICC is completely unacceptable. Once again, I would like to note that Africa has and never will support impunity of leaders who wilfully murder their own people. It is regrettable that the numerous proposals that we have presented within the framework of the Rome Statute to address these issues have been totally ignored.

Past experiences in our continent and elsewhere amply demonstrate the need to balance justice and reconciliation in complex conflict situations. It is in light of this fact that we have been insisting on the importance of finding home grown solutions to some of the intractable conflicts in our continent.

...

With regard to the Sudan, President Omar Hassan Al-Bashir has been demonstrating the necessary political leadership and commitment to resolve the Darfur issue and address outstanding issues with South Sudan. The African Union, through the High Level Panel, has

also been assisting Sudan in overcoming its difficulties and notable achievements have been made in this regard. The Peace and Security Council has empowered the High Level Panel to engage Sudan on the issue of democratic transformation as the country prepares to hold its general elections in 2015. In this context, it is indeed very important that the international community gives a chance to these processes and not be seen in any way to undermine them.

On the other hand, Kenya has come a long way in terms of addressing the post-2007 election violence. The adoption of the new Constitution, the reform of the Judiciary and the holding of successful legislative and presidential elections have certainly opened a new chapter in the country's political dispensation. More importantly, the satisfactory measures taken to reform the criminal justice system in Kenya were also meant to dispel the fears of some in the international community that they might not be as impartial as ICC would have seen it necessary. This is of course what the principle of complementarity requires.

President Uhuru Kenyatta and Deputy President William Ruto have played a critical role in reconciling the different communities and creating a peaceful condition for the smooth conduct of the elections. They have also been taking

practical measures to assist those who were affected by the post-election violence and restore their normal life.

It is in recognition of these encouraging developments that we have been requesting for the reconciliation process to be given a chance. But the ICC's response flies full in the face of these realities. There is no reason why the ICC finds it difficult to accept this legitimate request. Ultimately, what we all aspire to see is for Kenyans to reconcile and live in peace and harmony. But then again, this is not just about Kenya but definitely about the entire Africa.

...

Finally, it should be underscored that our goal is not and should not be a crusade against the ICC, but a solemn call for the organization to take Africa's concerns seriously. I hope during this extraordinary session we will be able to thoroughly deliberate on how best we could move forward on these issues which have far reaching significance in our collective efforts to promote peace and security in Africa."

The last statement came from Dr Tedros Adhanom Ghebreyesus, then Minister for Foreign Affairs of Ethiopia, now Director General of the World Health Organization. Ethiopia was chairing the organisation that year and hosted the

gathering in October 2013. In his closing remarks for the meeting of the Ministers, Dr Ghebreyesus said:

"We have indeed thoroughly deliberated on the issue of Africa's relationship with the International Court (ICC) based on the progress report submitted by the Commission on the implementation of the decision adopted by the 21st ordinary session of the Assembly on the International Jurisdiction, International Justice and the international criminal court (ICC).

In this regard, we have reviewed this relationship with a view to addressing the challenges that we have encountered in our engagement with the ICC. We took the opportunity to once again reiterate our unflinching commitment to fight impunity, promote democracy and human rights, the rule of law and good governance in our continent.

However, we have rejected the double standard that the ICC is applying in dispensing international justice. In this context, we have once again clearly and unambiguously expressed our serious disappointment against the ICC and its selective approach vis a vis Africa. Particularly, we are deeply troubled by the fact that a sitting Head of State and his Deputy are for the first time being tried in an international court, which infringes on the sovereignty of Kenya and undermines the progress achieved thus far in the

country's reconciliation and reform process.

Therefore, we have underscored that sitting Heads of State and Government should not be prosecuted while in office and we have resolved to speak with one voice to make sure that our concerns are heard loud and clear. In doing so, we have made it abundantly clear that this issue is not only Kenya's concern. It is indeed a serious issue for all of us in the continent with far reaching implications.

We have concluded our discussion on this important issue in a consensual manner and I am pleased that we came out with a united voice to push forward our case. One of the recommendations that we have made is to set up a Contact Group of the Executive Council to be led by myself and composed of five members from each region to undertake consultation with members of the UNSC in particular the Permanent Five. The objective of this Contact Group is to engage with members of the UNSC on concerns of the African Union in its relations with the ICC

including the request for deferral of proceedings against the President and Deputy President of Kenya as well as the President of the Sudan in conformity with Article 16 of the Rome Statute. In implementing this and other recommendations, I believe it is very important that we remain united so as to achieve the desired result and not leave any room for manipulation. Some media reported earlier today that we are divided but we have seen no sign of any of that. We are not divided and we will not be divided. Unity is the only option.”

The consistency in the discourse associated with a set of decisions is impressive. However, there is also a lack of commitment by the Member States on the way forward.⁴⁸ For instance, the mediatised attempt to massively withdraw from the Rome Statute has yet to materialise.⁴⁹ Indeed, only Burundi withdrew, while the Gambia and South Africa only attempted to withdraw (see

⁴⁸ H. Sipalla, State Defiance, “Treaty Withdrawals and the Resurgence of African Sovereign Equality Claims: Historicising the 2016 AU-ICC Collective Withdrawal Strategy”, in H.J. van der Merwe and G. Kemp (eds.), *International Criminal Justice in Africa, 2016*, Strathmore University Press & Konrad Adenauer Stiftung, Nairobi, 2017, pp. 61-99. The full book is available online (https://www.kas.de/c/document_library/get_file?uuid=48c88829-e9c3-716a-7da5-e391eff64499&groupId=252038). See also E. Keppeler, Managing Setbacks for the International Criminal Court in Africa, *Journal of African Law* 56 (2012) 1, pp. 1-14.

⁴⁹ BBC, “African Union backs mass withdrawal from ICC,” 1 February 2017, available online (<https://www.bbc.com/news/world-africa-38826073>); G.G. Jarvi, “African Union Leaders Back Leaving ICC,” *Jurist*, 1 February 2017, available online (<https://www.jurist.org/news/2017/02/african-union-leaders-back-leaving-icc/>); and Library of Congress, “African Union: Resolution Urges States to Leave ICC,” 10 February 2017 (<https://www.loc.gov/item/global-legal-monitor/2017-02-10/african-union-resolution-urges-states-to-leave-icc/>).

Appendix 1). In South Africa's case, the policy change has gone further with the ruling party, the ANC, having adopted a resolution to contribute to the reform at the ICC through the ASP.⁵⁰

In the same vein, the move to adopt the Malabo Protocol did not materialise in wide ratification so far, and it is fair to question whether this instrument will enter into force soon.⁵¹ And, at odds with this position of the African States, the African civil society has expressed a more balanced perception.

Indeed, and in contrast to the more critical African government views, African civil society organisations have consistently shown a higher level of support for all accountability avenues, including the ICC. Some specific examples, back then and today, could be cited as evidence of the complexity of

identifying an African view since the views of African civil society are also relevant and legitimate.

On 25 January 2011, a group of 58 civil society organisations made a statement supporting the ICC, in response to the campaign by the Government of Kenya to seek support from other African States.⁵² These extracts of the statement are pertinent for quoting:

“It is in this regard therefore that we, the undersigned civil society organizations, urge the Kenyan government and parliament to reaffirm their support for the ICC and put a stop to any attempts to undermine the Rome Statute system and the ICC's Kenya investigation, including through withdrawal or seeking deferral. We also urge the Kenyan government-in-particular the President and the Prime Minister to clarify its position with regard to the Rome Statute more broadly, and its

⁵⁰ See T. Gota, “ANC Backtracks on Decision to Withdraw from ICC,” *EWN*, 8 January 2023 (<https://ewn.co.za/2023/01/08/anc-backtracks-on-decision-to-withdraw-from-icc/amp>). For a background on the withdrawal, see G. Kemp, “South Africa’s (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes against Humanity, War Crimes and Genocide under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations,” *Washington University Global Studies Law Review* 16 (2017) 3, pp. 411-438, available online (<https://journals.library.wustl.edu/globalstudies/article/55/galley/16894/view/>).

⁵¹ As we are finalizing this paper in February 2023, we checked and there was still no ratification on the website of the African Union (<https://au.int/sites/default/files/treaties/36398->

[sl-PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20STATUTE%20OF%20THE%20AFRICAN%20COURT%20OF%20JUSTICE%20AND%20HUMAN%20RIGHTS.pdf](https://www.hrw.org/news/2011/01/25/kenya-civil-society-organizations-call-support-international-criminal-court)).

⁵² See Human Rights Watch, Kenya: Civil Society Organizations Call for Support for the International Criminal Court. Statement by African Civil Society Organizations and International Organization with a Presence in Africa, 25 January 2011 (<https://www.hrw.org/news/2011/01/25/kenya-civil-society-organizations-call-support-international-criminal-court>). See also on the website of the International Centre for Transitional Justice (<https://www.ictj.org/news/kenyafrican-union-reaffirm-support-icc>).

obligations to cooperate with the ICC in the cases currently before the court.

Kenya's withdrawal from the Rome Statute would mark a severe break with its commitment to the fight against impunity. In ratifying the Rome Statute in 2005, Kenya-along with the ICC's 113 other member countries-dedicated itself to the defense of victims' rights and to bringing to justice perpetrators of the most serious crimes. Withdrawal now would signal the intention to side with the perpetrators of Kenya's post-election violence rather than its victims.

The Kenyan government should note that withdrawal from the Rome Statute would not suspend ongoing ICC investigations or judicial proceedings that commenced prior to the date of withdrawal, and that, in any event, Kenya would remain required to cooperate with the ICC on obligations that arose while Kenya was a state party to the court.

As a court of last resort, the ICC places the primary obligation on national authorities to carry out prosecutions. Should Kenya decide to pursue national trials involving those individuals against whom ICC summonses may be issued, it could challenge the court's jurisdiction over these specific cases under article 19 of the Rome Statute. For a case to be found inadmissible, national proceedings must encompass both the person and the conduct that is the subject of the case

before the ICC. This process does not require withdrawal from the Rome Statute.

Similarly, the Kenyan government must be reminded that conducting national trials is not a basis for a UN Security Council deferral of the ICC's investigation under article 16 of the Rome Statute. An article 16 deferral is intended only in exceptional cases to maintain or restore international peace and security. It is unlikely that ICC investigations in Kenya are detrimental to international peace and security. Moreover, it should be noted that impunity for past cycles of post-election violence in Kenya is widely believed to have contributed significantly to the 2007-08 violence and instability.

African governments, together with civil society, played an active role in establishing the court. We therefore call on our governments to stand firm in their support for the ICC, and reject steps which would undermine the court at the upcoming AU summit. Instead, African ICC states parties should build on important achievements to date and continue to advance justice for victims of human rights violations, including victims in Kenya. The AU's Constitutive Act, in article 4, calls for, among other things, the rejection of impunity. The ICC is an integral component of this effort.”

In 2014, a similar *ad hoc* coalition of civil society organisations submitted recommendations to the ICC ASP session to challenge the campaign led by Kenya with the support of the African Union as shown before in the decisions and the proposed amendments.⁵³ In the statement of the coalition, this call to African States is made:

The backlash against the ICC by some African leaders in recent years calls for a deeper understanding and appreciation of the principle of complementarity, which dictates that the ICC is a court of last resort.

Domestic courts have primary jurisdiction and the ICC's Rome Statute reflects the vision of domestic courts that should be willing and able to ensure justice. However, national jurisdictions must be equipped with the tools that will allow them to act. The domestication of Rome Statute is central to empowering African courts to handle egregious crimes perpetrated in their territories. Yet, only a handful of African states have adopted

legislation that domesticates ICC crimes— as of last count, these were Burkina Faso, the Central African Republic, Kenya, Mauritius, Senegal, South Africa, and Uganda. We call upon all African states to domesticate the Rome Statute and develop capacity for dealing with international crimes at the national level.

Universal jurisdiction in an African context is also proving to be a useful tool, as reflected by the important work of the Extraordinary African Chambers and the recent decision of South Africa's Constitutional Court on domestic authorities pursuing cases involving serious crimes committed outside South Africa. Legislation domesticating the Rome Statute can be tailored to suit each national jurisdiction and to include a reasonable form of universal jurisdiction.

The Southern Africa Litigation Centre is an organisation based in Johannesburg, South Africa. It organised a conference in June 2014 about the strategic action of civil society organisations concerning accountability in Africa.⁵⁴ The various

⁵³ Human Rights Watch, Recommendations by African civil society groups and international organisations with a presence in Africa for the International Criminal Court's Assembly of States Parties 13th Session from December 8-17, 2014, 17 December 2014 (<https://www.hrw.org/news/2014/12/17/recommendations-african-civil-society-groups-and-international-organisations>).

⁵⁴ Southern Africa Litigation Centre, International Criminal Justice: Regional Advocacy Conference Report, Civil Society in Action: Pursuing Domestic Accountability for International Crimes, 2014, 94p. (<https://www.nytimes.com/2022/09/28/world/africa/guinea-2009-massacre-trial.html>).

presentations made at the conference are the best testimony to the commitment of civil society to fight impunity for international crimes, including litigating the enforcement of ICC warrants of arrest.

In July 2015, some 101 civil society organisations in Africa issued a statement in connection to the visit of Omar Al Bashir to South Africa, and the country’s failure to arrest him, despite the warrants of arrest.⁵⁵ That statement reads in part as follows:

“President al-Bashir, charged with genocide, war crimes and crimes against humanity in connection with the conflict in Darfur was in South Africa from 13-15 June for an African Union Summit. South Africa was under a clear obligation to arrest him pursuant to two warrants of arrest issued against him by the International Criminal Court (ICC) on 4 March 2009 (for war crimes and crimes against humanity) and on 12 July 2010 (for genocide).

South Africa is a party to the Rome Statute of the International Criminal Court. Pursuant to the terms of that treaty mandating international cooperation and assistance with the ICC, South Africa was required to facilitate the arrest and surrender of President al-Bashir to The

Hague in the Netherlands, the seat of the International Criminal Court. In addition, South Africa’s domestication of the Rome Statute of the ICC makes the government’s failure to arrest President Omar al-Bashir a contravention of domestic law as well.

...

We noted with deep concern reports that rather than arresting President al-Bashir, South African officials apparently allowed him to leave the country in direct defiance of the order by the Pretoria High Court. The actions pose serious consequences for the independence of the judiciary in South Africa and demonstrate a flagrant lack of respect for the rule of law and the rights of Darfur’s victims to have access to justice.

...

We call on the courts of South Africa to establish accountability and on the government to undertake an independent investigation into the circumstances that allowed for the departure of President al-Bashir in defiance of the Pretoria Court order and international arrest warrant and for full cooperation with the Court’s own inquiry on the matter. Those responsible must be brought to prompt justice, including for contempt of court. We also call on the Assembly of States Parties of

⁵⁵ MFWA, Civil Society Declaration on Sudanese President Omar al-Bashir’s visit to South Africa without Arrest, 3 July 2015

(<https://www.mfwa.org/civil-society-declaration-on-sudanese-president-omar-al-bashirs-visit-to-south-africa-without-arrest/>).

the ICC to take appropriate action to address non-compliance by South Africa and other States who breach their obligations of cooperation and assistance under the ICC Statute. We call on the United Nations Security Council which was briefed by the ICC Prosecutor on the situation in Darfur on 29 June to strongly reaffirm the obligation of States parties to duly cooperate with the ICC. Members of the Security Council, who referred Darfur to the ICC, have a special responsibility to fully support and facilitate the prosecutor's continued work.

We also call on governments and political parties alike to respect the space afforded to civil society organisations, pursuant to the South African Constitution, to litigate in the interests of the public. Matters of justice and accountability are pursued in the interests of the public, and civil society organisations have a mandate that warrants action when government authorities act in contravention of constitutionally protected values. Access to justice is a constitutionally enshrined right that all are entitled to utilise.”

The Institute for Human Rights and Development in Africa is an organisation based in Banjul, Gambia, following human rights issues on the continent closely with a strong litigation practice before the African Commission on Human and Peoples' Rights. On 28 April 2018, before that body, the Institute made a statement in support of accountability for the massacre at a stadium in Conakry, Guinea, on 28 September 2009.⁵⁶ After recalling various avenues for accountability, the Institute concluded by seeking the support of the African Commission for “a fair, equitable and inclusive trial in Guinea”.⁵⁷ The commitment of civil society is the driving force that led to the trial in Conakry, which started in September 2022.⁵⁸ More recently, following the arrest in Sudan of Omar Al Bashir, a group of civil society organisations issued an advocacy letter requesting the transfer of all accused to the ICC, showing their continuous support for the Court.⁵⁹

Civil society organisations have, therefore, consistently supported the work of the ICC as one of the avenues for

⁵⁶ See statement online (<https://www.ihrda.org/2018/04/statement-of-ihrda-on-the-september-28-case-in-guinea-at-the-62nd-ordinary-session-of-the-achpr/>). Add in source with information on the massacre.

⁵⁷ See statement online (<https://www.ihrda.org/2018/04/statement-of-ihrda-on-the-september-28-case-in-guinea-at-the-62nd-ordinary-session-of-the-achpr/>).

⁵⁸ Human Rights Watch, 22 September 2022, Guinea: Landmark Trial for 2009 Massacre (<https://www.hrw.org/news/2022/09/22/guinea-landmark-trial-2009-massacre>).

⁵⁹ See : Advocacy Letter, 26 August 2021, Sudan: Group Call for Transfer of Suspects to ICC Custody (<https://freedomhouse.org/article/sudan-groups-call-transfer-suspects-icc-custody>).

accountability for the international crimes committed on the continent. As a result, one must reassess any statement about an African negative perception of the ICC. And, for lack of evidence, one must assume that African peoples share the views of the activists through civil society organisations. Indeed, and to further such an assumption, there was a survey in Kenya specifically, and there appeared to be strong support for the ICC,⁶⁰ despite the political dynamic led by the Head of State, Uhuru Kenyatta.

In conclusion, there is a discourse among African States officials about the Court being biased against Africa, while among civil society, the perception is firmly for accountability by all means, including the Court. This does not mean there is nothing to change at the Court because that would be a different perspective and inquiry. We will, therefore, now consider how the African concerns could be considered in the ICC review process.

4. African Concerns in the Review Process

From the perceptions of the Court in its relationship with Africa as described above, there are two sets of issues with the Court: some of a legal nature, others of a functional/operational nature. The author believes that the review process could never have addressed the first set because of its scope and mandate, but only the second set. It is therefore a misplaced expectation if one hopes a review would address the legal issues: the African diplomats ought to develop a better strategy on the second set of issues. We will discuss the legal issues and suggest avenues for addressing what seems to be of interest to the African States. From our analysis, three main points are at stake: the immunity of sitting Heads of State, universal jurisdiction, and complementarity. All three are of a legal nature, while the third one also has an operational component.

On the first one, immunity for Heads of State, and as argued elsewhere,⁶¹ it is difficult to see any customary norms in this regard for the simple reason that international criminal courts or tribunals are only a recent practice in the

⁶⁰ See B. Lekalake and S. Buchanan-Clarke, "Support for the International Criminal Court in Africa: Evidence from Kenya," Afrobarometer, *Policy Paper* No. 23, 14 August 2015 (<https://www.afrobarometer.org/publication/pp2-3-support-international-criminal-court-africa-evidence-kenya/>).

⁶¹ S.R. Adjovi, Immunities in International Criminal Law. The Challenges from Africa, ICJ-Kenya, Discussion Paper, May 2015 (https://icj-kenya.org/news/sdm_downloads/discussion-paper-immunities-in-international-criminal-law-the-challenges-from-africa/).

international arena. The existing customary norms granting immunity to some State officials only concern the bilateral relationship between two States, not between a State (or two States) and an international court.⁶² Therefore, it is a legal issue open for constructive and progressive development, especially when it applies to situations referred by the Security Council, which concern a non-State Party. The African States need to develop their position in that regard and lobby at the General Assembly for the study of immunity for sitting Heads of State in international criminal tribunals by the International Law Commission (ILC). But were this to be successful and the topic taken up by the ICL, the African States would need to maintain their engagement so that their perspective is considered in the process. It is not impossible that the outcome would be a norm in support of some African States' (foreseen) position that the current practice of universal jurisdiction is beyond what would be legally acceptable to the majority of States.

The African States have already created a precedent in this regard with the Malabo Protocol, where there is such an immunity. However, it is interesting to note that this protocol was developed as an alternative to the ICC, but, ironically, with that immunity provision, the ICC will remain the only international option for criminal accountability of State Officials who would benefit from immunity before domestic and regional courts. In other words, African States have developed a norm that leads to a result contrary to their aim: shielding sitting Heads of State and Government from international prosecution and offering an African avenue for international criminal prosecution.

On the second issue, universal jurisdiction, African States have already embarked on the journey of the progressive development of the normative framework since Tanzania brought the question before the United Nations General Assembly.⁶³ The matter is currently on the agenda of its Sixth

⁶² Seized of the matter, two courts in Africa have concluded that the President of Sudan does not enjoy any immunities vis-à-vis of the ICC. See (1) South Africa, Supreme Court of Appeal, *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others* (867/15) [2016] ZASCA 17; 2016 (4) BCLR 487 (SCA); [2016] 2 All SA 365 (SCA); 2016 (3) SA 317 (SCA) (15 March 2016), available online (<http://www.saflii.org/za/cases/ZASCA/2016/17.html>); and Kenya, Court of Appeal at Nairobi,

Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Consolidated), *Attorney General v Kenya Section of International Commission of Jurists*, 16 February 2018 [2018] eKLR (<http://kenyalaw.org/caselaw/cases/view/148746/>).

