

AFRICA'S RELATIONSHIP WITH THE INTERNATIONAL CRIMINAL COURT: MORE POLITICAL THAN LEGAL

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In July 2002, the Rome Statute of the International Criminal Court came into force, giving birth to the International Criminal Court ('ICC' or 'the Court'). This marked a significant moment in international criminal justice. The birth of a permanent court that would hold accountable those responsible for gross violations of human rights and international humanitarian law was now a reality. The African region played a great and active role in the realisation of this Court. However, the fact that all accused persons presently before the Court are Africans has raised speculation that the ICC is targeting Africans. This perception was further exacerbated with the indictment of President Omar Hassan Ahmad Al Bashir of Sudan. Consequently, the African Union ('AU') has resolved to cease cooperation with the Court with regard to the arrest of Al Bashir. The Court recently celebrated 10 years of existence, but the AU's attitude towards the ICC suggests that political considerations continue to form an obstacle to international criminal justice.

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I INTRODUCTION

The post-Nuremberg quest for a permanent court to try those responsible for horrendous crimes against international humanitarian law and grave violations of human rights proved elusive for several decades. The lack of political will and

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the geopolitics of the Cold War contributed significantly to the inertia that dampened the realisation of that goal. However, the 1990s saw a shift in direction. In 1994, the conflict in the former Yugoslavia led to the creation of the International Criminal Tribunal for the Former Yugoslavia ('ICTY')¹ by the United Nations Security Council, acting under its Chapter VII powers.² A conflict similar to that in the former Yugoslavia also took place in Rwanda, leading the Security Council to create the International Criminal Tribunal for Rwanda ('ICTR').³ These tribunals are ad hoc in nature, but their presence helped to generate momentum for the establishment of a permanent international criminal court to hold perpetrators of serious violations of human rights criminally responsible. In addition, the timing was right. The Iron Curtain was blown away and, with it, the binary East–West geopolitical divide. Consequently, the stage was set for the realisation of the International Criminal Court ('ICC' or 'the Court').

With the entry into force of the *Rome Statute of the International Criminal Court* ('Rome Statute') in 2002, the ICC came into being.⁴ The Court's mandate is to try those responsible for war crimes, genocide, crimes against humanity and (soon) crimes of aggression.⁵ African states were instrumental in pushing for the realisation of the ICC⁶ and this is reflected in the fact that Africa has the highest regional representation to the *Rome Statute*.⁷ However, this close association was soon derailed. Africa's relationship with the ICC deteriorated, especially after the latter issued a warrant for the arrest of a sitting African head of state, President Omar Hassan Ahmad Al Bashir of Sudan. The African Union ('AU') and the African leadership have since accused the ICC of singling out or targeting Africans.⁸ Some critics of the ICC have also argued that the Court is part of a

¹ SC Res 827, UN SCOR, 3217th mtg, UN Doc S/RES/827 (25 May 1993).

² See *Charter of the United Nations* ch VII ('UN Charter').

³ SC Res 955, UN SCOR, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

⁴ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('Rome Statute').

⁵ Ibid arts 5–8. See also Betty Kaari Murungi, 'Implementing the International Criminal Court Statute in Africa' (2001) 26 *International Legal Practitioner* 87, 87.

⁶ Hassan Jallow and Fatou Bensouda, 'International Criminal Law in an African Context' in Max du Plessis (ed), *African Guide to International Criminal Justice* (Institute for Security Studies, 2008) 15, 41; Daniel D Ntanda Nsereko, 'Triggering the Jurisdiction of the International Criminal Court' (2004) 4 *African Human Rights Law Journal* 256, 257; Steve Odero, 'Politics of International Criminal Justice, the ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 145, 148.

⁷ Currently, 122 states are parties to the *Rome Statute*: 34 are African states; 18 are Asia-Pacific states; 18 are European states; 27 are from Latin America and the Caribbean; and 25 are from Western Europe and elsewhere: International Criminal Court, *The States Parties to the Rome Statute* <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

⁸ See, eg, *Communiqué of the 142nd Meeting of the Peace and Security Council*, PSC 142nd mtg, AU Doc PSC/MIN/Comm(CXLII) Rev.1 (21 July 2008) para 3 ('*Communiqué of the 142nd Meeting*').

conspiracy against Africa.⁹ Others have argued that the prosecution of a conflict's protagonists undermines ongoing peace processes.¹⁰ Consequently, Africa's relationship with the Court is now in a quagmire. Questions of political will which affected the creation of the ICC continue to haunt the Court.

This article seeks to examine Africa's relationship with the ICC. It seeks to address the allegation that the Court is biased against Africa. Any assessment of a tribunal's performance or its prosecutorial decisions should ordinarily be based on legal considerations.¹¹ Unfortunately, supranational adjudication is always bogged down by political factors.¹² In this vein, this article will assess the AU's criticisms of the ICC from both political and legal perspectives. While it is clear that the AU is of the view that the Court's prosecutorial decisions are politically motivated, it is equally clear that their discomfort with the Court is itself politically motivated.¹³

Part II examines Africa's contribution to the creation of the ICC. As will be seen, both the AU and African civil society exerted significant political will in relation to and support for the Court's formation.¹⁴ Part III engages in a legal analysis of the procedure involved in bringing cases before the ICC. This discussion is crucial to assessing the argument that the Court has unfairly targeted Africans. Part IV looks at the political aspects of the AU's criticism of the Court. While legal considerations are ordinarily the basis of prosecution, political considerations are relevant to supranational adjudication; supranational tribunals necessarily depend on the will and cooperation of states. For example, the ICC relies on the cooperation of states for the investigation, arrest and prosecution of suspects. Thus the Court will find itself in difficulty if it falls out

⁹ See, eg, David Hoile, 'Is the ICC Fit for Purpose', *New African* (London) March 2012, 8; David Hoile, 'Europe, Masters behind the ICC', *New African* (London) March 2012, 14. For a survey of the claims and counterclaims: see Mary Kimani, 'Pursuit of Justice or Western Plot?', *Africa Renewal* (online) October 2009 <<http://www.un.org/africarenewal/magazine/october-2009/pursuit-justice-or-western-plot>>.

¹⁰ See, eg, *Communiqué of the 142nd Meeting*, AU Doc PSC/MIN/Comm(CXLII) Rev.1, para 3.

¹¹ Dire Tladi, 'The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98' (2013) 11 *Journal of International Criminal Justice* 199, 201.

¹² Decisions of international courts and tribunals that mandate changes to the political and financial behaviour of governments are unlikely to gain their support, especially where respect for human rights is not an entrenched feature of that polity: see James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 770.

¹³ *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Extraordinary Assembly Dec.1, ext sess, AU Doc Ext/Assembly/AU/Dec.1-2(Oct.2013) (12 October 2013) para 4 ('*Decision on Africa's Relationship with the ICC*'). For further criticisms of