⁶³ U.N. Doc. A/63/237/Rev.1 Request for the inclusion of an additional item in the agenda of the sixty-third session. The scope and application of the principle of universal jurisdiction. Letter dated 29 June 2009 from the Permanent

Commission.⁶⁴ However, there is little to no progress, and the issue has been pending for over 10 years.⁶⁵ That is where the continuous and constructive engagement of the African States would play a role. Again, the diplomats must do their work, meeting and engaging with other States to reach a consensus for progress.⁶⁶

In addition, the African States have two other avenues at their disposal. They

need to adjust their legal frameworks to their perception of the law, especially developing their own version of universal jurisdiction and allowing its effectiveness before their judiciary. To our knowledge, no such strategy has been developed by any African State, except eventually Rwanda when it enshrined universal jurisdiction for international crimes, including genocide, in its penal code.⁶⁷ However, in addition to such a double

Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General
(www.undocs.org/A/63/237/Rev.1).

⁶⁴ See the latest resolution by the General Assembly (A/RES/77/111) deciding that the Sixth Committee shall continue the consideration of the matter. See also the report from the Sixth Committee, U.N. Doc. A/77/423
(www.undocs.org/A/77/423).

⁶⁵ Indeed, the summary of work on the website of the Sixth Committee of the United Nations General Assembly (https://www.un.org/en/ga/sixth/77/universal_jurisdiction.shtml) states as follows: “On the future consideration of the agenda item, while several delegations supported continued discussions within the Sixth Committee and its Working Group, others stated that the discussions within the Sixth Committee were at an impasse, noting the lack of progress. Delegations shared diverging views on the decision taken by the International Law Commission to include the topic “Universal criminal jurisdiction” in its long-term programme of work. While some delegations favoured consideration of the legal aspects of the topic by the Commission, other delegations reiterated their view that it would be premature and counterproductive at this stage for the Commission to undertake such a study. Several delegations suggested to revitalize the work of the Sixth Committee through the issuance of a report of the Secretary-General which would review previous reports on the subject, identifying challenges, and points of concordance and divergence, as to its scope and application.”

⁶⁶ See among others: O. Kaaba, The Application of Universal Jurisdiction in Africa, in J. Sarkin and E. Siang'andu (eds.), *Africa's Role and Contribution to International Criminal Justice*, Intersentia, 2020, pp. 137-154 (doi:10.1017/9781839700880.006) and C.C. Jalloh, Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction, *Criminal Law Forum* 21 (2010) 1, pp. 1-65, University of Pittsburgh Legal Studies Research Paper No. 2009-38, Florida International University Legal Studies Research Paper No. 17-28, Available online (SSRN: <https://ssrn.com/abstract=1526622>).

⁶⁷ See Article 14 of the Rwandan Penal Code which reads as follows
(https://www.police.gov.rw/fileadmin/templates/images/NEWS_2020/New_Penal_code.pdf):

“Article 14: International crime and transnational crime

An international crime is a crime classified as such under international law.

International crimes are the following:

1. the crime of genocide;
2. the crime against humanity;
3. war crimes.

A transnational crime means a crime, one of whose constituent elements is accomplished outside Rwanda's borders.

Any person, whether a Rwandan or foreign citizen, a national or foreign nongovernmental organization or association, that commits, inside or outside the territory of Rwanda, an international crime or transnational crime may, if apprehended on the territory of Rwanda, be punished in accordance with the Rwandan law.”

strategy, African States must also ensure that their domestic system does not allow impunity for international crimes. This last aspect would also play a role in the complementarity debate with the ICC.

This brings us to the third and last issue, the principle of complementarity. Here, we have a novel legal issue: the development of regional criminal jurisdiction, as the current legal framework does not consider the possible complementarity between a regional court or tribunal and the ICC. Without making the issue sound simple, no theoretical obstacle exists to such a perspective. Still, it cannot be safely argued that the negotiators of the Rome Statute had envisaged that possibility and that the current rules apply because, at the time of the negotiations, the issue did not form part of the discussions. Again, there is a possible gain for African States in this regard, and they must lobby their peers in the ICC ASP for a statement in that regard, including an amendment to the Rome Statute to provide the conditions for such complementarity if the consensus requires any change to the current set of provisions.

However, the complementarity issue has a practical component: domesticating the Rome Statute and seeking the necessary support for the domestic

judiciary to master the legal framework for operationalisation. This is where the African States can translate their commitment against impunity into action. And the African Union Commission should certainly assist the States in that regard, for instance, in developing a model law for domestication. It could also liaise with the ICC to organise training jointly for law enforcement in the African States. Several stakeholders are already doing so, and it would be worth continuing, focusing on specific areas of need, on a case-by-case basis, in conjunction with the ICC. Such a constructive relationship would undoubtedly have another benefit: developing a common understanding while building capacities on the continent to effectively hold individuals and corporations accountable for human rights violations.

5. Conclusion

In conclusion, the African States have grounds for debate on the legal norms and would be able to make progress if they develop the appropriate strategy for the aim they agree on. This would require substantive work and dedication to lobbying with other States to reach a consensus on critical aspects that would be reflected in the outcome, whether within the Assembly of States Parties or through

the United Nations General Assembly. Even within their own organisations, African States could succeed in agreeing on decisions that they are ready to enforce. It is only at that cost that the progress they seem to advocate for would hold any future.

The Independent Expert Review established by the ICC ASP, in its report,

did not do any justice to those African concerns because it failed to consider the issues raised earlier as deriving from the views of African stakeholders. But one must admit that the lack of clarity on the side of the African States does not help. However, such a failure at this stage does not jeopardise the future. It will just take longer to get the legal framework settled.

Bibliography

(1) Documents from the International Criminal Court

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Report of the Registry on the execution of the “Decision Requesting Observations on Omar Al-Bashir’s Visit to the Republic of Chad”, 15 March 2013. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-149>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Report of the Registry on the observations submitted by the Republic of Chad on Omar Al-Bashir’s visit to the Republic of Chad, 21 March 2013. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-150>. See also Annex 1 available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-150-anx1>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Pre-Trial Chamber II, 26 March 2013. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-151>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision Requesting Observations from the Republic of Chad on the Possible Reclassification of Document ICC-02/05-01/09-150-Conf-Anx1, Pre-Trial Chamber II, 18 April 2013. Available online: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2013_03126.PDF.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Report of the Registry on the execution of the “Decision Requesting Observations from the Republic of Chad on the Possible Reclassification of Document ICC-02/05-01/09-150-Conf-Anx1”, 3 May

2013. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-153>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision on the Reclassification of Document ICC-02/05-01/09-150-Conf-Anx1, Pre-Trial Chamber II, 6 May 2013. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-154>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Order requesting submissions from the Republic of South Africa for the purposes of proceedings under article 87(7) of the Rome Statute, Pre-Trial Chamber II, 4 September 2015. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-247>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Registry transmission of the submissions from the Republic of South Africa in response to the Order requesting submissions for the purposes of proceedings under article 87(7) of the Rome Statute, 4 September 2015. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-248>. See also Annex 1, 5 October 2015, available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-248-anxi>.

Situation in Darfur, Sudan. The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, Pre-Trial Chamber II, 6 July 2017. Available online: <https://www.icc-cpi.int/court-record/icc-02/05-01/09-302>.

International Criminal Court, Assembly of States Parties, Review of the International Criminal Court and the Rome Statute System, updated on 30 September 2020 (<https://asp.icc-cpi.int/Review-Court>).

(2) Documents from the African Union

African Union, Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), 8-9 June 2009, A.U. Doc. Min./ICC/Rpt.

African Union, Assembly, Decision on the Abuse of the Principle of Universal Jurisdiction, Jul. 2009, A.U. Doc. Assembly/AU/Dec.243(XIII).

African Union, Assembly, Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC), Jul. 2009, A.U. Doc. Assembly/AU/Dec.245(XIII).

African Union, Assembly, Decision on the Hissene Habre Case, Jul. 2009, A.U. Doc. Assembly/AU/Dec.246(XIII).

African Union, Report of the Experts' Meeting on the Rome Statute of the International Criminal Court (ICC), Nov. 2009, A.U. Doc. Exp/ICC/Legal/Rpt(II).

African Union, Assembly, Decision on the Report of the Second Meeting of States Parties to the Rome Statute on the International Criminal Court (ICC), Jan. 2010, A.U. Doc. Assembly/AU/Dec.270(XIV).

African Union, Assembly, Decision on the Abuse of the Principle of Universal Jurisdiction, Jan. 2010, A.U. Doc. Assembly/AU/Dec.271(XIV).

African Union, Assembly, Decision on The Hissene Habre Case, Jan. 2010, A.U. Doc. Assembly/AU/Dec.272(XIV).

African Union, Assembly, Decision on the Implementation of the Decisions on the International Criminal Court (ICC), Jan. 2011, A.U. Doc. Assembly/AU/Dec.334(XVI).

African Union, Assembly, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC), Jan. 2012, A.U. Doc. Assembly/AU/Dec.397(XVIII).

African Union, Report on the Meetings of Ministers of Justice and/or Attorneys General on Legal Matters, 14 and 15 May 2012, A.U. Doc. Min/Legal/Rpt.

African Union, Assembly, Decision on Africa's Relationship with the International Criminal Court (ICC), Oct. 2013, A.U. Doc. Ext/Assembly/AU/Dec.1.

African Union, Assembly, Progress Report of the Commission on the Implementation of the Decisions of the Assembly of the African Union on the International Criminal Court, Jan. 2014, A.U. Doc. Assembly/AU/13(XXII).

African Union, Assembly, Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court, Jan. 2014, A.U. Doc. Assembly/AU/Dec.493(XXII).

African Union, Assembly, Decision on the Hissene Habre Case, Jul. 2016, A.U. Doc. Assembly/AU/Dec.615(XXVII).

African Union, Assembly, Decision on the International Criminal Court, Jul. 2016, A.U. Doc. Assembly/AU/Dec.616(XXVII).

(3) Doctrine and others

F. Aggad-Clerx and P. Apiko, The International Criminal Court, Africa and the African Union, 11 November 2016, ECDPM Discussion Paper No. 201, vi-23p. Available online (<http://www.ecdpm.org/dp201/>).

M.C. Bassiouni and D. Hansen, The Inevitable Practice of the Office of the Prosecutor, *ICC Forum*, Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately? March 2013 – January 2014. Available online (<https://iccforum.com/africa>).

F. Bensouda, "We Are Not Against Africa", Interview, *New African Magazine*, 11 September 2012. Available online (<https://newafricanmagazine.com/3303/>).

D. Bosco, *Rough Justice. The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014, x-297p.

D. Bosco, Time for the African Union to Choose a Path, *International Criminal Justice Today*, 8 December 2014. Available online (<https://www.international-criminal-justice->

today.org/arguendo/time-for-the-african-union-to-choose-a-path/).

T.F. Buchwald (Amb.), The Path Forward for the International Criminal Court: Questions Searching for Answers, *Case Western Reserve Journal of International Law* 52 (2020), 417-431. Available online (<https://scholarlycommons.law.case.edu/jil/vol52/iss1/18>).

B.J. Cannon, D.R. Pkalya, and B. Maragia, The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative, *African Journal of International Criminal Justice* 2 (2016) 1-2, pp. 6-28. Available at SSRN (<https://ssrn.com/abstract=3061703>).

P. Clark, Why International Justice Must Go Local: The ICC in Africa, Africa Research Institute, CounterPoints, 12 March 2019. Available online (<https://www.africaresearchinstitute.org/newsite/publications/why-international-justice-must-go-local-the-icc-in-africa/>).

M. Clarke Kamari, Accountability and the Expansion of the Criminal Jurisdiction of the African Court, *International Criminal Justice Today*, 21 November 2014. Available online (<https://www.international-criminal-justice-today.org/arguendo/accountability-and-the-expansion-of-the-criminal-jurisdiction-of-the-african-court/>).

M. Clarke Kamari, *Fictions of Justice. The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, Cambridge, 2009, xxv-322p.

M. Clarke Kamari, Is the ICC targeting Africa inappropriately or are there sound reasons and justifications for why all the situations currently under investigation or prosecution happen to be in Africa? *ICC Forum*, Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately? March 2013 – January 2014. Available online (<https://iccforum.com/africa>).

J.V.R. Cole, Africa's Relationship with the International Criminal Court: More Political than Legal, *Melbourne Journal of International Law* 14 (2014) 2, 670-698. Available online (<https://law.unimelb.edu.au/data/assets/pdf>

[file/0004/1687495/10Cole-Depaginated.pdf](https://iccforum.com/africa)).

M.M. deGuzman, Response to Question: Is the ICC Targeting Africa Inappropriately? *ICC Forum*, Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately? March 2013 – January 2014. Available online (<https://iccforum.com/africa>).

P.C. Diaz, *The International Criminal Court in Central and Eastern Africa: Between the Possible and the Desirable*, PhD Thesis, Graduate School-Newark Rutgers, The State University of New Jersey, May 2010, iv-293p.

R. Garrido, African Regional Jurisdiction: How African Union is Creating an Innovative Regional Jurisdiction for international Crimes, *Portuguese Law Review* 4 (2020) 1, pp. 113-140. Available at SSRN (<https://ssrn.com/abstract=3567754>).

S. Ghodri, L'Afrique et la Cour pénale internationale : deux entités irréconciliables ? *Revue des Juristes de Sciences Po*, 2009. Available online (<https://www.revuedesjuristesdesciencespo.com/index.php/2020/11/05/lafrique-et-la-cour-penale-internationale-deux-entites-irreconciliables/>).

R. Goldstone and P. Hoffman, The ICC deserves the continued support of SA and all other peace-loving nations, *Daily Maverick*, Op-Ed, 14 August 2020. Available online (<https://www.dailymaverick.co.za/article/2020-08-14-the-icc-deserves-the-continued-support-of-sa-and-all-other-peace-loving-nations/>).

E. Guematcha, L'Afrique et la Cour pénale internationale, *Annuaire Français de Relations Internationales* XIX (2018), pp. 623-636 (<https://www.afri-ct.org/wp-content/uploads/2019/07/Article-Guematcha.pdf>). See also the updated and translated version: Africa and the International Criminal Court, available at SSRN (<https://ssrn.com/abstract=3631968>).

D. Guilfoyle, Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis, *Melbourne Journal of International Law* 20 (2019) 2, 1-52. Available online

(https://law.unimelb.edu.au/data/assets/pdf_file/0003/3567441/Guilfoyle.pdf).

R.J. Hamilton, Africa, the Court, and the Council, in M.M. deGuzman, J.E. Beasley, & V. Oosterveld (eds.), *The Elgar Companion to the International Criminal Court* (2020). American University, WCL Research Paper No. 2019-01, Available at SSRN (<https://ssrn.com/abstract=3235475>).

D. Hoile, *Justice Denied. The Reality of the International Criminal Court*, The Africa Research Centre, London, 2014, xiii-609p.

M. Jackson, Regional Complementarity. The Rome Statute and Public International Law, *Journal of International Criminal Justice* 14 (2016) 5, 1061-1072. Available online (<https://doi.org/10.1093/jicj/mqw045>).

C.C. Jalloh, Africa and the International Criminal Court: Collision Course or Cooperation? *North Carolina Central Law Review* 34 (2012), pp. 203-229. Available online (https://ecollections.law.fiu.edu/faculty_publications/253).

C.C. Jalloh, International Criminal Court, Decision on the Authorization of an Investigation into the Situation in the Republic of Kenya, *American Journal of International Law* 105 (2011), pp. 540-547. Available online (https://ecollections.law.fiu.edu/faculty_publications/245).

C.C. Jalloh, Kenya vs. The ICC Prosecutor, *Harvard International Law Journal* 53 (2012), pp. 269-285. Available online (https://ecollections.law.fiu.edu/faculty_publications/249).

C.C. Jalloh, Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa, *African Journal of Legal Studies* 7 (2014), pp. 43-59. Available online (<https://doi.org/10.1163/17087384-12342040>).

C.C. Jalloh, Regionalizing International Criminal Law? *International Criminal Law Review* 9 (2009), pp. 445-499. Available online (https://ecollections.law.fiu.edu/faculty_publications/250).

C.C. Jalloh, D. Akande and M. du Plessis, Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court, *African Journal of Legal Studies* 4 (2011), pp. 5-50. Available online (https://ecollections.law.fiu.edu/faculty_publications/242).

C.C. Jalloh and I. Bantekas (eds), *The International Criminal Court and Africa*, Oxford University Press, Oxford, 2017, 426p.

C.C. Jalloh, M. Clarke Kamari, V.O. Nmehielle (eds.), *The African Court of Justice and Human and Peoples' Rights in Context. Development and Challenges*, Cambridge University Press, Cambridge, 2019, xxv-1167p. Available online (<https://doi.org/10.1017/9781108525343>).

J.-B. Jeangène Vilmer, Union africaine versus Cour pénale internationale : répondre aux objections et sortir de la crise, *Etudes internationales* 45 (2014) 1, pp. 5-26. Available online (<https://www.jbjv.com/L-Afrique-face-a-la-justice-penale,712.html>).

B. Kahombo, Africa Within the Justice System of the International Criminal Court: The Need for a Reform, KFG Working Paper Series, No. 2, Berlin Potsdam Research Group “The International Rule of Law – Rise or Decline?”, May 2016. Available at SSRN (<https://ssrn.com/abstract=3129009>).

G.S. Kamanda, The International Criminal Court in Africa: A Motion for Continued Constructive Engagement, *International Journal of African Studies* 1 (2021) 2, pp. 27-42. Available at SSRN (<https://ssrn.com/abstract=3890800>).

S. Kendall, ‘UhuRuto’ and Other Leviathans: The International Criminal Court and the Kenyan Political Order, *African Journal of Legal Studies* 7 (2014), pp. 399-427.

E. Keppler, Managing Setbacks for the International Criminal Court in Africa, *Journal of African Law* 56 (2012) 1, pp. 1-14.

M. Kersten, Building Bridges and Reaching Compromise. Constructive Engagement in the Africa-ICC Relationship, Wayamo Foundation Policy Report, 2018, 30p. Available online (https://www.wayamo.com/wp-content/uploads/2018/05/ICC-Africa-Paper_May-2018-1.pdf).

T.R. Kirabira, Surrender of Ali Kushayb and Paul Gicheru: New Perspectives in Africa's Relationship with the ICC, *New York University Journal of International Law and Politics* 54 (2021) 1. Available at SSRN (<https://ssrn.com/abstract=4118985>).

R. Lekalake and S. Buchanan-Clarke, Support for the International Criminal Court in Africa. Evidence from Kenya, Afrobarometer Policy Paper No. 23, August 2015, 18p. Available online (https://www.afrobarometer.org/wp-content/uploads/migrated/files/publications/Policy%20papers/ab_r6_policypaperno23_kenya_anti_corruption.pdf).

O.A. Maunganidze, The Conflation of Politics and Law: Africa and the International Criminal Justice, *International Criminal Justice Today*, 8 December 2014. Available online (<https://www.international-criminal-justice-today.org/arguendo/the-conflation-of-politics-and-law-africa-and-international-criminal-justice/>).

H. Mbori Otieno, The Merged African Court of Justice and Human Rights (ACJ&HR) as a Better Criminal Justice System than the ICC, *University of Nairobi Law Journal* 8 (2015) 1, pp. 118 et seq. Available at SSRN (<https://ssrn.com/abstract=4010815>).

P. Mendes Errol, *Peace and Justice at the International Criminal Court. A Court of Last Resort*, Edward Elgar, Cheltenham (UK) and Northampton (USA), 2010, viii-215p.

A. Ngari, Sticking with the ICC is Africa's best shot at reform, *ISS Today*, 16 November 2016. Available online (<https://issafrica.org/iss-today/sticking-with-the-icc-is-africas-best-shot-at-reform>).

A. Ngari, The real problem behind South Africa's refusal to arrest al-Bashir, *ISS Today*, 10 July 2017. Available online (<https://issafrica.org/iss-today/the-real-problem-behind-south-africas-refusal-to-arrest-al-bashir>).

W. Nortje, South Africa's Refusal to Arrest Omar Al-Bashir, TOAEP, FICHL Policy Brief Series No. 85 (2017), 4p. Available online (<https://www.toaep.org/pbs-pdf/85-nortje/>).

Oxford Transitional Justice Research, Debating International Justice in Africa, Collected Essays, 2008-2010, 208p. Available online (https://www.law.ox.ac.uk/sites/default/files/migrated/justice_in_africa1.pdf).

M. du Plessis, The International Criminal Court that Africa Wants, Institute for Security Studies, Monograph 172, August 2010, ix-105p. Available online (<https://issafrica.s3.amazonaws.com/site/uploads/Mono172.pdf>).

C. Rossi, Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court, *Human Rights Quarterly* 40 (2018) 2, pp. 369-405. Available at SSRN (<https://ssrn.com/abstract=2969130>).

J.J. Sarkin, Reforming the International Criminal Court (ICC): Progress, Perils and Pitfalls Post the ICC Review Process, *International and Comparative Law Review* 21 (2021) 1, pp. 7-42. Available online (<https://doi.org/10.2478/iclr-2021-0001>).

J.J. Sarkin, Understanding South Africa's Changing Positions on International Criminal Justice: Why the country wanted to withdraw from the International Criminal Court (ICC) and why it may remain in the ICC for the time being? *Cadernos de Estudos Africanos* 40 (2020), pp. 91-114. Available online (<http://journals.openedition.org/cea/5353>).

L.I. Schneider, The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa? *Journal of International Criminal Law* 1 (2020) 1, pp. 90-109. Available online (https://www.jicl.ir/article_113047.html).

C.A. Taku (chief), Has the International Criminal Court Inappropriately Targeted Africa? *ICC Forum*, Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately? March 2013 – January 2014. Available online (<https://iccforum.com/africa>).

A. Tejan-Cole, Is the ICC's exclusively African case docket a legitimate and appropriate intervention or an unfair targeting of Africans? *ICC Forum*, Africa Question: Is the International Criminal Court (ICC) Targeting Africa Inappropriately? March 2013

– January 2014. Available online (<https://iccforum.com/africa>).

M.T. Tessema and M. Vesper-Gräske, Africa, the African Union and the International Criminal Court: Irreparable Fissures? TOAEP, FICHL Policy Brief Series No. 56 (2016), 4p. Available online (<https://www.toaep.org/pbs-pdf/56-tadesse-graeske>).

B. van der Merwe (ed.), International Criminal Justice in Africa. Challenges and Opportunities, Konrad Adenauer Stiftung, Nov. 2014, iv-108p. Available online (https://www.kas.de/o/webfriend-to-liferay-url-rest-endpoint/urlredirect/url/wf/doc/kas_39470-1522-2-30.pdf?141110132544).

B. van Schaack, African Heads of State Before the International Criminal Court, *International Criminal Justice Today*, 21 June 2015. Available online (<https://www.international-criminal-justice-today.org/arguendo/african->

[heads-of-state-before-the-international-criminal-court/](https://www.international-criminal-justice-today.org/arguendo/african-heads-of-state-before-the-international-criminal-court/)).

E. Wakesho Ngolo, Analysing the Future of International Criminal Justice in Africa: A Focus on the ICC, *Strathmore Law Review* 1 (2016) 1. Available at SSRN (<https://ssrn.com/abstract=3627834>).

Wayamo Foundation & Konrad Adenauer Stiftung, *Precurity or Prosperity: African Perspectives on the Future of the International Criminal Court*, December 2020, 47p. Available online (<https://africanperspectives.wayamo.com/>).

G. Werle, L. Fernandez and M. Vormbaum (eds.), *Africa and the International Criminal Court*, Asser Press & Springer, The Hague, 2014, International Criminal Justice Series Vol. 1, xiii-303p. Available online (<https://link.springer.com/content/pdf/10.1007/978-94-6265-029-9.pdf?pdf=button>).

Appendix on African States and the Rome Statute

A. 33 African States are party to the Rome Statute:

1. Benin signed on 24 Sep 1999 and ratified on 22 Jan 2002.
2. Botswana signed on 8 Sep 2000 and ratified on 8 Sep 2000.
3. Burkina Faso signed on 30 Nov 1998 and ratified on 16 Apr 2004.
4. Cabo Verde signed on 28 Dec 2000 and ratified on 10 Oct 2011.

24 January 2012: With regard to article 87 (2) of the Rome Statute, Cape Verde declares that all requests for cooperation and any other supporting documents that it receives from the Court shall be transmitted through diplomatic channels via its Embassy in Brussels, preferably in Portuguese or translated in this language.

5. Central African Republic signed on 7 Dec 1999 and ratified on 3 Oct 2001.
6. Chad signed on 20 Oct 1999 and ratified on 1 Nov 2006.

14 December 2010: The Government of the Republic of Chad maintains the diplomatic channel for communications and French as the working language in accordance with article 87 paragraphs 1 (a) and 2 of the Rome Statute.

7. Comoros signed on 22 Sep 2000 and ratified on 18 Aug 2006.
8. Congo signed on 17 Jul 1998 and ratified on 3 May 2004.
9. Côte d'Ivoire signed on 30 Nov 1998 and ratified on 15 Feb 2013.

There is a note on Côte d'Ivoire. However, this note was missing from the UN Treaty website as of 15 December 2022.

10. Democratic Republic of the Congo signed on 8 Sep 2000 and ratified on 11 Apr 2002.
 “Pursuant to article 87, paragraph 1 (a) of the Rome Statute of the International Criminal Court, requests for cooperation issued by the Court shall be transmitted to the Government Procurator's Office of the Democratic Republic of the Congo. For any request for cooperation within the meaning of article 87, paragraph 1 (a) of the Statute, French shall be the official language.”
11. Djibouti signed on 7 Oct 1998 and ratified on 5 Nov 2002.
12. Gabon signed on 22 Dec 1998 and ratified on 20 Sep 2000.
13. Gambia did not attend the Rome Conference (See U.N. Doc. A/CONF.183/13(Vol.I), p. 74), but signed on 4 Dec 1998 and ratified on 28 Jun 2002.

In accordance with article 127 (1) of the Rome Statute of the International Criminal Court, on 10 Nov 2016, the Government of Gambia notified the Secretary-General of its decision to withdraw from the Rome Statute of the International Criminal Court (See C.N.862.2016.TREATIES-XVIII.10).

On 10 February 2017, the Government of The Gambia notified the Secretary-General of its decision to rescind its notification of withdrawal from the Rome Statute deposited with the Secretary-General on 10 November 2016. (See C.N.62.2017.TREATIES-XVIII.10 of 16 February 2017).

14. Ghana signed on 18 Jul 1998 and ratified on 20 Dec 1999.
15. Guinea signed on 7 Sep 2000 and ratified on 14 Jul 2003.
16. Kenya signed on 11 Aug 1999 and ratified on 15 Mar 2005.

17. Lesotho signed on 30 Nov 1998 and ratified on 6 Sep 2000.

17 March 2004: “Pursuant to Article 87 paragraph 1 (a) and 2 of the Rome Statute establishing the International Criminal Court, with regard to the Kingdom of Lesotho, requests for cooperation and any documents supporting such requests shall be transmitted through the diplomatic channel, that is, the Ministry of Foreign Affairs of the Kingdom of Lesotho, and such communication be in the English language.”

18. Liberia signed on 17 Jul 1998 and ratified on 22 Sep 2004.
 19. Madagascar signed on 18 Jul 1998 and ratified on 14 Mar 2008.
 20. Malawi signed on 2 Mar 1999 and ratified on 19 Sep 2002.
 21. Mali signed on 17 Jul 1998 and ratified on 16 Aug 2000.

21 May 2004: Pursuant to article 87, paragraphs 1 (a) and 2 of the Rome Statute, relating to the designation of channels of communication between States parties and the Court and to the language to be used in requests for cooperation, the Permanent Mission of Mali to the United Nations has the honour to inform the Secretariat that the Government of Mali wishes such requests to be addressed to it in French, the official language, through the diplomatic channel.

22. Mauritius signed on 11 Nov 1998 and ratified on 5 Mar 2002.
 23. Namibia signed on 27 Oct 1998 and ratified on 25 Jun 2002.
 24. Niger signed on 17 Jul 1998 and ratified on 11 Apr 2002.
 25. Nigeria signed on 1 Jun 2000 and ratified on 27 Sep 2001.
 26. Senegal signed on 18 Jul 1998 and ratified on 2 Feb 1999.
 27. Seychelles signed on 28 Dec 2000 and ratified on 10 Aug 2010.
 28. Sierra Leone signed on 17 Oct 1998 and ratified on 15 Sep 2000.

30 April 2004: “.....the Permanent Mission of Sierra Leone to the United Nations remains the main channel of communication between Sierra Leone as a State Party and the Court, the language of communication is English.”

29. South Africa signed on 17 Jul 1998 and ratified on 27 Nov 2000.

In accordance with article 127 (1) of the Rome Statute of the International Criminal Court, on 19 Oct 201, the Government of South Africa notified the Secretary-General of its decision to withdraw from the Rome Statute of the International Criminal Court (See C.N.786.2016.TREATIES-XVIII.10).

However, on 7 March 2017, the Government of South Africa notified the Secretary-General of the revocation of its notification of withdrawal from the Rome Statute deposited with the Secretary-General on 19 October 2016. (See C.N.121.2017.TREATIES-XVIII.10).

30. Tunisia did not sign before acceding on 24 Jun 2011.
 31. Uganda signed on 17 Mar 1999 and ratified on 14 Jun 2002.
 32. United Republic of Tanzania signed on 29 Dec 2000 and ratified on 20 Aug 2002.
 33. Zambia signed on 17 Jul 1998 and ratified on 13 Nov 2002.

B. 1 single African State withdrew from the Rome Statute

1. Burundi signed on 13 Jan 1999 and ratified on 21 Sep 2004.

In accordance with article 127 (1) of the Rome Statute of the International Criminal Court, on 27 Oct 2016, the Government of Burundi notified the Secretary-General of

its decision to withdraw from the Rome Statute of the International Criminal Court (See C.N.805.2016.TREATIES-XVIII.10).

This withdrawal became effective on 27 Oct 2017.

C. 21 African States are not party to the Rome Statute:

1. Algeria signed on 28 Dec 2000.
2. Angola signed on 7 Oct 1998.
3. Cameroon signed on 17 Jul 1998.
4. Egypt only signed on 26 Dec 2000.

Declarations:

...

2. The Arab Republic of Egypt affirms the importance of the Statute being interpreted and applied in conformity with the general principles and fundamental rights which are universally recognized and accepted by the whole international community and with the principles, purposes and provisions of the Charter of the United Nations and the general principles and rules of international law and international humanitarian law. It further declares that it shall interpret and apply the references that appear in the Statute of the Court to the two terms fundamental rights and international standards on the understanding that such references are to the fundamental rights and internationally recognized norms and standards which are accepted by the international community as a whole.

3. The Arab Republic of Egypt declares that its understanding of the conditions, measures and rules which appear in the introductory paragraph of article 7 of the Statute of the Court is that they shall apply to all the acts specified in that article.

4. The Arab Republic of Egypt declares that its understanding of article 8 of the Statute of the Court shall be as follows:

(a) The provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2 (b) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which are indiscriminate in nature and cause unnecessary damage, in contravention of international humanitarian law.

(b) The military objectives referred to in article 8, paragraph 2 (b) of the Statute must be defined in the light of the principles, rules and provisions of international humanitarian law. Civilian objects must be defined and dealt with in accordance with the provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) and, in particular, article 52 thereof. In case of doubt, the object shall be considered to be a civilian.

(c) The Arab Republic of Egypt affirms that the term "the concrete and direct overall military advantage anticipated" used in article 8, paragraph 2 (b) (iv), must be interpreted in the light of the relevant provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I). The term must also be interpreted as referring to the advantage anticipated by the perpetrator at the time when the crime was committed. No justification may be adduced for the nature of any crime which may cause incidental damage in violation of the law applicable in armed conflicts. The overall military advantage must not be used as a basis on which to justify the ultimate goal of the war or any other strategic goals. The advantage anticipated must be proportionate to the damage inflicted.

(d) Article 8, paragraph 2 (b) (xvii) and (xviii) of the Statute shall be applicable to all types of emissions which are indiscriminate in their effects and the weapons used to deliver them, including emissions resulting from the use of nuclear weapons.

5. The Arab Republic of Egypt declares that the principle of the non-retroactivity of the jurisdiction of the Court, pursuant to articles 11 and 24 of the Statute, shall not invalidate the well-established principle that no war crime shall be barred from prosecution due to the statute of limitations and no war criminal shall escape justice or escape prosecution in other legal jurisdictions.

Notifications made under article 87 (1) and (2)

Pursuant to article 87, paragraphs 1 and 2, the Arab Republic of Egypt declares that the Ministry of Justice shall be the party responsible for dealing with requests for cooperation with the Court. Such requests shall be transmitted through the diplomatic channel. Requests for cooperation and any documents supporting the request shall be in the Arabic language, being the official language of the State, and shall be accompanied by a translation into English being one of the working languages of the Court.

5. Equatorial Guinea did not even attend the Rome Conference (See U.N. Doc. A/CONF.183/13(Vol.I), p. 74).
6. Eritrea signed on 7 Oct 1998.
7. Ethiopia did not even sign.
8. Guinea-Bissau only signed on 12 Sep 2000.
9. Libya did not even sign.
10. Mauritania did not even sign.
11. Morocco only signed on 8 Sep 2000.
12. Mozambique only signed on 28 Dec 2000.
13. Rwanda did not even sign.
14. Sahrawi Arab Democratic Republic could not attend the Rome Conference because it is not a recognized State within the framework of the United Nations.
15. Sao Tome and Principe only signed on 28 Dec 2000.
16. Somalia did not even attend the Rome Conference (See U.N. Doc. A/CONF.183/13(Vol.I), p. 75).
17. South Sudan did not sign because it did not exist at the time.
18. Sudan only signed on 8 Sep 2000.

In a communication received on 26 August 2008, the Government of Sudan informed the Secretary-General of the following:

“....., Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”

19. Swaziland did not even sign.
20. Togo did not even sign.
21. Zimbabwe signed on 17 Jul 1998.

Examining the domestic legal framework in select African States that form part of the situational docket of the International Criminal Court

Geoffrey Lugano

1. Introduction

Although the International Criminal Court (ICC) sits at the centre of the global war on impunity for alleged perpetrators of atrocity crimes (genocide, crimes against humanity, war crimes and the crime of aggression), States have the primary responsibility of investigating and prosecuting such serious perpetrators. The treaty establishing the ICC—the Rome Statute (or the “Statute”)—has produced a criminal justice system that is heavily reliant on national courts based on the Statute’s foundational principle of complementarity.¹ As such, the Statute confers the primacy of jurisdiction for core international crimes to national institutions, with the ICC only stepping in as a Court of ‘last resort.’

Nonetheless, as a formal matter, States have no obligations to enact implementing legislations of the Rome Statute in this ‘total war on impunity.’ While the duty to prosecute alleged perpetrators of core

international crimes is mentioned in the preamble of the Rome Statute, it is not binding. Yet still, as a practical matter, it is implied in the commitments undertaken that States should have domestic laws ‘that are adequate, in both substantive and procedural terms,’² whether they follow either the monist or dualist legal systems, to enable them to fulfil their primary responsibilities in the ICC’s system of justice.

More so, the alternative of prosecuting core international crimes as ‘ordinary’ is not convincing. Ordinary criminal law provisions are not always well suited to prosecute all those forms of conducts encompassed under the substantive provisions of the ICC Statute.³ In this sense, the prosecution of core international crimes as ‘ordinary’ does not produce the same stigmatization or significance as the former would.⁴

¹ Julio Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC,’ *Journal of International Criminal Justice* 5 (2) (2007): 421–440; Art.1 and 17 of the Rome Statute.

² Ibid.

³ Olympia Bekou, ‘National Implementation of the ICC Statute to Prosecute International Crimes in Africa,’ in *The International Criminal Court and Africa*, ed. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 274.

⁴ Ibid, 275.

National implementation of the Rome Statute enables States to perform their primary duties to investigate crimes whose jurisdiction could potentially be claimed by the ICC, and consequently escape being rendered unable.⁵ In this regard, inability could be attributed to inadequacies in domestic law, ‘which might render the national judicial system substantially or unavailable,’ thus rendering the cases admissible at the ICC.⁶ In other words, States’ failure to enact implementing legislation of the Rome Statute limits the possibilities of bringing to justice alleged perpetrators of core international crimes.⁷ If many States were to follow this trend, the ICC is likely to be overwhelmed by the number of cases that pass the admissibility tests before it. Such an eventuality is counter-intuitive to the principle of complementarity, which grants the primacy of jurisdiction over core international crimes to national institutions.

Against the backdrop of recent calls for reforms at the ICC,⁸ this paper examines the domestic legal framework in select African States that form part of the situational

docket of the Court as of the time of writing. In so doing, the paper assesses whether there has been domestic implementing legislation of the Rome Statute in the African situations, and the challenges arising in that regard. Questions that are addressed are whether there are missing gaps that cause lags in cooperation with the ICC, in the experience of African States, and whether there are structural and other issues that could be examined and revisited.

Since the ICC’s establishment in 2002, Africa has provided the highest number of its active situations. These include Uganda, Sudan, the Democratic Republic of Congo (DRC), Kenya, Libya, Central African Republic (CAR), Mali, and Côte d’Ivoire. Whereas the ICC’s interventions on the continent have elicited mixed reactions,⁹ the question that begs answering is whether African States’ contact with the ICC has led to reforms in their national legal systems in such a way that they would avoid deference to the Court in future. Reforming the legal frameworks in African States is particularly important in satisfying the principle of

⁵ Ovo Catherine Imoedemhe, *The Complementarity Regime of the International Criminal Court: National implementation in Africa* (Cham: Springer, 2017), 62.

⁶ *Ibid.*, 62; Article 17(3) of the Rome Statute.

⁷ Bekou, *supra* n 5..

⁸ Assembly of State Parties, *supra* n 2.

⁹ Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa, ‘After Nuremberg: Exploring Multiple Dimensions of the Acceptance of

International Criminal Justice,’ *International Nuremberg Principles Academy*, 2017, <https://www.nuremberg-academy.org/resources/acceptance-online-platform/publications/online-edited-volume/> (accessed 7 January 2023); Peter Brett and Line Engbo Gissel, *Africa and the Backlash Against International Courts* (London: Zed Books, 2020).

complementarity and fostering cordial relations with the ICC. In the absence of domestic abilities to investigate and prosecute alleged perpetrators of core international crimes, the ICC is likely to continue intervening in African situations that satisfy the admissibility test, albeit with continued pan-Africanist pushbacks¹⁰ as witnessed earlier on during the Court’s foremost interventions on the continent.¹¹

While several African States formed part of the situational docket at the ICC as of the time of writing, this paper focuses on a few States following a case selection matrix. Case selection is premised on striking a balance on States’ geographical locations (west, east, central, and north Africa), the modes of the ICC’s trigger of the jurisdiction (state-referrals, the United Nations Security Council (UNSC) referrals, and the Office of the Prosecutor’s (OTP) *proprio motu* (own motion) provision), and States’ legal traditions (common law, civil law, and *sharia* (Islamic) law). For the ICC’s case origination, preference is given to first-case scenarios owing to their precedent-setting qualities.

As a result, Uganda, Kenya, and Sudan have been selected as the ICC’s first state-referral, *proprio motu* (own motion) and the

UNSC referral situations, respectively. Furthermore, both Uganda and Kenya practice common law and are situated in east Africa; Sudan’s selection is premised on its location in North Africa and the *Sharia* legal systems. In order to complete the African geographical and legal landscape, CAR and Côte d’Ivoire merited case selection as civil law traditions, and locations in central and west Africa, respectively. However, it is important to note that the five cases selected are not representative of their respective regions and legal systems, as each has its unique political context under which the Rome Statute is domesticated. Yet still, the few cases selected provide an impression of the status of national implementation of the relevant provisions of the Rome Statute in Africa, and from which meaningful implications could be drawn.

Case selection matrix.

<i>Situation</i>	<i>Modes of the ICC’s intervention</i>	<i>Region</i>	<i>Legal system</i>
1. <i>Uganda</i>	State-referral	East	common law
2. <i>Sudan</i>	UNSC referral	North	Sharia
3. <i>Kenya</i>	Proprio motu	East	common law
4. <i>Côte d’Ivoire</i>	Proprio motu	West	civil law
5. <i>CAR</i>	State referrals (2)	Central	civil law

¹⁰ Kamari Maxine Clarke, *Affective justice: The International Criminal Court and the Pan-Africanist*

pushback (Durham and London: Duke University Press, 2019).

¹¹ *Ibid.*

The review of the status of affairs in the select African States that form the situational docket at the ICC (as of the time of writing) began with an examination of the pathways that they adopted towards adjusting their legal orders with those of the Rome Statute. These include temporal dimensions of reforms that speak to the context in which the ICC's normative framework diffuses and the various approaches (individual or model approach, and variants of express criminalization) that have implications on the scope of States' implementing legislations.

Next, was the evaluation of the States' enactment of the provisions of the Rome Statute that primarily enable the global war on impunity for alleged perpetrators of atrocity crimes. These are 1) criminalization of core international crimes as stipulated in Article 5 of the Statute, 2) elimination of obstacles to investigations and prosecutions (vide the principles of individual criminal responsibility, the irrelevance of official capacity and non-applicability of statutes of limitation), 3) cooperation with the ICC, 4) witness protection, 5) victim-centeredness, and 6) penalties. In so doing, relevant legal documents (such as statutes, constitutions, regulations, and so forth) were reviewed vis-à-vis their implementation of and alignment with the Rome Statute.

Taking the relevant sections of the Rome Statute as points of reference, the select States were examined with regards to their implementation of, and alignment with each of the six primary provisions highlighted above. Such an assessment was also enriched by reviewing the extant literature on the ICC and the States' implementation of the Statute such as journal articles, media sources, reports from governmental and non-governmental organizations (NGOs) and commentaries on relevant provisions of the Statute.

Consequently, the assessment establishes that the select African States that form part of the situational docket at the ICC (as of the time of writing) have varying levels of domestic legal compliance with the Rome Statute system of justice, as well as missteps that undermine their abilities to effectively confront impunity for alleged perpetrators of atrocity crimes. To illustrate, although the core international crimes are generally prohibited in the States' respective legislations, their definitions are problematic in some cases, particularly in States that opted for individual and dynamic criminalization approaches such as Sudan and CAR. Moreover, most States are yet to eliminate all the obstacles to prosecutions, as a few others (Sudan and Côte d'Ivoire) have no legislation on cooperation with the ICC, while victim-centeredness and witness

protection portend as ‘judicial afterthoughts’ in most of the States. Furthermore, the death penalty is still imposed in some States despite international abolition trends,¹² and the Statute’s signal that even ‘the most serious crimes of concern to the international community as a whole’¹³ do not warrant it.

Beyond the legal requirements, the African States are confronted with rival normative frameworks that have implications on their abilities to comply with the Rome Statute system of justice. In all the States under study, the traction of restorative justice has engendered the adoption of amnesty, reconciliatory tones and traditional justice mechanisms that undermine the opportunities for putting to ‘test’ the legal reforms that come with the national implementing legislation of the Rome Statute.

This introduction is followed by discussions of the pathways in States’ implementation of the Rome Statute, which include the temporal dimensions that reveal the contexts under which the Statute diffuses, and the approaches that States adopt in aligning their legal orders with the Statute. The paper then turns to national implementation of the provisions of the

Statute that primarily enable the global war on impunity for alleged perpetrators of atrocity crimes, namely: 1) incorporation and definition of Article 5 crimes, 2) elimination of obstacles to prosecutions, 3) cooperation with the ICC, 4) witness protection, 5) victim centeredness, and 6) penalties. Afterwards, the paper goes beyond the legal reforms to assess the rival normative frameworks in the States under study that undermine their motion towards prosecuting alleged perpetrators of atrocity crimes. The paper then concludes with a summary of each of the States’ missteps in their implementing legislation and proposes some policy recommendations in addressing them.

2. Pathways in States’ Implementation of the Rome Statute

With regard to the incorporation of international law, States are said to operate under either monist or dualist legal traditions. Simply put, the monist tradition implies that when a State ratifies an international treaty, ‘the self-executing provisions of that treaty apply directly and prevail over conflicting domestic

¹² United Nations, ‘UN Experts Call for Complete Abolition of the Death Penalty as ‘Only Viable Path,’ 10 October 2022,

<https://news.un.org/en/story/2022/10/1129382> (accessed 7 January 2023).

¹³ Preamble of the Rome Statute.

provisions.¹⁴ Conversely, the dualist tradition requires the incorporation of legislation to give effect to international treaties at the national level.¹⁵ The implication is that arguments could be made that for States that follow the monist tradition, implementation legislations are unnecessary, as the Rome Statute ‘would be directly applicable in the domestic legal order’ and would triumph over any conflicting domestic legislation.¹⁶

However, the ‘pure’ form of monism is rarely practised, given that most States find themselves operating between the two extremes of monism and dualism.¹⁷ Furthermore, for States that follow the ‘pure’ monist legal tradition, it is difficult to determine how the Rome Statute could be applied in the absence of specific legislative authority.¹⁸ For example, the cooperation regime requires legislation, pursuant to Article 88 of the Rome Statute, that expressly calls upon States to ‘ensure that there are available procedures under their national law’ for all the specified forms of cooperation.

Going back to the arguments that could be made on the irrelevance of implementing legislation in monist legal traditions, similar

arguments could be made in dualist systems, as the Rome Statute does not impose express obligations in this regard. However, as already highlighted in the previous section, States’ enactment of adequate domestic legislation in both substantive and procedural terms is a prerequisite for fulfilling their primary responsibilities in the Rome Statute system of justice. In so doing, States have discretion on when, and how they should enact implementing legislation of the Rome Statute, given the silence of the Statute in this regard and the absence of guidelines elsewhere. Hence, States can embark on enacting legislation before or after ratifying the Rome Statute, and they can adopt any appropriate methods in such endeavours.

As such, the temporal dimensions of national implementation of the Rome Statute unveil the contexts in which the ICC’s normative framework diffuses, including the level of political consensus on the provisions of the Statute, local capacity to domesticate them, and the general sentiments about atrocity crimes. Conversely, the approaches or methods that States adopt in enacting domestic legislation have implications on the scope of their

¹⁴ Olympia Bekou and Sangeeta Shah, ‘Realising the Potential of the International Criminal Court: The African Experience,’ *Human Rights Law Review*, 6(3) (2006): 503.

¹⁵ Ibid.

¹⁶ Ibid, 503.

¹⁷ Ibid, 504.

¹⁸ Ibid.

implementation of the relevant provisions of the Statute.

2.1. Temporal Dimensions in States' Implementation of the Rome Statute

African States were relatively fast in signing the Rome Statute, beginning with Senegal on 17 July 1998. Of the States under study, Côte d'Ivoire first signed the Statute in November 1998, followed by Uganda in March 1999, Kenya in 1999, CAR in December 1999, and lastly Sudan in September 2000.¹⁹ However, the opposite occurred in treaty ratification and the eventual enactment of domestic implementing legislation of the Statute, revealing inadequate political will and State capacity gaps.

To illustrate, CAR ratified the Rome Statute in October 2001, followed by Uganda in June 2002, and Kenya in March 2005—several years after signing the Rome Statute and its coming into force.²⁰ For its part, Côte d'Ivoire's interests in the Statute were kept alive by a 2003 note of acceptance of the Court's jurisdiction,²¹ as Sudan unsigned the Statute in August 2008 after the Court indicted President Omar-al-Bashir.

Additionally, Côte d'Ivoire's president reconfirmed the acceptance of the Court's jurisdiction in December 2010 and May 2011, but only after the 2010-2011 post-election violence (PEV) in which atrocity crimes were committed. Côte d'Ivoire eventually ratified the Rome Statute in May 2013.²²

The States' delays in treaty ratification and the extremes of abandoning it altogether can be attributed to several factors, including 1) inadequate political will, 2) local capacity gaps, and 3) the rare occurrence of international crimes.

2.1.1. Inadequate political will

The question of political will can be discerned at the level of States' status within the Rome Statute system of justice. First, for State Parties to the ICC such as Kenya, Uganda and Côte d'Ivoire, the commitments they undertook in accepting the Court's style of justice implied that they ought to have domestic laws that are adequate in both substantive and procedural terms. Yet still, the domestic authorities in these States are culpable in the commission of atrocities in their quests for,

¹⁹ United Nations, 'Rome Statute of the International Criminal Court,' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (accessed 15 August 2022).

²⁰ Assembly of State Parties to the Rome Statute, 'State Parties,' <https://asp.icc-cpi.int/States->

<parties/States-parties-chronological-list> (accessed 15 August 2022).

²¹ International Criminal Court, 'Situations Under Investigation: Côte d'Ivoire,' <https://www.icc-cpi.int/cdi> (accessed 10 August 2022).

²² Ibid.

and maintenance of political power.²³ Hence, a critical look at the States' eventual decisions to enact national implementing legislation of the Rome Statute indicates that the pursuit of justice was not necessarily their primary motivation.

For example, in Kenya, the authorities placed the International Crimes Bill on the parliament's agenda in February 2008 after the 2007/2008 post-election (PEV).²⁴ As at the time, the political elite were eager to demonstrate their capacities in the investigation and prosecution of alleged masterminds of the 2007/2008 PEV, and potentially escape the possibilities of the ICC's intervention. With the ICC's active prosecution of the alleged masterminds of the PEV, a section of the suspects (Uhuru Kenyatta and William Ruto) who were subsequently elected as president and deputy, respectively, campaigned for Kenya's and African States' collective withdrawal from the ICC.²⁵

Equally, Uganda passed the International Crimes Act, of 2010 as part of meeting the expectations of holding an ICC conference in Kampala in that year.²⁶ Uganda's president, Yoweri Museveni, has also been publicly condemning the ICC as an unnecessary disruption in African affairs, either in defence of his Kenyan counterparts or as a cover for his alleged culpability in the northern conflict in which the ICC intervened in 2004 following State referral.²⁷

For Côte d'Ivoire, the political elite had been suspicious of the ICC, as seen in their intermittent commitment to the Court over time. In this regard, the 2015 partial amendments to the Ivorian penal code, together with further amendments could be seen as measured outcomes of State actors' balance between safeguarding their interests, and their international responsibilities. Conversely, CAR's political instability negatively impacted the State's capacity to comply with both its domestic

²³ William Gumede, 'The International Criminal Court and Accountability in Africa,' LSE Blog, 31 January 2018, <https://blogs.lse.ac.uk/africaatlse/2018/01/31/the-international-criminal-court-and-accountability-in-africa/> (accessed 7 January 2023).

²⁴ Benson Kinyua, 'The Rome Statute: Its Implementation in Kenya,' June 2011, <https://ssrn.com/abstract=2353383> (accessed 27 July 2022).

²⁵ Geoffrey Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neo-colonial: Lessons from Kenya,' *International Journal of*

Transitional Justice 11(1) (2017): 9–29; Gabrielle Lynch, *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge: Cambridge University Press, 2018).

²⁶ Sarah Nouwen, *Complementarity in the Line of fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

²⁷ Geoffrey Lugano, 'Distance in the International Criminal Court's Relations with the Local,' *International Journal of Transitional Justice* 16 (3) (2022): 346–362.

and international obligations.²⁸ As such, the State was only able to embark on legal reforms in 2010 through partial amendments to the criminal code and the code of criminal procedure.²⁹

For non-State Parties, such as Sudan, there are no obligations to enact domestic implementing legislation. Hence, Sudan's motion towards compliance with the Rome Statute system of justice followed the 2005 UNSC's referral to ostensibly 'perform complementarity' and potentially limit the ICC's involvement.³⁰ This began with the State authorities' December 2007 amendment to the Armed Forces Act 1986 that expanded the list of war crimes in the Armed Forces Act 1983, and further amendments to the Criminal Act 1991 in 2009 to provide further provisions for the criminalization of core international crimes. Sudan's chequered implementation of the Rome Statute could be understood in the context of a State under siege, as the UNSC had adopted a UN chapter 7 decision that

imposed the ICC's jurisdiction on a non-member state.

Collectively, the African States coalesce at the African Union (AU) from which they occasionally adopt non-cooperation decisions on the ICC. For example, following common perceptions of the Court's bias in Africa, the AU adopted a strategy of withdrawing *en masse* from the ICC in early 2016.³¹ While South Africa, The Gambia, Kenya, and Burundi initiated steps towards withdrawing from the Court,³² all the States but Burundi have rescinded such decisions. This is indicative of the State's acceptance of the ICC's utility in the regulation of international crimes, amidst the misgivings that the political elite might have on the Court.

2.1.2. Local capacity gaps

As a novel concept, most drafters of domestic legislation in the African States were unfamiliar with the Rome Statute and its 'delicate balances.'³³ Being a difficult task, implementation requires expert knowledge

²⁸ Godfrey Musila, 'The Special Criminal Court and other Options of Accountability in the Central African Republic: Legal and Policy Recommendations,' International Nuremberg Principles Academy, 2016, https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf (accessed 20 July 2022).

²⁹ Parliamentarians for Global Action, 'Central African Republic and the Rome Statute,' <https://www.pgaction.org/ilhr/rome-statute/central-african-republic.html> (accessed 10 July 2022).

³⁰ Nouwen, *supra* n 28 at 289..

³¹ African Union, 'Decisions and Declarations,' October 2013, https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf (accessed 7 January 2023).

³² Franck Kuwunu, 'ICC: Beyond the Threats of Withdrawal,' Africa Renewal, May-July 2017, <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> (accessed 7 January 2023); MPs Vote to Quit the ICC, *The Star*, 6 September 2013.

³³ Bekou and Shah, *supra* n 16..

of international criminal law and procedure, which most drafters of domestic legislation are not conversant in.

The capacity gaps in most ICC member States, including in Africa, contributed to the development of ‘positive complementarity,’³⁴ under which collective action was triggered towards enabling States to draft implementing legislation. Several actors, such as the Parliamentarians for Global Action (PGA), the Coalition for the International Criminal Court (CICC), and the Commonwealth Secretariat stepped in to assist African States in enacting national implementing legislations, of which some inputs will be highlighted in the subsequent section.

2.1.3. Rare occurrence of atrocity crimes

As stipulated in the preamble of the Rome Statute, atrocity crimes are those which are ‘the most serious ... and of concern to the international community’ and are so grave that ‘they threaten the peace, security and well-being of the world.’ These categories of crimes, including genocide, crimes against humanity, war crimes and the crime of aggression, are rare occurrences that are mostly committed

during hostilities. Thus, the rarity of international crimes negated the urgency of enacting domestic implementing legislation in the African States under study and many others.

2.2. Approaches in States’ Implementation of the Rome Statute

The approach that States adopt in their implementation of the Rome Statute significantly depends on their legal systems (common law, civil law or *Sharia* law) as will be seen in the divergent pathways that the various African States under study adopted. Broadly speaking, States can opt for either an individual approach under which they tailor-make their legislation, or the model approach that entails adopting a ‘model kit of implementation’. Whether States opt for either the individual or model approach, they still have to contend with selecting an appropriate method of enacting the relevant provisions of the Rome Statute.

In so doing, States have the liberty of using either the minimalist approach, or the express criminalization method.³⁵ First, in the minimalist approach, States apply ‘military or ordinary law,’ and domestic

³⁴ Positive complementarity is broadly conceived as ‘activities and actions of cooperation aimed at promoting national proceedings, with specific reference to the prosecutorial policy of the ICC.’ See Hitomi Takemura, ‘Positive Complementarity,’ Max Planck Encyclopedia of International Law,

October 2018, <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2507.013.2507/law-mpeipro-e2507?prd=MPIL> (accessed 12 July 2022).

³⁵ Imoedemhe, *supra* n 7 at 72.

crime labels that are already in place (such as murder, rape, and theft) to ‘the conduct in question.’³⁶ In this approach, States do not incorporate international crimes, but merely apply domestic laws to the applicable conduct.³⁷ This approach has been adopted in Denmark and Peru in their criminalization of serious offences.³⁸ Libya also relied on this approach during its admissibility challenge to the ICC’s prosecution of Saif Ai-Islam Gaddafi.³⁹

The downside of the minimalist approach is that the crimes, their requirements, and penalties only partially conform to international standards. As such, it might ‘not serve the best interests of States as it does not provide the opportunity to import international crimes into their domestic criminal law.’⁴⁰ Hence, the majority of States, including in Africa, have opted for the express criminalization approach that is more useful in importing the substantive provisions of the Rome Statute.

Express criminalization entails ‘specific incorporation through a general and open-ended reference to the Rome Statute.’⁴¹ This can be done in three ways: 1) the static or

literal transcription approach, 2) the dynamic criminalisation approach, and 3) the hybrid approach.⁴²

First, the static approach involves a ‘transcription of the international crimes into domestic law in such a way that it repeats the definitions’⁴³ of crimes as they appear in Article 5 of the Rome Statute. The legislation acquires the same wording and penalties as spelt out in the Statute. This approach has the advantages of clearly and predictably setting out which conduct is considered an international crime, and the applicable penalties.⁴⁴ On the flip side, this approach ‘may not take into account new developments in international criminal law.’⁴⁵

The static or literal transcription has variations, such as instances where States only make references to the Article 5 crimes and do not reproduce their texts.⁴⁶ Kenya and Uganda embraced this method in their respective implementation of the Rome Statute.⁴⁷ Another variation is where States reproduce the Article 5 crimes from the Statute, together with the full details of the ICC’s Elements of Crime document.⁴⁸ Côte

³⁶ Ibid, 72.

³⁷ Ibid, 73.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid, 73.

⁴² Ibid.

⁴³ Ibid, 74.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ See Kenya’s International Crimes Act 2008 and Uganda’s International Crimes Act 2010.

⁴⁸ Imoedehme supra n 7 at 74.

d'Ivoire used this method in its national implementation of the Rome Statute.⁴⁹

Second, the dynamic approach entails the redrafting, rephrasing, or reformulation of the Rome Statute's Article 5 crimes.⁵⁰ This is to ostensibly 'provide a better connection to existing criminal provisions in the domestic legislation or to clarify some of the Rome Statute concepts.'⁵¹ This method is compatible with the individual State approach, as it allows them to tailor the Rome Statute to their national situations. Notably, CAR and Sudan adopted these approaches in their national implementing legislations.⁵²

Third, a hybrid approach combines the static and dynamic methods. This is to 'facilitate the transcription of certain international crimes, with a generic or residual clause covering other grave violations of international humanitarian law or treaties to which the state is party.'⁵³ Changes in Finnish criminal law are considered to conform to this model.⁵⁴

2.2.1. *Static or literal transcription in Kenya, Uganda, and Côte d'Ivoire*

By adopting the static or literal transcription approach in their implementation of the relevant provisions of the Rome Statute, Kenya, Uganda, and Côte d'Ivoire defined core international crimes in domestic law in ways that are compatible with the Statute. However, Kenya and Uganda adopted the Commonwealth Model Law,⁵⁵ as Côte d'Ivoire opted for the individual approach in partially amending its penal code.

Using the Commonwealth Model Law as a template, Kenya and Uganda incorporated nearly all the substantive provisions of the Rome Statute in 'one-all-encompassing pieces of legislation.'⁵⁶ Guidance from the commonwealth, whose goals include promoting good governance, peace, human rights, and the rule of law,⁵⁷ provided the possibilities of enacting nearly 'all provisions to do with the ICC'⁵⁸ in a single legislation.

Specifically, Kenya's International Crimes Act 2008 provides for 'the punishment of certain international crimes

⁴⁹ See chapter I (offences against the jus cogens) of book II of Côte d'Ivoire's penal code.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² This can be gleaned in the States' pieces of legislation that are discussed in the subsequent sections of this report.

⁵³ Imoedemhe, *supra* n 7 at 75.

⁵⁴ Ibid.

⁵⁵ Christian De Vos, 'All Roads Lead to Rome: Implementation and Domestic Politics in Kenya

and Uganda,' in *Contested Justice: The Practice and Politics of International Criminal Interventions*, eds. Christian De Vos, Sara Kendall and Carsten Stahn (Cambridge: Cambridge University Press, 2015).

⁵⁶ Bekou and Shah, *supra* n 16 at 507.

⁵⁷ The Commonwealth, 'Democracy, Governance and Law,' <https://climate.thecommonwealth.org> (accessed 12 July 2022).

⁵⁸ Bekou and Shah, *supra* n 16 at 507.

and enabling co-operation with the ICC.⁵⁹ Further, the Act explicitly states that the Rome Statute has the force of law in Kenya, particularly with regards to the relevant provisions of the Statute such as jurisdiction, admissibility and applicable law, general principles of criminal law, rules of procedure and evidence, investigation and prosecution of crimes, the conduct of trials, penalties, appeals, international cooperation and judicial assistance, and enforcement of sentences.⁶⁰

Uganda's International Crimes Act 2010 takes a similar approach, beginning with the objective of 'giving effect to the Rome Statute of the International Criminal Court.'⁶¹ The Act also gives 'the force of law in Uganda,' and commits Uganda to the relevant provisions of the Statute in a similar fashion as Kenya.⁶²

Similarly, Côte d'Ivoire passed several separate laws that provided for the implementation of the Rome Statute. These include Bill n°2015.134 of 9 March 2015 which fully implemented certain substantial provisions of the Rome Statute, and Bill n°2015.133 of 9 March 2015 which voided the statutes of limitations.⁶³

Moreover, chapter I (offences against the jus cogens) of Book II of the penal code reproduces the Rome Statute's Article 5 crimes together with the elements of crimes and penalties, albeit selectively. Even though the penal code focuses on the description of the crimes, their elements, and penalties, it omits several provisions of the Rome Statute, notably cooperation and irrelevance of official capacity.

2.2.2. *Dynamic Criminalization in CAR and Sudan*

The dynamic criminalization approach as adopted by CAR and Sudan is evident in the pieces of legislation with which the two States implemented the relevant provisions of the Rome Statute. Based on their respective legal cultures and governance contexts, the two States reformulated various provisions of the Statute into their domestic legal systems.

First, as an authoritarian and Islamic regime for the most part of its contact with the ICC, Sudan amended its domestic law with the flavour of militarism and *Sharia* law. In this regard, Sudan's first point of call in criminalizing core international crimes was amending the Armed Forces Act 1986 in 2007. The Armed Forces Act as amended

⁵⁹ Kenya, International Crimes Act 2008.

⁶⁰ Article 4(2) of Kenya International Crimes Act 2008.

⁶¹ Uganda, International Crimes Act 2010.

⁶² *Ibid.*

⁶³ Parliamentarians for Global Action, 'Côte d'Ivoire and the Rome Statute,' <https://www.pgaction.org/ilhr/rome-statute/cote-divoire.html> (accessed 12 July 2022).

in 2007 contains a few provisions of the Rome Statute (particularly Article 5 crimes), but does not explicitly mention the terms genocide, war crimes and crimes against humanity, or refer to their international legal sources such as the Geneva and the Genocide conventions.⁶⁴

Furthermore, the Armed Forces Act was confined to military conduct and did not provide for civilian acts. Thus, in order to ‘complete the picture’,⁶⁵ Sudan amended the Criminal Act of 1991 in 2009 with the introduction of a new chapter (chapter 18) on core international crimes.⁶⁶ Whereas the new chapter is more comprehensive than the Armed Forces Act, it is aligned to customary international law rather than the Rome Statute.⁶⁷ Nonetheless, Sudan is at liberty to align its national law with customary international law, as it is not a party to the Rome Statute. At the same time, the definitions of Article 5 crimes in Sudan’s legislation have been reformulated in ways that depart from those in the Rome Statute. This is problematic, as Sudan is a party to

the Genocide and Geneva conventions, from which the Statute derives the definitions of the crimes of genocide and war crimes.

The high levels of impunity in CAR necessitated adjustments to the penal code and legal system, as effected in bill n°10.001 of 6 January 2010 that partially gave effect to substantial provisions of the Rome Statute.⁶⁸ Moreover, the 2015 Organic Law (*loi organique* n° 15-003) was enacted to provide for the establishment of the Special Criminal Court (SCC).⁶⁹

It is important to note that the Organic Law does not generate new norms, and instead cross-references domestic legislations, particularly the Central African penal code and the code of criminal procedure.⁷⁰ With regards to temporal jurisdiction, the Organic Law provided that the SCC’s investigations would begin from 1 January 2003 and proceed for an initial five-year period with the possibilities of extension.⁷¹ The SCC became fully

⁶⁴ Nouwen, supra n 28 at 284.

⁶⁵ Ibid, 286.

⁶⁶ Mohamed Babiker, ‘The prosecution of International Crimes Under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations,’ in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* ed. Lutz Oette (Brulington: Routledge, 2011).

⁶⁷ Nouwen supra n 28.

⁶⁸ Parliamentarians for Global Action, supra n 31.

⁶⁹ Loi organique n° 15-003

⁷⁰ Patryk Labuda, ‘The Special Criminal Court in the Central African Republic: Failure or Vindication of complementarity?’, *Journal of International Criminal Justice*, 15(1): 175-206.

⁷¹ Following this provision, on 28 December 2022, the CAR parliament renewed the SCC’s mandate for another five-year term. See Franck Petit, ‘Toussant Muntazini: If they Extend the Special Court Mandate, they Expect Added Value,’ JUSTICEINFO.NET, 5 January 2023, <https://www.justiceinfo.net/en/110828-toussaint->

operationally in June 2021,⁷² and conducted its first trial in May 2022.

As such, the SCC was established amidst the ICC's forays into the CAR starting with the investigations into conflicts in Bangui in 2003 that led to the Jean-Pierre Bemba case.⁷³ Further, at the end of 2018, the ICC arrested three suspects ([Mahamat Saïd Abdel Kani, Alfred Yekatom](#) and [Patrice-Edouard Ngaissona](#)) in the context of its CAR investigations.⁷⁴ Whereas the SCC's legal framework envisages cooperation with the ICC,⁷⁵ this has not been the case. As an SCC magistrate acknowledged, 'two rogatory commissions sent to the International Criminal Court in October 2021 have remained unanswered, and that there is almost no collaboration from the ICC.'⁷⁶

Given that the ICC does not have a permanent field presence in the CAR, it struggles with having an impact, making the SCC a 'valuable potential partner for the

ICC.'⁷⁷ Case-related cooperation between the SCC and the ICC is beneficial to both institutions as they could benefit from division of labour based on institutional strengths and capacities. For example, the SCC could be instrumental for the ICC in terms of securing witnesses in the CAR cases it is prosecuting and conducting outreach missions to victims and affected communities. In turn, the ICC could transfer to the SCC the loads of evidence it has been collecting for future investigations and prosecutions.

The prosecutorial capacities of the SCC are particularly envisaged in Article 3 of the Organic Law that established the court. As the legislation states, the SCC is competent to investigate and judge:

"The serious violations of human rights and serious violations of international humanitarian law committed on the territory of the Central African Republic since January 1, 2003, as defined by the Penal Code... and by virtue of the

[muntazini-extend-special-court-mandate-expected-added-value.html](#) (accessed 7 January 2023).

⁷² United Nations, 'CAR Special Criminal Court (SCC) Now Fully Operational,' June 2021, <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational> (accessed 14 July 2022).

⁷³ International Criminal Court, 'Situation in the Central African Republic: The Prosecutor v Jean Pierre Bemba Gombo,' March 2019, <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf> (accessed 7 January 2023).

⁷⁴ International Criminal Court, 'Central African Republic II,' January 2022, <https://www.icc-cpi.int/carII> (accessed 7 January 2023).

⁷⁵ This is via law n°18-010 establishing the SCC's rules of procedure and evidence. Article 14 of the SCC also provides that the SCC's prosecutor should consult the ICC's prosecutor regarding his or her investigation and prosecutorial strategy.

⁷⁶ Julian Elderfield, 'The Rise and Rise of the Special Criminal Court (Part II),' *OpinioJuris*, 7 April 2021, <https://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-ii/> (accessed 7 January 2023).

⁷⁷ *Ibid*, 1.

international obligations ... in matters of international law, in particular the genocide, crimes against humanity and war crimes.”⁷⁸

With regards to subject matter jurisdiction, the language of Article 3 is significant as reference to ‘serious violations of international humanitarian law’ covers a much broader category of offences than just the crimes of genocide, war crimes and crimes against humanity.⁷⁹ As ‘a generic term with no fixed content’, the frame of ‘serious violations of international humanitarian law’ ‘leaves the door open to potentially creative jurisprudential innovations grounded in customary international (humanitarian) law.’⁸⁰

Another notable innovation in Article 3 of the Organic Law is the provision that the SCC might refer to ‘the substantive norms and the rules of procedure established at the international level’ in three circumstances.⁸¹ These include when the legislation in force does not deal with a particular matter, when there is uncertainty concerning the interpretation or application of a rule of domestic law, and when there are questions of the compatibility of this law with international law. Nevertheless, ‘reliance on international law could in some instances elicit concerns about legality and fair trial.’⁸²

Seemingly, States have taken up their broad discretion in implementing the ICC Statute as seen in the different approaches they have adopted. A close examination of the States’ implementation of specific provisions of the Rome Statute, as well as the alignment of their legal orders with the Statute provides a more comprehensive outlook of their level of compliance with the Rome Statute system of justice.

3. National implementation of the provisions of the Rome Statute

The provisions of the Rome Statute that primarily enable criminal accountability for alleged perpetrators of atrocity crimes that States should pay attention to include: 1) the criminalization of core international crimes, 2) elimination of obstacles to prosecutions 3) cooperation with the ICC, 4) witness protection, 5) victim-centeredness, and 6) penalties for the criminalized offences.

3.1. Incorporation, and definition of Article 5 crimes

Although it is not obligatory to include the Article 5 crimes of genocide, crimes against humanity, war crimes, and crimes of aggression into domestic law, their incorporation and definition demonstrates States’ willingness to facilitate their prosecution at the national level.⁸³

⁷⁸ Article 3 of the CAR’s Organic Law.

⁷⁹ Labuda, supra n 72 at 187.

⁸⁰ Ibid, 187.

⁸¹ Musila, supra n 30 at 18.

⁸² Ibid, 18.

⁸³ Bekou and Shah, supra n 16.

Generally, the Article 5 crimes are duly incorporated in the implementing legislations of all States under study, with the exception of the crime of aggression (Article *8bis*) that was activated in December 2017 following the 2010 Kampala amendments to the Rome Statute. Additionally, the States are yet to ratify amendments to the Rome Statute on biological weapons, blinding laser weapons, and non-detectable fragments as war crimes.

States that adopted the static or literal transcription approach in their national implementation legislations (Kenya, Uganda, and Côte d'Ivoire) are compliant with the definitions of Article 5 crimes in the Rome Statute. Conversely, the definitions of the core international crimes in the States that opted for the dynamic criminalization approach (CAR and Sudan) are not in conformity with the Statute and are at times inadequate in the description of the crimes.

3.1.1. Article 5 crimes in Kenya, UGANDA, and Côte d'Ivoire

Kenya's and Uganda's respective International Crimes Acts do not reproduce the definition of the Article 5 crimes, but only make references to them.⁸⁴ In this regard, Kenya's International Crimes Act

2008 lists part 2 (which relates to jurisdiction, admissibility, and applicable law) of the Rome Statute among the relevant provisions that have the force of the law in Kenya. Further, part II (on international crimes and offences against the administration of justice) of the legislation specifies that in this section, genocide, crimes against humanity and war crimes have 'meanings ascribed to them' in the Rome Statute.

Similarly, Uganda's International Crimes Act 2010 begins with the enumeration of part 2 of the Rome Statute (that relates to jurisdiction, admissibility, and applicable law) as part of the relevant provisions of the Statute that have the force of law in Uganda.⁸⁵ In the same breadth, part II of the Act provides that genocide, crimes against humanity and war crimes are 'acts as referred to' in Articles 6, 7 and 8 of the Rome Statute, respectively.

Likewise, Côte d'Ivoire reproduces the definitions of all the Article 5 crimes together with the elements of crime in its penal code, with the exception of Article 8(2)(e) of the Rome Statute that completes the criminalization of war crimes.⁸⁶ Article 8(2) of the Rome Statute lists and defines four categories of war crimes that include

⁸⁴ Kenya, International Criminal Act 2008; Uganda, International Criminal Act 2010..

⁸⁵ International Criminal Act 2010.

⁸⁶ Côte d'Ivoire: Code pénal, 1981-640 ; 1995-522.

crimes committed in both international armed conflict, and non-international armed conflict.⁸⁷ By omitting Article 8(2)(e), the criminal code excludes the commission of atrocity crimes in the context of civil war, which are more prevalent in present-day Côte d'Ivoire.

3.1.2. *Article 5 Crimes in CAR and Sudan*

With regards to the dynamic criminalization approach, CAR and Sudan's departures from the Rome Statute's definitions correspondingly denote different meanings of the respective crimes. For example, Article 6 of the Rome Statute defines the crime of genocide as a commission of any of the listed acts 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.' However, Article 152 of CAR's penal code slightly deviates from the Rome Statute's definition by extending protection to 'any other group defined by specific criteria.'⁸⁸ 'Arguably, this definition could extend protection to any group, including political, cultural and social groups.'⁸⁹ Scholars and States alike have been resistant to, and advise against expanding the groups

protected, given that 'such an approach can result in the trivialisation of genocide, universally regarded as the most serious international crime.'⁹⁰ Moreover, CAR's reformulation of the crime of genocide could be confused with the crime against humanity of persecution that refers to crimes 'against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender...or other grounds.'⁹¹

For crimes against humanity, Article 153 of CAR's penal code duplicates Article 7(1) of the Rome Statute's definition as the commission of any of the listed acts 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.' Nonetheless, the penal code excludes the state or organizational policy element in Article 7(2) of the Rome Statute that is relevant to what constitutes an attack. Without this critical element, 'any attack on civilians by any entity' could denote a crime against humanity, and this strips 'the crime of its essence.'⁹² Article 153 of CAR's penal code also fails to 'define any of the key terms

⁸⁷ The four categories of war crimes as defined in the Rome Statute are: 1) grave breaches of the Geneva Conventions of 12 August 1949 (Art. 8(2)(a), (2)) other serious violations of the laws and customs applicable in international armed conflict (Art. 8(2), (3)), serious violations of article 3 common to the four Geneva Conventions (Art.8(2)(c), and (4)) 'other serious violations of the

laws and customs applicable in armed conflicts not of an international character, within the established framework of international law' (Art. 8(2)).

⁸⁸ Article 152 of CAR penal code.

⁸⁹ Musila, supra n 30 at 16.

⁹⁰ Ibid, 16.

⁹¹ Article 7(h) of the Rome Statute.

⁹² Musila, supra n 30 at 17.

relating to crimes against humanity, similar to those found in the rest of Article 7(2) of the Rome Statute, and the Elements of Crime.”⁹³

Article 153 further provides several innovations in the description of crimes against humanity. These include the criminalization of massive and systematic executions as separate offences, and the expansion of the Rome Statute’s prohibition of torture to include the ‘practice of torture and other inhumane acts.’ However, gender has not been recognized as a ground of persecution.

Whereas Articles 154 to 156 of CAR’s penal code broadly cover the war crimes enumerated in Article 8 of the Rome Statute,⁹⁴ the crimes listed in Article 8(2)(e) are largely omitted. Although such omissions and the others before are potentially remedied by the SCC’s reference to international law as the Organic Law provides, such an approach could, in some situations, ‘elicit concerns about the legality and fair trial.’⁹⁵

The problems with reformulating the definition of Article 5 crimes are similarly observable in Sudan’s national implementing legislations of the Rome Statute. As a starting point, Sudan’s

Criminal Act of 2007 (as amended in 2009) reformulates the crime of genocide as:

“... the commitment of the offence or the offences of homicide against an individual or individuals of a national, ethnic, racial, or religious group upon that entity with the intention of exterminating it or destroying it partially or totally in the context of a systematic and widespread conduct directed against that group and commits in the same context any of the following acts:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”⁹⁶

The definition of genocide in Sudan’s Criminal Act 2007 significantly departs from the Rome Statute, and that of the Geneva Convention of 1948 that the Statute draws upon. Unlike the 1948 definition that affirms that ‘any of the listed’ acts constitute genocide, the Criminal Act stipulates

⁹³ Ibid, 17.

⁹⁴ Ibid.

⁹⁵ Ibid, 18.

⁹⁶ Sudan, Criminal Act 2007.

homicide as the ‘essential act that constitutes genocide if the other elements of the crime are present.’⁹⁷ Hence, the Acts’ reference to homicide ‘appears to narrow the definition and is bound to create confusion.’⁹⁸

Also, the relationship between homicide and the other five acts enumerated at the end of Article 188 of the Criminal Act 2007 is unclear. Seemingly, the definition implies that they are cumulative; that there needs to be the act of homicide as well as any of the five listed acts.⁹⁹ The Geneva Convention’s definition clearly distinguishes the five acts from homicide, ‘as genocide is characterised by the intent to destroy a protected group by the enumerated means.’¹⁰⁰ While only the first of the five acts relate to homicide, the others do not have to lead to the death of members of a protected group. With the 1948 definition, there is a recognition that there are several ways of destroying groups. As such, centering homicide as ‘an essential element of the crime of genocide does not fully capture the nature of the crime.’¹⁰¹

Moreover, the Criminal Act 2007 introduces new elements to the definition of

genocide that mirror crimes against humanity. In so doing, Article 187 of the Act stipulates that acts of genocide can be committed ‘in the context of a systematic and widespread conduct.’¹⁰² This definition likely creates confusion by mixing genocide with crimes against humanity and introduces a new threshold for the former that is non-existent in both the Genocide Convention of 1948 and the Rome Statute of the ICC.

By insinuating that genocide can be committed against an ‘individual’, the Criminal Act 2007’s definition also defies the ‘collective or quantitative’ dimension of the core crime. In the ICC statute, ‘the number contemplated must be significant,’¹⁰³ as encapsulated in the phrase ‘in whole or in part.’ Hence, the objective of killing ‘only a few members of a group’ cannot amount to genocide.

For crimes against humanity, Article 186 of the Criminal Act 1991 reproduces the definition in Article 7 of the Rome Statute but fails to bring the definition of rape in line with international statutes and jurisprudence.¹⁰⁴ Article 186 of the Criminal Act 1991 defines rape as using ‘coercion in

⁹⁷ Redress, ‘Comments on the Proposed Amendment of the Sudanese Criminal Act,’ September 2008, http://www.pelrs.com/downloads/Miscellaneous/Penal_Code_Amendment_Position%20Paper%202.pdf (accessed 15 July 2022), 5.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ The Geneva Conventions of 1948.

¹⁰¹ Redress, *supra* 99..

¹⁰² Ibid.

¹⁰³ Babiker, *supra* n 68 at 166.

¹⁰⁴ Redress, *supra* n 99.

a sexual intercourse with a female or sodomy with a male’, or ‘committing outrages upon personal dignity of the victim if such is accompanied by penetration in any way.’¹⁰⁵ This definition fails to cover all acts of penetration, and neither does it specify the forms of coercion.

Similar omissions can be seen in Article 149 of the Criminal Act, which ‘does not include penetration other than sexual intercourse by way of penile penetration into the vagina or anus.’¹⁰⁶ Moreover, the inclusion of adultery in the definition of sexual intercourse ‘has created ambiguity’ with regard to the applicable rules of evidence, such as the requirement of a confession or four male eyewitnesses to the act.¹⁰⁷ Women are also exposed to the risk of prosecution as any reference to adultery is an admission of indulging in unlawful sexual intercourse.

War crimes are criminalized in Article 188 of the Criminal Act 2007 as ‘Crimes against persons.’¹⁰⁸ Further, in Articles 189 to 192 of the Act, four groups of war crimes are addressed, namely: (a) ‘war crimes against properties and other rights’ (Article 189), (b) ‘war crimes against humanitarian operations,’ (c) ‘war crimes related to the

prohibited methods of warfare,’ and (d) ‘war crimes related to the use of prohibited weapons.’ In this sense, Article 188 frames of war crimes significantly deviate from the structure of Article 8 of the Rome Statute, which consists of both international armed conflict and non-international armed conflict. Conversely, in the Criminal Act 2007 all the crime categories ‘can be committed in the context of an international armed conflict or non-international armed conflicts,’¹⁰⁹ thus obscuring the distinction between the two crime categories.

Moreover, the Criminal Act 2007 omits several war crimes, namely: ‘(i) sexual slavery; (ii) making improper use of a flag of truce, of the flag or the military insignia and uniform of the enemy or the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious physical injury; (iii) the transfer, directly or indirectly, by the Occupying Power of parts of its civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside its territory.’¹¹⁰

¹⁰⁵ Ibid.

¹⁰⁶ Babiker, *supra* n 68 at 169.

¹⁰⁷ Ibid.

¹⁰⁸ Sudan, Criminal Act 2007.

¹⁰⁹ Babiker, *supra* 68 at 170.

¹¹⁰ Redress, *supra* n 99 in references to Rome Statute.

3.2. Elimination of obstacles to investigations and prosecutions

The Rome Statute provides for the elimination of obstacles to investigations and prosecutions in numerous ways, that similarly call for States' adjustment of their domestic legislations. These include the principles of individual criminal responsibility, the irrelevance of official capacity and the non-applicability of statutes of limitation.

3.2.1. Individual criminal responsibility

The principle of individual criminal responsibility is cardinal in the criminalization of Article 5 crimes, as international criminal law deals with individuals and not States. The principle has its origins in the departure from longstanding immunity of State officials from foreign criminal jurisdictions in order to enable them to perform their functions free from external constraints towards increasing recognition of the mantra that 'crimes against international law are committed by men, not by abstract legal entities.'¹¹¹ Consequently, the Rome Statute articulates the principle of individual criminal responsibility in several ways.

First, Article 25 addresses 'individual criminal responsibility' stating that: a person

who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.' Article 25 goes on to stipulate that individual criminal liability is established if a person, inter alia: (a) 'commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible, (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted, and (c), aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'

Second, Article 28 provides for the responsibility of commanders and other superiors in the commission of atrocities. Accordingly, Article 28(a) stipulates that:

"A military commander or person effectively acting as a military commander shall be criminally responsible' for acts committed by forces under his or her effective command and control, or effective authority and control."

With this provision, military commanders are held criminally liable for the atrocity crimes the forces under their

¹¹¹ Ellies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), 18.

effective control commit. However, as Article 28(b) further articulates, responsibility is limited to instances where the superior had or should have had knowledge of such crimes or failed to undertake ‘all the necessary and reasonable measures’ to prevent their commission.

Third, Article 33 on ‘superior orders and prescription of law’ subsequently ringfences the concept of individual criminal responsibility. This is by stating that ‘an order of a Government or of a superior, whether military or civilian, shall not relieve a person of criminal responsibility.’¹¹² To this effect, exceptions are made when (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful.

At the same time, Article 33 affirms that ‘orders to commit genocide or crimes against humanity are manifestly unlawful.’ The implication is that Article 33 ‘was limited to war crimes, as it was recognized that conduct that amounted to genocide or crimes against humanity would be

manifestly illegal that the defence should be denied altogether.’¹¹³

The import of Article 33 is that it strikes a balance between the interests of justice on the one hand, and the obligations of soldiers on the other hand. While in itself the Article does not provide ‘an escape to impunity, it might, in those rare cases when it is likely to be invoked, provide justice to a soldier who finds himself carrying the responsibility for decisions made in good faith on the basis of orders given by others who had information, denied to the accused himself, which rendered the order illegal.’¹¹⁴

Generally, the provisions made for Articles 25, 28 and 33 of the Rome Statute in Kenya, Uganda, Côte d’Ivoire, and Sudan vary as a result of the differences in the approaches they adopted in their national implementing legislations. On the one hand, the model approach that Kenya and Uganda adopted enabled their respective International Crimes Acts to enumerate the Rome Statute’s Articles 25, 28 and 33 among the general principles of criminal law that are applicable in the prosecution of Article 5 crimes. On the other hand, the individual approach employed by Côte d’Ivoire, CAR, Sudan resulted into their

¹¹² Article 33 of the Rome Statute.

¹¹³ Charles Garraway, ‘Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied,’ December 1999, International Review of the Red Cross,

<https://www.icrc.org/en/doc/resources/documents/article/other/57jq7h.htm> (accessed 17 July 2022).

¹¹⁴ Ibid, 1.

omissions of some of the provisions for individual criminal responsibility.

For CAR, Article 162 of the penal code generally prohibits immunities for genocide, crimes against humanity and war crimes.¹¹⁵ Additionally, title four on ‘criminal responsibility and the applicable penalties’ of the SCC’s Organic Law reproduces verbatim the Rome Statute’s Article 25(3)(a) and Article 28(a) and (b).¹¹⁶ However, CAR has no legislation on the responsibility of commanders and other superiors. Equally, Côte d’Ivoire’s penal code of 1981 as amended in 2015 provides for individual criminal responsibility and responsibility of commanders, with omissions on superior orders and prescription of the law.

Likewise, Sudan recognizes the traditional modes of individual criminal responsibility but also provides cover against prosecutions in equal measure. Notably, Article 3 of the Criminal Procedures Act 1991 as amended in 2009 prohibits the criminal prosecution of ‘any Sudanese national for any act or omission that constitutes violation of international humanitarian law including crimes against humanity, genocide, and war crimes’ in non-Sudanese courts. Simply put, the Act provides a wide cover to Sudanese

nationals, whether in official or non-official positions, from prosecutions in foreign courts on alleged commission of international crimes. Additionally, Sudan’s legal order makes no reference to the responsibility of commanders and other superiors, and superior orders and prescription of law.

3.2.2. Irrelevance of official capacity

Article 27 of the Rome Statute articulates the principle of ‘irrelevance of official capacity’ that voids the traditional practice of exempting certain persons from criminal responsibility based on their higher-level positions in government. In so doing, the Article pronounces an equal application of the law ‘without any distinction based on official capacity as a Head of State or Government, a member of a government or parliament, an elected representative or a government official.’ The Article declares 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.’¹¹⁷

Traditional practice has been that international law grants Heads of States absolute immunity. However, such a

¹¹⁵ Article 162 of CAR penal code.

¹¹⁶ Loi organique n° 15-003.

¹¹⁷ Article 27 (1) of the Rome Statute.

position has been revisited over time with a number of exceptions to the absolutist position. As part of customary international law, ‘immunities including for Heads of State, are neither available as defence mechanisms nor are they available as jurisdictional bars to charges involving the allegation of international crimes.’¹¹⁸ Such a ‘narrow exception to the principle of sovereign immunities’ emerged alongside the view that regardless of rank or positions, individuals ‘could be held criminally responsible for acts committed in violation of international law.’¹¹⁹

Based on this paradigm shift, Article 27 of the Rome Statute prohibits absolute immunity for Heads of State and government officials for trials before the ICC. Nevertheless, with many States still holding the traditional view, national legislations, together with their court systems continue to suggest the shielding of sitting Heads of States and government from prosecutions. This reluctance to uphold the Rome Statutes’ position on irrelevance of official capacity at domestic levels is further reinforced by Article 27’s prohibition of immunities only at the

international level, and with no ‘absolute obligation for States to remove immunities for the purposes of national prosecutions.’¹²⁰

By virtue of their model approaches, Kenya’s and Uganda’s respective International Crimes Acts provide for the irrelevance of official capacity. The two legislations make references to part 3 of the Rome Statute (on general principles of criminal law) as among the relevant provisions of the Statute that they give force of the law to.

Yet still, Uganda’s Constitution of 1995 (with amendments through 2017) shields the president from proceedings in ‘any court’.¹²¹ More so, exemptions to the president’s prosecutions are only premised on the president ‘ceasing office’, and not on liability for a crime for which the president might be accused or lifting immunities under a treaty to which Uganda is a party.¹²² Conversely, Article 143 of Kenya’s Constitution of 2010 takes a more progressive path by making exceptions on the president’s immunity regarding a “crime for which the President may be prosecuted

¹¹⁸ Guénaël Mettraux, John Dugard and Max du Plessis, ‘Heads of State Immunities, International Crimes and President Bashir’s Visit to South Africa,’ *International Criminal Law Review* 18 (2018): 583.

¹¹⁹ *Ibid*, 583.

¹²⁰ Bekou and Shah, *supra* n 16 at 513.

¹²¹ Article 98(4) of the Constitution of Uganda, 1995.

¹²² Article 98(5) of the Constitution of Uganda, 1995.

under any treaty to which Kenya is party and which prohibits such immunity”.¹²³

Similarly, CAR provides for irrelevance of official capacity in Article 56 of the Organic Law, but only in a partial manner. The SCC law states that “this law shall apply equally to all persons without any distinction based on official capacity”.¹²⁴ This is an omission of Article 27 of the Rome Statute’s specific identification of Head of State, elected representatives or government, and member of Government or parliament as official capacity. The question that begs therefore, is whether the Organic Law implicitly approves immunities for international crimes for certain categories of people. The cover for immunity, especially for the president, is further enabled by CAR’s Constitution of 2015, with the declaration that the office holder has no responsibility for acts committed while executing his or her duties, with the exception of treason.¹²⁵

At the more extreme end, Sudan’s legal order renders the principle irrelevant. To this end, several laws including the Criminal Procedures Act as amended in 2009, the Police Act 2008, the Armed Forces Act 1999, and the National Security Act 2010,

grant immunities for State officials for acts, including for gross human rights violations, committed in the course of performing official functions.¹²⁶ Furthermore, Côte d’Ivoire is yet to legislate on irrelevance of official capacity. As such, Article 27 of the Rome Statute is incompatible with the Article 157 of the Ivorian constitution of 2016 that excuses the president from criminal liability, with the exception of cases of high treason.¹²⁷

3.2.3. *Statutes of limitation*

Article 29 of the Rome Statute on ‘non-applicability of statute of limitations’ states that ‘the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.’ Seemingly, this provision is directed at national legislations, given that the Statute itself has no statutory limitation to the prosecution of core international crimes.¹²⁸

States are bound to abolish any statute of limitation if they have to effectively provide for the investigation and prosecution of alleged perpetrators of atrocity crimes. By adopting the provisions of Article 29 of the Rome Statute, States potentially safeguard against the excusal of criminal liability on

¹²³ Article 143(4) of the Constitution of Kenya, 2010.

¹²⁴ Article 56 of SCC Organic Law.

¹²⁵ Article 124 of the CAR Constitution, 2015.

¹²⁶ Babiker, *supra* n 68.

¹²⁷ Article 157 of the Constitution of Côte d’Ivoire, 2016.

¹²⁸ William Schabas, *An Introduction to the International Criminal Court. 6th Edition* (Cambridge: Cambridge University Press, 2020).

the grounds that ‘the offence was time-barred under national legislation.’¹²⁹

Both Kenya’s and Uganda’s implementing legislation recognize the non-applicability of statutes of limitations. Particularly, Article 4 of the former’s International Crimes Act 2008 on ‘general principles of criminal law’ lists Article 29 of the Rome Statute among the applicable relevant provisions of the Statute.¹³⁰ The same case applies for Uganda’s legislation which follows a similar approach in Article 19 on ‘general principles of criminal law.’¹³¹ Moreover, Section 98(5) of Uganda’s Constitution of 1995 stresses that “(5) civil or criminal proceedings may be instituted against a person after ceasing to be President, in respect of anything done or omitted to be done in his or her personal capacity before or during the term of office of that person; and any period of limitation in respect of any such proceedings shall not be taken to run during the period while that person was President.”

CAR’s legislations also exclude statutes of limitations for core international crimes. Particularly, Article 162 of the penal code states that ‘public and civil action, as well as the sentences imparted for genocide, crimes against humanity and war crimes are not

subject to statutes of limitations.’ This is reiterated in Article 7(c) of CAR’s code of criminal procedure, which States that “the crime of genocide, war crimes and crimes against humanity are not subject to statutes of limitation”.¹³²

Equally, Côte d’Ivoire has provisions on non-applicability of statutes of limitation as established in amendments to the code of criminal procedure. In so doing, law no. 2015-133 of 9 March 2015 inserted to Article 7 of the Code of criminal procedure the provision that ‘in matters of genocide, crimes against humanity and war crimes, there is no statute of limitations on public action.’¹³³

Sudan is an outlier among the countries under study with regards to legislating against statutes of limitation. Pursuant to Article 38(a) of Sudan’s Criminal Procedure Act 1991, international crimes described in the Criminal Act 1991 (as amended in 2009) are subject to a ten-year prescription period, as the offences therein are punishable by death or incarceration for ten or more years.¹³⁴ In other words, the 2009 amendments to the Criminal Act 1991 did not consider the procedural changes required to enable the prosecution of core international crimes, such as the exclusion

¹²⁹ Imoedemhe, *supra* n 7 at 179.

¹³⁰ Kenya, International Crimes Act 2008.

¹³¹ Uganda, International Crimes Act 2010.

¹³² Article 7(c) CAR Code of criminal procedure.

¹³³ Law no. 2015-133 of 9 March 2015.

¹³⁴ Sudan, Criminal Act 1991.

of statutes of limitation, among several other things.

3.3. Cooperation with the ICC.

By virtue of their accession to the Rome Statute, State Parties are duty bound to cooperate with the ICC in the investigation and prosecution of core international crimes. The Statute expressly calls upon States to fully cooperate with the ICC, and ‘ensure that there are procedures available under their national law for all of the forms of cooperation which are specified¹³⁵ in the Statute. For non-State Parties however, the basis for cooperation includes *ad hoc* arrangements under which the ICC may request assistance¹³⁶ or grant requests for assistance from States.¹³⁷

Whether for State or non-State Parties, the multiple obligations in the Rome Statute’s cooperation regime cannot be adequately covered within pre-existing cooperation frameworks, such as extradition arrangements that have been available to States over the years. Particularly, parts 9 and 10 of the Rome Statute contain the range of cooperation issues between the ICC and States, which can be grouped into three broad categories, namely: 1) the arrest and surrender of persons at the ICC’s request (2) other

practical assistance with respect to the ICC’s investigations and prosecutions and (3) general enforcement.¹³⁸

Of the three, the arrest and surrender of persons is the most significant, as the Rome Statute does not allow trials in absentia. Additionally, the ICC does not have executive power and a police force of its own, and thus entirely depends on State cooperation in the arrest and surrender of suspects. The viability of the ICC’s cases also depends on the availability of documentary evidence, witnesses, and other crucial information, which are collectively enabled by other practical assistance with the Court’s investigations and prosecutions.

The ‘Rome Statute’s formulation of cooperation also foresees the option of ‘reverse’ cooperation,’ under which the ICC is expected to assist and support domestic institutions in conducting their own investigations and prosecutions.¹³⁹ Hence, the availability of cooperation legislation enables proactive complementarity, as it would be easier for States to seek assistance from the Court.¹⁴⁰

The third aspect of enforcement is also important in its own right, as the ICC cannot enforce sentences on its own. As in

¹³⁵ Article 88 of the Rome Statute.

¹³⁶ Article 87 (5)(b)(a) of the Rome Statute.

¹³⁷ Article 93 (10)(c) of the Rome Statute.

¹³⁸ Imoedemhe, *supra* n 7.

¹³⁹ Article 93(10) of the Rome Statute.

¹⁴⁰ Imoedemhe, *supra* n 7.

many other aspects of the Court's functions, enforcement is a shared responsibility among State Parties to the Rome Statute.

Of the four State Parties to the ICC under study, only Côte d'Ivoire is yet to enact legislation on cooperation with the ICC. The absence of a cooperation legislation provides legal cover for domestic authorities to ignore the Court's requests for assistance with the arrest and surrender of suspects. A case in point is the refusal of the Ivorian authorities to act on a warrant of arrest for a former ICC suspect—Simone Gbagbo—and their resort to domestic trials in contempt of the Court's procedures.¹⁴¹

For their part, Kenya and Uganda have provisions on the three categories on state cooperation with the ICC in their respective International Crimes Acts. Specifically, they are enlisted in the legislations' sections on 1) general provisions relating to requests for assistance, 2) arrests and surrender of persons to the ICC, 3) domestic procedures for other types of cooperation, 4) enforcement of penalties, and 5) requests to the ICC for assistance.¹⁴²

Similarly, CAR enacted a cooperation regime with the ICC through law n°18-010 establishing the SCC's rules of procedure and evidence in July 2018. Article 14 of the law states that both the SCC and the ICC have jurisdiction to judge the crimes of genocide, crimes against humanity and war crimes. Additionally, Article 37 of the SCC's ordinary law obligates the domestic tribunal to recognize the ICC's precedence in case it exercises jurisdiction over a specific case. Moreover, Article 14 of the SCC law provides that conflicts of jurisdiction between the SCC and the ICC are settled by the decisions of the latter, in line with Article 119 of the Rome Statute.

Article 14 of the SCC also provides that the SCC's prosecutor should consult the ICC's prosecutor regarding his or her investigation and prosecutorial strategy. While such a provision could be construed as an avenue for exchanges between the two offices, it potentially undermines the independence of the SCC. On a positive note, however, the Article has provisions for the SCC's requests to the ICC for judicial assistance, and that the former

¹⁴¹ Faith Karimi and Christabelle Fombu, 'Ivory Coast Refuses to Transfer Former First Lady Simone Gbagbo to ICC,' CNN News, September 2013, <https://edition.cnn.com/2013/09/21/world/africa>

</ivory-coast-first-lady-icc/index.html> (accessed 20 July 2022).

¹⁴² Kenya, International Crimes Act 2008; Uganda, International Crimes Act 2010..

must respect the principle of cooperation and judicial aid.¹⁴³

For Sudan, relationships with the ICC are regulated by a non-cooperation legislation. Specifically, Article 3 of the Criminal Procedure Act as amended in 2009 prohibits ‘assistance or support to any entity to hand over any Sudanese national in order to be prosecuted overseas for committing any crime that constitutes violation of the International Humanitarian Law including crimes against humanity, genocide and war crimes.’¹⁴⁴ Simply put, the Act prohibits non-Sudanese actors and institutions from prosecuting Sudanese nationals, and any assistance to them.

3.4. Witness protection

Witnesses are important actors in criminal proceedings, whether in the prosecution of ordinary or core international crimes, as they help in establishing evidence for prohibited conducts. Thus, the protection of witnesses from both physical and psychological harm, ‘is imperative to the integrity and success of judicial processes.’¹⁴⁵

Recognizing the centrality of witnesses in the viability of cases, Article 43(6) of the Rome Statute establishes a Victims and

Witnesses Unit (VWU) within the Registry of the ICC. The VWU is mandated to have ‘protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses.’¹⁴⁶

The functions of the VWU are further elaborated in Rule 17 of the ICC’s rules of evidence and procedure. With respect to all witnesses and victims who double up as witnesses, the VWU is obligated to 1) ‘provide them with adequate protective and security measures and formulating long and short-term plans for their protection,’ 2) ‘recommend to the organs of the Court the adoption of protection measures and also advising relevant States of such measures,’ and 3) ‘assist them in obtaining medical, psychological and other appropriate measures,’ 4) make available to the Court and other parties training in issues of trauma, sexual violence and confidentiality,’ and 5) ‘recommend, in consultation with the OTP, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all

¹⁴³ Article 14 of the SCC law.

¹⁴⁴ Article 13 of the Criminal Procedure Act.

¹⁴⁵ Chris Mahony, ‘The Justice Sector Afterthought: Witness Protection in Africa,’ Institute for Security

Studies, 2010, <https://www.legal-tools.org/doc/f476e7/pdf/> (accessed 18 July 2022), 1.

¹⁴⁶ Article 43(6) of the Rome Statute.

intergovernmental and non-governmental organizations acting at the request of the Court.¹⁴⁷ Moreover, the VWU advises witnesses ‘where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony, and assists them when they are called to testify before the Court.¹⁴⁸

While State-parties are not obligated to replicate the ICC’s VWU, the practice of witness protection in the countries under study seems to be a ‘judicial afterthought.’¹⁴⁹ Most of the countries under study have no legislation on witness protection, and instead rely on informal protection measures based on a need’s basis.¹⁵⁰ It is only Kenya and CAR that have witness protection legislations, albeit with a number of operational challenges.

First, Kenya enacted a Witness Protection Act in 2006 that was subsequently amended in 2012 and 2016.¹⁵¹ The objective of the Act was to ‘provide for the protection of witnesses in criminal cases and other proceedings, and to establish a

Witness Protection Agency (WPA) and provide for its powers, functions, management, and administration, and for connected purposes.’¹⁵² While the WPA has since been established, and the legislation covers witnesses in national courts or international(ised) tribunals outside Kenya, witness protection is still problematic.¹⁵³ For example, many witnesses in the Kenyan cases at the ICC were forcefully disappeared or intimidated, and some others were found dead, and with no investigations on these unfortunate circumstances.¹⁵⁴ As a result, the ICC indicted some Kenyans for offences against the administration of justice in the William Ruto and Joshua Sang case.¹⁵⁵ The WPA is also underfunded, and there are doubts about its independence..¹⁵⁶

Second, CAR’s witness protection is provided in law n°18-010 establishing the SCC’s rules of procedure and evidence. Specifically, Article 46 of the SCC law provides for a support and protection unit for victims and witnesses. Additionally, Article 47 of the law provides frameworks for counselling for victims and witnesses.

¹⁴⁷ International Criminal Court, ‘Rules of Procedure and Evidence,’ 2019, <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf> (accessed 23 July 2022), 6.

¹⁴⁸ Ibid.

¹⁴⁹ Mahony, *supra* n 147..

¹⁵⁰ Ibid.

¹⁵¹ Witness Protection Agency, ‘The Legal Framework,’ <https://wpa.go.ke/about-us/the-legal-framework/> (accessed 14 July 2023).

¹⁵² Kenya, Witness Protection Act 2006.

¹⁵³ People Daily, ‘Tall Order Protecting Witnesses and Whistle-blowers in Kenya,’ *People Daily*, 17 January 2022.

¹⁵⁴ Ibid.

¹⁵⁵ International Criminal Court, ‘Offences Against the Administration of Justice,’ 2013, <https://www.icc-cpi.int/taxonomy/term/326> (accessed 14 July 2023).

¹⁵⁶ People Daily, *supra* n 155.

Pursuant to the legislation, and following the ICC’s model, the SCC has a Victim and Witness Support and Protection Unit.¹⁵⁷ In sum, the SCC’s witness protection regime is consistent with international legal standards. However, the challenge is putting such measures into practice in a volatile environment like CAR where armed groups continuously challenge the authority of the State.

3.5. Victims’ Centredness

As a victims’ Court, the ICC advances the rights of victims in several unprecedented ways than in the case law and practice of previous *ad hoc* tribunals or national judicial institutions. The rights of victims ‘can be found scattered throughout the various pieces of legislation that govern the proceedings of the ICC.’¹⁵⁸ These include 1) the Rome Statute itself that establishes the principal rights of victims, 2) the rules of evidence and procedure, 3) the Court’s

regulations, and 4) the regulations of the Court’s registry.¹⁵⁹

The advances in the Rome Statute follow the UN’s earlier adoption of the ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.’¹⁶⁰ The declaration called for the treatment of victims and their access to justice, provision of medical, psychological, and social support, and providing remedies to victims of abuses of power and crime.¹⁶¹ Living up to these ideals, the Rome Statute promotes the rights of victims by providing for their rights to participation, the rights to protection, and the rights to reparations.

The right to participation is particularly important, as it gives victims an opportunity to contribute to ‘the establishment of the truth given their experience of the crimes.’¹⁶² It is also a way of acknowledging their suffering and enables their agency and empowerment.¹⁶³ On this note, Article 68(3) of the Rome Statute guarantees victims’ rights to participation, as Articles

¹⁵⁷ Juan-Pablo Perez-Leon-Acevedo, ‘Victims at the Central African Republic’s Special Criminal Court,’ *Nordic Journal of Human Rights*, 39 (1) 2021: 1-17.

¹⁵⁸ Paulina Gonzalez, ‘The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court,’ 2006, <https://sur.conectas.org/wp-content/uploads/2017/11/sur5-eng-paulina-vega-gonzalez.pdf> (accessed 1 August 2022), 20.

¹⁵⁹ Ibid.

¹⁶⁰ United Nations, ‘Declaration of Basic Principles of Justice for Victims of Crime and Abuse of

Power,’ 1985,

<https://www.unodc.org/pdf/rddb/CCPCJ/1985/A-RES-40-34.pdf> (accessed 24 July 2022).

¹⁶¹ Ibid.

¹⁶² Redress and Institute for Security Studies, ‘Victims Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecution,’ September 2015, <https://redress.org/wp-content/uploads/2017/12/September-Victim-Participation-in-criminal-law-proceedings.pdf> (accessed 25 August 2022), 11.

¹⁶³ Ibid.

43 and 68(1) provide for victims’ protection from physical and psychological harm. Victims’ rights to reparations are subsequently enshrined in Articles 75 and 79 of the Statute.¹⁶⁴ Towards these ends, the ICC has since established the Office of Public Counsel for Victims (OPCV), the Victims and Witnesses Unit (VWU), the Victims Participation and Reparations Section (VPRS), the Trust Fund for Victims (TFV), and field outreach offices in situations.¹⁶⁵

As with witness protection, victim centeredness is emerging as a ‘justice sector afterthought in Africa.’¹⁶⁶ Again, it is only Kenya and CAR that have legislation on victims, with notable variations in their levels of safeguarding victims’ rights.

For CAR, Article 46 of the SCC’s rules of procedure and evidence establishes a support and protection unit for victims and witnesses.¹⁶⁷ Moreover, Article 47 of the rules provide for counselling for victims and witnesses. As in witness protection, CAR’s legal regime on victims’ centeredness mirrors the practice in international proceedings, such as the ICC’s.

In Kenya, Article 50 (9) of the Constitution of 2010 recognizes the plight of victims by mandating Parliament ‘to enact legislation providing for the protection, rights and welfare of victims of offences.’ Consequently, the Victims Protection Act 2014 as amended in 2019 provides for ‘the protection of victims of crime and abuse of power...and reparation and compensation.’ However, the Act fails to establish victims’ rights to participate in criminal proceedings. While the Act gives effect to Article 50 (9) of Kenya’s Constitution of 2010, it makes no references to Articles 43, 68(1) and 68(3) of the Rome Statute.

3.6. Penalties

Article 77 of the Rome Statute provides guidance in the determination of penalties for the core international crimes. The Article gives judges the discretion of sentencing perpetrators to either imprisonment for a number of years with an upper limit of 30 years, or life imprisonment, depending on ‘the gravity of the crime and the individual circumstances of the convicted person.’¹⁶⁸ In addition to the option of imprisonment, judges have the liberty to order ‘a fine under the criteria

¹⁶⁴ Articles 75 and 79 of the Rome Statute.

¹⁶⁵ International Criminal Court, ‘About the Court,’ 2023, <https://www.icc-cpi.int/about/in-the-courtroom> (accessed 14 July 2023).

¹⁶⁶ Mahony, *supra* n 147.

¹⁶⁷ Article 46 of the SCC.

¹⁶⁸ Art 77(1)(a) and (b) of the Rome Statute

provided for in the Rules of Procedure and Evidence, or a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.¹⁶⁹

Further, Article 78 of the Statute provides guidance on the ICC’s imposition of penalties. Accordingly, sentencing ought to be based on ‘the gravity of the crime and the individual circumstances of the convicted person.’ The latter could include the time spent on detention¹⁷⁰ and whether one has been convicted for more than one crime.¹⁷¹

It is important to note that the Rome Statute does not provide for the death penalty. Imperatively, the absence of the death penalty in the Statute ‘suggests that even the most serious crimes of concern to the international community’¹⁷² do not warrant it. However, the Statute’s sentencing provisions ‘are not authoritative for the sentences that may be prescribed by national law’ for core international crimes as explicitly stipulated in Article 80 of the Statute:¹⁷³

“Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.”

Following in the Rome Statute, together with international abolition trends, Kenya, Uganda, CAR and Côte d’Ivoire impose life imprisonment as the maximum penalty for the Article 5 crimes. Yet still, Kenya¹⁷⁴ and Uganda¹⁷⁵ have the death penalty for certain ordinary crimes. More explicitly, Article 27 of Sudan’s Criminal Act as amended in 2009 provides for the death penalty on convictions for both core international crimes, and ordinary offences such as murder, armed robbery, and offences against the state.¹⁷⁶

4. Beyond legal reforms: rival normative frameworks and implications for States’ prosecution of atrocity crimes

Beyond the legal reforms, African States are confronted with rival normative frameworks that have implications on their abilities to comply with the Rome Statute

¹⁶⁹ Article 77 (2)(a) and (b) of the Rome Statute.

¹⁷⁰ Articles 78(2) and 110 (3) of the Rome Statute.

¹⁷¹ Article 78(3) of the Rome Statute.

¹⁷² Bekou and Shah, *supra* n 16 at 519.

¹⁷³ *Ibid*, 519; see also Article 80 of the Rome Statute.

¹⁷⁴ Kenya is considered an abolition *de facto*, for having not carried out executions for more than 30

years. See Edgar Odongo, ‘The Death Penalty in Kenya: A Bleak Future?’, *Jurist*, September 2021, [https://www.jurist.org/commentary/2021/09/edgar-odongo-ochieng-death-penalty-kenya/\(accessed 15 August 2022\)](https://www.jurist.org/commentary/2021/09/edgar-odongo-ochieng-death-penalty-kenya/(accessed%2015%20August%202022)).

¹⁷⁵ Derrick Kiyonga, ‘Uganda’s death penalty under renewed focus,’ *Daily Monitor*, 10 June 2023.

¹⁷⁶ Sudan, Criminal Act 2007.

system of justice. Over time, the traction of restorative justice has engendered the adoption of amnesty, reconciliatory tones and traditional justice mechanisms that undermine the opportunities for putting to ‘test’ the legal reforms that come with the national implementing legislations of the Rome Statute. It is also important to note that ‘there is no general prohibition under international law on amnesties, including for genocide, crimes against humanity and war crimes.’¹⁷⁷

Transitional societies are often confronted with the ‘peace versus justice’ conundrum that depicts a long-standing struggle between the pursuit of criminal accountability and the immediate concerns of establishing peace, or the appropriate sequencing of the two tracks. Opinions continue to differ ‘about what exactly doing justice means, as well as about the strategies and mechanisms best suited to realize that objective.’¹⁷⁸

Although the advocates of criminal accountability argue that the peace versus justice debate has been overcome by events,¹⁷⁹ or believe that it is a false

dichotomy, there is a general consensus that prosecutions are only possible when some semblance of peace has been achieved in the event of atrocity commission. More so, the transitional justice paradigm has moved away from its initial strong focus on the need for retribution and has ‘gradually become more open toward supplementary or even alternative nonjudicial methods of rendering justice for past abuses.’¹⁸⁰

As in other parts of the world, Kenya, Uganda, CAR, Côte d’Ivoire, and Sudan condone non-judicial mechanisms in their redress to past abuses, against the backdrop of their motions towards compliance with the Rome Statute system of justice. For example, whereas Kenya provides for *de facto* amnesties, Uganda, CAR, Côte d’Ivoire, and Sudan are more explicit in their approval of amnesty by providing for its legislation.¹⁸¹ Amnesties are believed to encourage parties to conflicts to rapidly embrace peace agreements, and they can be effectively linked to truth-telling and reconciliation processes, thus achieving accountability via non-judicial methods.¹⁸² Alongside amnesties, traditional

¹⁷⁷ Labuda, *supra* n 72 at 197.

¹⁷⁸ Stef Vandeginste and Chandra Lekha Sriram, ‘Power Sharing and Transitional Justice: A Clash of Paradigms?’ *Global Governance* 17(4) (2011): 498.

¹⁷⁹ For example, through advances in international criminal law and the increasing recognition of the norm of criminal accountability.

¹⁸⁰ Vandeginste and Sriram, *supra* n 181 at 491.

¹⁸¹ Louise Mallinder, ‘Global Comparison of Amnesty Laws,’ October 2009, https://www.researchgate.net/publication/228214698_Global_Comparison_of_Amnesty_Laws (accessed 7 January 2023).

¹⁸² Redress, ‘A general Amnesty in Sudan: International Law Analysis,’ January 2021, <https://redress.org/wp->

justice mechanisms are also instrumental in the transitions from conflict in several African societies, such as in Uganda in the aftermath of the northern conflict.¹⁸³

5. Conclusion

The select African States that form part of the situational docket at the ICC as of the time of writing this paper have enacted national implementation legislations of the Rome Statute with varying degrees of compliance on criminalization of core international crimes, elimination of obstacles to prosecutions, cooperation with the ICC, witness protection, victims' centeredness, and penalties. The varying degrees of compliance is contingent on the methods of implementation, as well as the political contexts under which the legal reforms unfold.

For example, Kenya's and Uganda's dependence on the Commonwealth Model Law enabled their incorporation of nearly all the substantive provisions of the Rome Statute in single legislations, as well as compatibility with the Statute's definition of core international crimes. However, just as in other African States, Uganda and Kenya

are yet to ratify the amendments to the Statute on the crime of aggression, and the use of biological weapons, blinding laser weapons, and non-detectable fragments as war crimes.

Despite their common adoption of the Commonwealth Model Law, Kenya and Uganda take divergent paths in legislating on other provisions of the Rome Statute, notably on, witness protection and victim-centeredness. Unlike Uganda, Kenya has legislation on witness protection and victims' participation, albeit with practical challenges in operationalization and deviations to their protection. Hence, Uganda has recently adopted regulations as it continues with the process of enacting the appropriate legislations.

For their part, States that opted for the individual method such as Côte d'Ivoire, CAR and Sudan had much flexibility in their implementation of substantive provisions of the Rome Statute. Though useful in aligning international law with domestic legal cultures, such flexibility provided room for the States' omissions and/or reformulation of certain texts of the Statute, which undermined their compliance levels.

[content/uploads/2021/01/REDRESS-Sudan-General-Amnesty-Briefing-Note.pdf#:~:text=A%20GENERAL%20AMNES TY%20IN%20SUDAN%20International%20Law%20Analysis,weapons%20or%20participated%20in%20military%20operations%20in%20Sudan](https://www.conectas.org/en/pursuit-transitional-justice-african-traditional-values/) (accessed 23 July 2022).

¹⁸³ Cecily Rose and Francis Ssekandi, 'The Pursuit of Transitional Justice and African Traditional Values: A Clash of Civilizations- the Case of Uganda,' January 2007, <https://sur.conectas.org/en/pursuit-transitional-justice-african-traditional-values/> (access 7 January 2007).

For example, while Côte d'Ivoire's statutes incorporate and reproduce the definition of the core international crimes, they do not provide for 1) Article 8(2)(e) of the Rome Statute that completes the criminalization of war crimes non-international armed conflict, 2) irrelevance of official capacity, 3) cooperation with the ICC, 4) witness protection and 5) victim centeredness.

Similarly, CAR's advancements in the implementation of the Rome Statute (vide amendments to the criminal code and the SCC's Organic Law) are undermined by certain omissions and reformulations of the definition of some core international crimes. Specifically, CAR's penal code extends protection to 'any other group defined by specific criteria' in its definition of genocide and excludes the state or organizational policy element in Article 7(2) of the Statute. At the same time, the penal code largely omits the crimes listed in Article 8(2)(e). However, such omissions are potentially mitigated by the SCC's reference to international law in instances of uncertainty concerning the interpretation or application of a rule of domestic law, and when there are questions about the compatibility of this law with international law.

Moreover, CAR provides for the irrelevance of official capacity but only in a

partial manner by excluding such specific identifications as Head of State, elected representatives or government, and member of Government or parliament as official capacity. The cover for immunity, especially for the president, is further enabled by CAR's 2015 Constitution which declares that the office holder has no responsibility for acts committed while executing his or her duties, except treason. Furthermore, CAR's legislation on cooperation with the ICC is problematic, as it elevates the ICC in dispute resolution in case of conflict between the Court and the SCC. The ordinary law also provides that the SCC's prosecutor should consult the ICC's prosecutor regarding his or her investigation and prosecutorial strategy. The law also obligates the SCC to recognize the ICC's precedence in case it exercises jurisdiction over a specific case. Collectively, these provisions contradict the ICC's foundational principle of complementarity. On a positive note, however, CAR has legislation on victims and witness protection, and the abolition of the death penalty.

Sudan lies at the extreme end of non-compliance with the substantive provisions of the Rome Statute. These begin with the incorporation of Article 5 crimes in line with customary international law rather than the Rome Statute, and the

reformulation of their definitions in ways that depart from those in the Statute. To illustrate, Sudan’s legislation refers to homicide as a key component of genocide, which seemingly narrows the definition of genocide and creates confusion in the law, fails to define rape in line with international statutes and jurisprudence, criminalizes war crimes in ways that significantly deviate from the structure of Article 8 of the Rome Statute, and omit several war crimes. Furthermore, domestic statutes prohibit the prosecution of any Sudanese nationals from prosecution in international tribunals and do not refer to the responsibility of commanders and other superiors, and superior orders and prescription of law. Further, Sudan’s legal orders render irrelevant the principle of ‘irrelevance of official capacity,’ and provide for a ten-year prescription period. Sudan is also an outlier among the African States by legislating on non-cooperation with the ICC, in addition to having no provisions on witness protection, victim-centeredness, and the abolition of the death penalty.

Evidently, the African States under study have several missteps in their enactment of the relevant provisions of the Rome Statute that potentially render them unable to investigate and prosecute core international crimes. Subsequently, this paper recommends several policy proposals

towards addressing such glaring gaps. Besides the policy options, there should be vigilance on rival normative frameworks such as amnesty, reconciliatory tones and traditional justice mechanisms that are similarly relevant in providing redress to past abuses.

6. Recommendations

As a starting point, concerted efforts should be put on the select African States’ ratification of amendments to the Rome Statute such as the crime of aggression and the use of biological weapons, blinding laser weapons, and non-detectable fragments as war crimes. These amendments were incorporated into the Statute long after the States enacted national implementing legislations. This paper, therefore, calls for the activation of both national and regional advocacy towards African States’ ratification of the amendments.

To some extent, the glaring missteps in the State’s implementation of the Rome Statute are attributable to capacity gaps at the domestic level. The principle of ‘positive complementarity’ should thus be activated as a framework for addressing such capacity gaps. The focus should be on training national officials in drafting amendments to the Rome Statute implementing legislation, with a focus on the missing and inadequate provisions.

Training should also be extended to national legislators, with particular attention to improving their understanding of the missing links in their respective legal orders, and the need for amendments.

As of now, the enthusiasm for ‘positive complementarity’ seems to have waned, and yet there are still glaring capacity gaps in the national implementation of substantial provisions of the Rome Statute. The current debate on reforming the ICC thus provides a critical entry point and momentum for embarking on ‘positive complementarity,’ that greatly contributed to most of the States’ enactment of their respective implementing legislations.

Equally, the ‘judicial afterthoughts’ of witness protection and victim-centeredness should be addressed. This could be done in several ways, including placing them on the agenda of national legislators through concerted national and regional advocacy. Given that witness protection and victims’ centeredness are novel concepts in most jurisdictions, model legislations (based on the varied legal traditions of African countries) could be good starting points for such proposed national and regional advocacy.

Bibliography

(1) Case law

International Criminal Court, ‘Central African Republic II,’ January 2022, <https://www.icc-cpi.int/carII> (accessed 7 January 2023).

International Criminal Court, *Situations Under Investigation: Côte d’Ivoire*, <https://www.icc-cpi.int/cdi> (accessed 10 August 2022).

International Criminal Court, *Situation in the Central African Republic: The Prosecutor v Jean Pierre Bemba Gombo*, March 2019, <https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf> (accessed 7 January 2023).

(1) Domestic Legislation

Central African Republic, Constitution of the Central African Republic, 2015.

Central African Republic, Special Criminal Court, Loi organique n° 15-003, 2015.

Central African Republic, Code of criminal procedure, Law no. 2015-133 (9 March 2015)

Côte d’Ivoire, Code pénal, 1981-640; 1995-522 (31 July 1981)

Côte d’Ivoire, Constitution of Côte d’Ivoire, 2016.

Republic of Kenya, Constitution of the Republic of Kenya, 2010.

Republic of Kenya, International Crimes Act, No. 16 of 2008 (24 December 2008)

Republic of Kenya, Witness Protection Act, No. 16 of 2006 (1 September 2006)

Republic of Uganda, Constitution of the Republic of Uganda, 1995.

Republic of Uganda, International Criminal Court Act, No. 11 of 2010

Republic of Sudan, Armed Forces Act 2007 (5 December 2007)

Republic of Sudan, Criminal Act, 1991 (last amended, 2020)

(2) Other Primary Sources

African Union, ‘Decisions and Declarations,’ October 2013, https://au.int/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf (accessed 7 January 2023).

Assembly of State Parties to the Rome Statute, ‘State Parties,’ <https://asp.icc-cpi.int/States-parties/States-parties-chronological-list> (accessed 15 August 2022).

Geneva Conventions of 1948.

International Criminal Court, ‘Rules of Procedure and Evidence,’ 2019.

United Nations, *Rome Statute of the International Criminal Court (last amended 2010)*.

United Nations, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, 1985.

(3) Secondary Sources

Babiker M., ‘The prosecution of International Crimes Under Sudan’s Criminal and Military Laws: Developments, Gaps and Limitations,’ in *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* ed. Lutz Oette (Brulington: Routledge, 2011).

Bekou O., ‘National Implementation of the ICC Statute to Prosecute International Crimes in Africa,’ in *The International Criminal Court and Africa*, ed. Charles Chernor Jalloh and Ilias Bantekas (Oxford: Oxford University Press, 2017), 274.

Bekou O. and Shah S., ‘Realising the Potential of the International Criminal Court: The African Experience,’ *Human Rights Law Review*, 6(3) (2006).

Buckley-Zistel, S., Mieth F., and Papa, M., ‘After Nuremberg: Exploring Multiple Dimensions of the Acceptance of International Criminal Justice,’ International Nuremberg Principles Academy, 2017, <https://www.nuremberga-cademy.org/resources/acceptance-online-platform/publications/online-edited-volume/> (accessed 7 January 2023)

Brett P. and Gissel LE., *Africa and the Backlash Against International Courts* (London: Zed Books, 2020).

Clarke, KM., *Affective justice: The International Criminal Court and the Pan-Africanist pushback* (Durham and London: Duke University Press, 2019).

De Vos, C. 'All Roads Lead to Rome: Implementation and Domestic Politics in Kenya and Uganda,' in *Contested Justice: The Practice and Politics of International Criminal Interventions*, eds. Christian De Vos, Sara Kendall and Carsten Stahn (Cambridge: Cambridge University Press, 2015).

Elderfield J., 'The Rise and Rise of the Special Criminal Court (Part II),' *OpinioJuris*, 7 April 2021, <https://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-ii/> (accessed 7 January 2023).

Garraway, G. 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied,' December 1999, *International Review of the Red Cross*, <https://www.icrc.org/en/doc/resources/documents/article/other/57jq7h.htm> (accessed 17 July 2022).

Gonzalez, P. 'The Role of Victims in International Criminal Court Proceedings: Their Rights and the First Rulings of the Court,' 2006, <https://sur.conectas.org/wp-content/uploads/2017/11/sur5-eng-paulina-vega-gonzalez.pdf> (accessed 1 August 2022).

Gumede W., 'The International Criminal Court and Accountability in Africa,' LSE Blog, 31 January 2018, <https://blogs.lse.ac.uk/africaatlse/2018/01/31/the-international-criminal-court-and-accountability-in-africa/> (accessed 7 January 2023).

Imoedemhe, OC., *The Complementarity Regime of the International Criminal Court: National implementation in Africa* (Cham: Springer, 2017)

International Criminal Court, 'About the Court,' 2023, <https://www.icc-cpi.int/about/in-the-courtroom> (accessed 14 July 2023).

Juan-Pablo Perez-Leon-Acevedo, JP. 'Victims at the Central African Republic's Special Criminal Court,' *Nordic Journal of Human Rights*, 39 (1) 2021: 1-17.

Karimi F. and Fombu, C. 'Ivory Coast Refuses to Transfer Former First Lady Simone Gbagbo to ICC,' CNN News, September 2013, <https://edition.cnn.com/2013/09/21/world/africa/ivory-coast-first-lady-icc/index.html> (accessed 20 July 2022).

Kinyua B, 'The Rome Statute: Its Implementation in Kenya,' June 2011, <https://ssrn.com/abstract=2353383> (accessed 27 July 2022).

Kiyonga, D. 'Uganda's death penalty under renewed focus,' *Daily Monitor*, 10 June 2023.

Kuwonu, F., 'ICC: Beyond the Threats of Withdrawal,' *Africa Renewal*, May-July 2017, <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal> (accessed 7 January 2023).

Labuda, P., 'The Special Criminal Court in the Central African Republic: Failure or Vindication of complementarity?', *Journal of International Criminal Justice*, 15(1): 175-206.

Lugano G., 'Counter-Shaming the International Criminal Court's Intervention as Neo-colonial: Lessons from Kenya,' *International Journal of Transitional Justice* 11(1) (2017): 9-29

Lugano G., 'Distance in the International Criminal Court's Relations with the Local,' *International Journal of Transitional Justice* 16 (3) (2022): 346-362.

Lynch G., *Performances of Injustice: The Politics of Truth, Justice and Reconciliation in Kenya* (Cambridge: Cambridge University Press, 2018).

Mahony C., 'The Justice Sector Afterthought: Witness Protection in Africa,' Institute for Security Studies, 2010, <https://www.legal-tools.org/doc/f476e7/pdf/> (accessed 18 July 2022), 1.

Mallinder, L. 'Global Comparison of Amnesty Laws,' October 2009, https://www.researchgate.net/publication/228214698_Global_Comparison_of_Amnesty_Laws (accessed 7 January 2023).

Mettraux, G., Dugard J., and du Plessis, M. 'Heads of State Immunities, International Crimes and President Bashir's Visit to South Africa,' *International Criminal Law Review* 18 (2018): 583.

Musila G., 'The Special Criminal Court and other Options of Accountability in the Central African Republic: Legal and Policy Recommendations,' International Nuremberg Principles Academy, 2016, https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf (accessed 20 July 2022).

Nouwen S., *Complementarity in the Line of fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2013).

Odongo, E. 'The Death Penalty in Kenya: A Bleak Future?', *Jurist*, September 2021, <https://www.jurist.org/commentary/2021/09/edgar-odongo-ochieng-death-penalty-kenya/> (accessed 15 August 2022).

Parliamentarians for Global Action, 'Central African Republic and the Rome Statute,' <https://www.pgaction.org/ilhr/rome-statute/central-african-republic.html> (accessed 10 July 2022).

Parliamentarians for Global Action, 'Côte d'Ivoire and the Rome Statute,' <https://www.pgaction.org/ilhr/rome-statute/cote-divoire.html> (accessed 12 July 2022).

Petit F., 'Toussant Muntazini: If they Extend the Special Court Mandate, they Expect Added Value,' JUSTICEINFO.NET, 5 January 2023, <https://www.justiceinfo.net/en/110828-toussaint-muntazini-extend-special-court-mandate-expect-added-value.html> (accessed 7 January 2023).

People Daily, 'Tall Order Protecting Witnesses and Whistle-blowers in Kenya,' *People Daily*, 17 January 2022.

Redress, 'A general Amnesty in Sudan: International Law Analysis,' January 2021, <https://redress.org/wp-content/uploads/2021/01/REDRESS-Sudan-General-Amnesty-Briefing-Note.pdf#:~:text=A%20GENERAL%20AMNESTY%20IN%20SUDAN%20International>

[%20Law%20Analysis,weapons%20or%20participated%20in%20military%20operations%20in%20Sudan](https://redress.org/wp-content/uploads/2021/01/REDRESS-Sudan-General-Amnesty-Briefing-Note.pdf#:~:text=A%20GENERAL%20AMNESTY%20IN%20SUDAN%20International) (accessed 23 July 2022).

Redress, 'Comments on the Proposed Amendment of the Sudanese Criminal Act,' September 2008, <http://www.pclrs.com/downloads/Miscellaneous/Penal Code Amendment Position%20aper%20 2 .pdf> (accessed 15 July 2022), 5.

Redress and Institute for Security Studies, 'Victims Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecution,' September 2015, <https://redress.org/wp-content/uploads/2017/12/September-Victim-Participation-in-criminal-law-proceedings.pdf> (accessed 25 August 2022).

Rose C. and Ssekandi, F. 'The Pursuit of Transitional Justice and African Traditional Values: A Clash of Civilizations- the Case of Uganda,' January 2007, <https://sur.conectas.org/en/pursuit-trasitional-justice-african-traditional-values/>.

Schabas, W. *An Introduction to the International Criminal Court. 6th Edition* (Cambridge: Cambridge University Press, 2020).

Takemura H., 'Positive Complementarity,' Max Plank Encyclopedia of International Law, October 2018, <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2507.013.2507/law-mpeipro-e2507?prd=MPIL> (accessed 12 July 2022).

Terracino, J., 'National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC,' *Journal of International Criminal Justice* 5 (2) (2007): 421–440; Art.1 and 17 of the Rome Statute.

The Commonwealth, 'Democracy, Governance and Law,' <https://climate.thecommonwealth.org> (accessed 12 July 2022).

United Nations, 'CAR Special Criminal Court (SCC) Now Fully Operational,' June 2021, <https://peacekeeping.un.org/en/car-special-criminal-court-scc-now-fully-operational> (accessed 14 July 2022).

United Nations, ‘UN Experts Call for Complete Abolition of the Death Penalty as ‘Only Viable Path,’ 10 October 2022, <https://news.un.org/en/story/2022/10/1129382> (accessed 7 January 2023)

Vandeginste S. and Sriram CL., ‘Power Sharing and Transitional Justice: A Clash of Paradigms?’ *Global Governance* 17(4) (2011): 498.

van Sliedregt, E. *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), 18.

Witness Protection Agency, ‘The Legal Framework,’ <https://wpa.go.ke/about-us/the-legal-framework/> (accessed 14 July 2023).

International Criminal Court, ‘Offences Against the Administration of Justice,’ 2013, <https://www.icc-cpi.int/taxonomy/term/326> (accessed 14 July 2023).

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

Lorraine Smith van Lin

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-learned 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.*

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

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%20othe r%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-agma-blog/detail/-/content/the-international-criminal-court-s-new-chief-prosecutor-challenges-and-opportunities>> accessed 23.09.2022.

¹¹News 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'être* 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

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.htm> > 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

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

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

Kenya²⁵ 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 proprio 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.

²⁶International 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 Gaddafi 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.

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 UNSC³⁵ 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

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 International 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 addressed to the Secretary-General and the President of the Security Council' (22.10.2013) S/2013/624.

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](https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan._2017.pdf)

[g_resources/icc_withdrawal_strategy_jan._2017.pdf](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.

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

⁴⁶ Spies, p.431.

⁴⁷ Chipaika, 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/Statement_s/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/kenyafrican-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

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).

⁶¹The 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 Schwannsee 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

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.

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

⁷⁴The “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

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.

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/Bureau20agenda%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.

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.

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.

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

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-](https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf)

[73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf](https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.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

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-](https://ecfr.eu/publication/peace-versus-justice-the-coming-european-split-over-the-war-in-ukraine/)

[the-coming-european-split-over-the-war-in-ukraine/](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.

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 *proprio 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.

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

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

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

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

¹³⁹ICC Office of the Prosecutor, Prosecutorial Strategy 2009-2012, para. 16 < <https://www.icc-cpi.int/sites/default/files/OTPPProsecutorialStrategy20092013.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

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/2021-028-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.

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

¹⁵⁸African 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.

¹⁶¹African Union, List of Countries Which Have Signed, Ratified/ Acceded 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. Nmeielle (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.

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.

¹⁷⁵The 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.

¹⁷⁶

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.*

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 Malawi¹⁸⁵ and Chad¹⁸⁶ 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](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.

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

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-article>> accessed 18.09.2022. See also Lorraine Smith-van Lin, p. 128.

¹⁸⁹

¹⁹⁰

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.

¹⁹³

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 Epublsher, (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> ; Devashesh 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

<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.

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

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-](https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/)

[by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/](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

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

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.

Bibliography

(1) Cases Law

Decision on the withdrawal of charges against Mr. Kenyatta ICC-01/09-02/11-1005 (13.03.2015)

Democratic Alliance v Minister of International Relations and Cooperation and Others, High Court of South Africa (2017) No.83145/2016

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)

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)

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 (17.03.2017)

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 (6.05.2019)

Situation in Georgia (Decision on the Prosecutor's request for authorization of an investigation) ICC-01/15 (27.01.2016)

Situation in Libya in the Case of Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al Senussi (Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi') ICC-01/11-01/11 OA 4 (21.05.2014)

Situation in Libya in the Case of The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif

Al-Islam Gaddafi and Abdullah Al-Senussi ICC-10/11-01/11 (22.11.2011)

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 Saif Al-Islam Gaddafi) ICC-01/11-01/11 (31.05.2013)

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)

Situation in Libya in the Case of The Prosecutor v. Saif Al Islam Gaddafi (Decision on the 'Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute) ICC-01/11-01/11 (05.05.2019)

Situation in Libya 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 pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"' of 5 April 2019) ICC-01/11-01/11 (09.03.2022)

Situation in the Democratic Republic of The Congo The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Judgement on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II on 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07 OA 8 (25.09.2009)

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)

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)

Situation in the Republic of Kenya in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Judgment on the appeal of the Republic of Kenya against the

decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute") ICC-01/09-01/11 OA (30.08.2011)

Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute) ICC-01/09-02/11 O A (30.08.2011)

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 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)

Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi ICC-01/11 (27.06.2011)

(2) Primary Sources

African Union, *Protocol on the Statute of the African Court of Justice and Human Rights* (01.07.2008)

Assembly of the African Union, Thirteenth Ordinary Session (2009) Assembly/AU/Dec.245(XIII) Rev.1

Assembly of the African Union, Fourteenth Ordinary Session (2010) Assembly/AU/Dec.270(XIV)

Assembly of the African Union, Sixteenth Ordinary Session (2011) Assembly/AU/Dec.334(XVI)

Assembly of the African Union, Eighteenth Ordinary Session (2012) Assembly/AU/Dec.397(XVIII)

Assembly of the African Union, Twenty-second Ordinary Session (2014) Assembly/AU/Dec.493(XXII)

Assembly of the African Union, Thirty-third Ordinary Session (2020) Assembly/AU/Dec.789(XXXIII)

Assembly of the African Union Twenty-seventh Ordinary Session (2016) Assembly/AU/Dec.616 (XXVII)

Assembly of the African Union Twenty-eighth Ordinary Session (2017) Assembly/AU/Draft/Dec.1(XXVIII)Rev.2

ICC Assembly of States Parties Thirteenth Session (2014) Report on the Working Group on Amendments ICC-ASP/13/31

ICC Assembly of States Parties Fourteenth Session (2015) ICC-ASP/14/35

ICC Assembly of States Parties Eighteenth Session (2019) Report of the Bureau on Complementarity ICC-ASP/18/25

ICC Assembly of States Parties Nineteenth Session (2020) Report of the Bureau on Complementarity ICC-ASP/19/22

ICC Assembly of States Parties Twentieth Session (2021) Report of the Bureau on Complementarity ICC-ASP/20/22

ICC Assembly of States Parties, Report on the activities of the Court (2010) ICC-ASP/9/23.

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

ICC Bureau of the Assembly of States Parties, Fifth meeting (2019)

ICC Bureau of the Assembly of States Parties, Twentieth meeting (2021)

ICC Decisions of the Bureau of the Assembly of States Parties, Third Meeting (2016) <<https://asp.icc-cpi.int/bureau/decisions/2016/Decisions-of-the-Bureau-2016-%2803%29>> accessed 28.08.2022

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)

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

ICC 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

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

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)* 17.07.1998

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.

UN Security Council Resolution 1970 (2011) S/RES/1970.

UN Security Council Resolution 1593 (2005) S/RES/1593.

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

UN Security Council 7060th Meeting (15.11.2013) S/PV.7060; Assembly/AU/Dec.334(XVI)

UN Security Council 7180th Meeting (22.05.2014) S/PV.7180

UN, Kenya's Proposal of Amendments (22.11.2013) C.N.1026.2013.TREATIES-XVIII.10

UN, Vienna Convention on the Law of Treaties, 23.05.1969

(3) Secondary Sources

African Union Draft Withdrawal Strategy Document (12.01.2017) <https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf> accessed 28.08.2022

African Union, List of Countries Which Have Signed, Ratified/ Acceded 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

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, 09.01.2012 <<https://www.au.int/en/content/press-release-decisions-pre-trial-chamber-i-international-criminal-court-icc-pursuant-article>> accessed 18.09.2022

African Union Transitional Justice Policy (2019)

<https://au.int/sites/default/files/documents/36541-doc-au_tj_policy_eng_web.pdf> accessed 02.09.2022

Akande D, '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 <<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

Akande D, Du Plessis M, Jalloh C, 'An African expert study on the African Union concerns about Article 16 of the Rome Statute of the ICC' Institute for Security Studies Position Paper (2010)

Al Hussein PZR, Ugarte BS, Wenaweser C, Intelman T, 'The International Criminal Court Needs Fixing' *New Atlanticist* (24.04.2019) available at <<https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing/>> accessed 02.09.2022

Al Jazeera, 'Sudan's Military Removes Al Bashir' (20.04.2019) available at <<https://www.aljazeera.com/news/2019/4/20/sudans-military-removes-al-bashir-all-the-latest-updates>> accessed 03.09.2022

Ambos K, Office of the Prosecutor: Policy Paper on Case Selection and Prioritisation (2018) *International Legal Materials* 57:6

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.

Amnesty International, 'The ICC at 20: Double standards have no place in international justice' (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.

Apiko P, Aggad F, 'The International Criminal Court, Africa and the African Union: What Way Forward?' (2016) *European Centre for Development Policy Management Discussion Paper No: 201*

Arab News, 'The Downfall of Omar Bashir' (03.06.2020) available at <<https://www.arabnews.com/node/1661506>> accessed 03.09.2022

Arbour L, 'The Relationship between the ICC and the UN Security Council' (2014) *Global Governance* 20:2

Augusto DT, 'Having Regard to the Jurisprudence of the ICC, Consider Whether the Concept of "Complementarity" in the Rome Statute is Working' <https://giuricivile.it/complementarity-in-the-rome-statute/#_ftnref17> accessed 02.09.2022

Bachmann SDD, Nwibo EL, 'Pull and Push- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges' (2018) *Brooklyn Journal of International Law* 43

BBC World News, 'Sudan coup: Why Omar al-Bashir was overthrown' (15 April 2019) <<https://www.bbc.com/news/world-africa-47852496>> accessed 26.09.2022

Benedetti F, Bonneau K, Washburn J, *Negotiating the International Criminal Court: New York to Rome* (Martinus Nijhoff Publishers 2013)

Buchwald T, 'The Path Forward for the International Criminal Court: Questions Searching for Answers' (2020) *Case Western Reserve Journal of International Law*, p 419, <<https://scholarlycommons.law.case.edu/jil/vol52/iss1/18>> accessed 05.09.2022

Center for Constitutional Rights, 'Factsheet: U.S. Sanctions on the International Criminal Court' (02.04.2021) available at <<https://ccrjustice.org/factsheet-us-sanctions-international-criminal-court>> accessed 03.09.2022

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

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.

Chipaike R, Tshuma N, Hofisi S, 'African Move to Withdraw from the ICC: Assessment of Issues and Implications' (2019) *Indian Council of World Affairs* 75:3

Clark P, 'The International Criminal Court's Impact on Peacebuilding in Africa', in McNamee T, Muyangwa M (eds.) *The State of Peacebuilding in Africa: Lessons Learned for*

Policymaker and Practitioners (Palgrave Macmillian 2020)

Clarke KM, Jalloh CC, Nmehielle VO, 'Introduction' in Clarke KM, Jalloh CC, Nmehielle VO (eds) *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press 2019)

Clarke KM, 'New frontiers in international human rights: Actionable nonactionables and the (non)performance of perpetual becoming' (2022) *Journal of Human Rights* 21:2

Clarke KM, 'Peace and Justice Sequencing in Management of Violence in the Malabo Protocol for the African Court' in Jalloh CC, Clarke KM, Nmehielle VO (eds) *The African Court of Justice and Human and Peoples' Rights in Context* (Cambridge University Press 2019)

Clarke KM, 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

Coalition for the International Criminal Court, 'Why back the International Criminal Court and the fight for global justice?' available at <<https://www.coalitionfortheicc.org/explore/20-icc-benefits>> accessed 02.09.2022

Cole RJW., 'Africa's Relationship with the International Criminal Court: More Political Than Legal', (2013) *Melbourne Journal of International Law* 14

Cornell Z, 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' (2006) *Cornell International Law Journal* 39:2

Du Plessis M, 'Exploring Efforts to Resolve the Tension between the AU and the ICC over the Bashir Saga', in Ankumah EA (ed.) *The International Criminal Court and Africa: One Decade On* (Intersentia 2016)

Du Plessis M, Gevers C, '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

Gaeta P, Labuda P, '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)

Gissel LE, 'A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003 (2018) *European Journal of International Law* 29:3

Goldston J, '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/>>

Herik L, Sliedregt E, 'International Criminal Law and the Malabo Protocol: About Scholarly Reception, Rebellion and Role Models' *Grotius Center Working Paper* 2017/066-ICL (2017)

Human Rights Watch, 'U.S. Sanctions on the International Criminal Court: Questions and Answers' (14.12.2020) available at <<https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court>> accessed 04.09.2020

ICC, Al Bashir Case <<https://www.icc-cpi.int/darfur/albashir>> accessed 24.08.2022

ICC, 'ICC judges reject opening of an investigation regarding Afghanistan situation' Press Release ICC-CPI-20190412-PR1448 (12.04.2019)

ICC, Colombia: preliminary examination <<https://www.icc-cpi.int/colombia>> accessed 05.02.2022.

ICC, Gaddafi Case, available at <<https://www.icc-cpi.int/libya/gaddafi>> accessed 01.09.2022

ICC, Independent Expert Review: Categorization of recommendations and remaining issues <<https://asp.icc-cpi.int/Review-Court/Categorization-Recommendations>> accessed 01.09.2022

ICC, Karim A. A. Khan QC, available at <<https://www.icc-cpi.int/about/otp/who-s-who/karim-khan>> accessed 03.09.2022

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](https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy%20Paper%20Preliminary%20Examinations%202013-ENG.pdf)> accessed 19.09.2022.

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

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](https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)> accessed 27.09.2022

ICC Press Release, 'Situation in Georgia: ICC Pre-Trial Chamber delivers Three Arrest Warrants' (30.06.2022) <<https://www.icc-cpi.int/news/situation-georgia-icc-pre-trial-chamber-delivers-three-arrest-warrants>> accessed 27.09.2022

ICC, Review Conference of the Rome Statute opened in Kampala, Press Release ICC-ASP-20100531-PR532 (31.05.2010)

ICC, 'Situation in the Islamic Republic of Afghanistan' ICC-02/17 available at <<https://www.icc-cpi.int/afghanistan>> accessed 04.09.2022

ICC, Situation in Libya, available at <<https://www.icc-cpi.int/libya>> accessed 01.09.2022

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) available at <<https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/KenyattaEng.pdf>> accessed 03.09.2020

ICC, Statement of the Prosecutor on the withdrawal of charges against Uhuru Muigai Kenyatta,

<<https://www.youtube.com/watch?v=s3HORJn15Mg>> accessed 01.09.2022

ICC, Statement of the Prosecutor 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

ICC, 'Statement of the Prosecutor 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

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

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

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

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

Jackson M, 'Regional Complementarity: The Rome Statute and Public International Law' (2016) *Journal of International Criminal Justice* 14:5

Jalloh CC, 'Place of the African Court of Justice and Human and Peoples' Rights in the Prosecution of Serious Crimes in Africa' in Jalloh CC, Clarke KM, Nmeihelle VO (eds) *The African Court of Human and Peoples' Rights in Context* (Cambridge University Press 2019)

Jalloh CC, 'The African Union, the Security Council and the International Criminal Court' in Jalloh CC, Banketas I (eds) *The International Criminal Court and Africa* (Oxford University Press 2017)

Jalloh CC, '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 (2022). *Florida International University Legal Studies Research Paper No. 22-14*

Kerr CG, 'Sovereign Immunity, the AU, and the ICC: Legitimacy Undermined' (2020) *Michigan Journal of International Law* 41:1

Kersten M, 'Wayamo Foundation Policy Report: Building Bridges and Reaching Compromise Constructive Engagement in the Africa-ICC Relationship' (2018)

King H, 'Immunities and Bilateral Immunity Agreements: Issues Arising from Articles 27 and 98 of the Rome Statute' (2006) *New Zealand Journal of Public and International Law* 4

Krastev I, Leonard M, '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

Kotecha B, 'The International Criminal Court's Selectivity and Procedural Justice' (2020) *Journal of International Criminal Justice* 18:1

Magliveras KD, 'The Withdrawal of African States from the ICC: Good, Bad, or Irrelevant?' (2019) *Netherlands International Law Review* 66

Nyawo J, *Selective Enforcement and International Criminal Law* (Intersentia 2017)

Okpe SO, 'Anti-Impunity Norm of the International Criminal Court: A Curse of Blessing for Africa?' (2020) *Journal of Asian and African Studies* 55:8

Pensky M, 'Impunity: A Philosophical Analysis' in Morten Bergsmo and E.J. Buis (eds.) *Philosophical Foundations of International Criminal Law: Foundational Concepts* (Torkel Opsahl 2019)

Peter CM, 'Fighting Impunity: African States and the International Criminal Court' in

Ankumah EA (ed) *The International Criminal Court and Africa* (Intersentia 2016)

Rastan R, 'What is "Substantially the Same Conduct"?' (2017) *Journal of International Criminal Justice* 15

Sacouto S, 'The International Criminal Court's New Chief Prosecutor: Challenges and Opportunities' (2021) *Konrad Adenauer Stiftung*

<<https://www.kas.de/en/web/newyork/un-agma-blog/detail/-/content/the-international-criminal-court-s-new-chief-prosecutor-challenges-and-opportunities>> accessed

23.09.2022.

Sadat, L. 'Why the ICC's Judgment in the Al-Bashir Case Wasn't so Surprising' *Just Security*, <

<https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/>>

Schabas W, '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

Singi Y, 'Head of State Immunity: The ICC's Biggest Impediment', (2021) *Indian Journal of International Law* 59

Smith-van Lin L, '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)

Spies YK, 'Africa, the International Criminal Court, and the Law-Diplomacy Nexus' (2021) *The Hague Journal of Diplomacy* 16

TarBush E, 'Immunity and Impunity: Personal Immunities and the International Criminal Court' (24.06.2020) available at

<<https://globaljustice.queenslaw.ca/news/immunity-and-impunity-personal-immunities-and-the-international-criminalcourt#:~:text=Personal%20immunity%20is%20absolute%2C%20meaning,Arrest%2>

0Warrant%20at%20para%2058).> accessed
04.09.2022

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

United Nations, Kenya's Proposal of
Amendments, C.N.1026.2013.TREATIES-
XVIII.10 (22.11.2013)

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](https://press.un.org/en/2021/ga12384.doc.htm)> accessed 26.09.2022

UN Meeting Coverage and Press Releases,
'Referral of Syria to International Criminal
Court' (22 May 2014)
<[https://press.un.org/en/2014/sc11407.doc.
htm](https://press.un.org/en/2014/sc11407.doc.htm)> accessed 01.09.2022

UN News, 'British human rights lawyer
elected chief prosecutor of the International
Criminal Court', (12.02.2021)

<[https://news.un.org/en/story/2021/02/108
4582](https://news.un.org/en/story/2021/02/1084582)> accessed 05.09.2022

Wayamo Foundation, 'Precarity or
Prosperity: African Perspectives on the Future
of the International Criminal Court' (2020)

Weiss J, 'The rise and decline of reform
narratives: Evidence from NPM reforms in
Germany', (2017) IPPA 2017 Singapore-
T08P14: Policy Narratives and Public Policy,
<[https://www.ippapublicpolicy.org/file/paper/
/593d2330eb798.pdf](https://www.ippapublicpolicy.org/file/paper/593d2330eb798.pdf)> accessed 01.09.2022

Wet E, '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)



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

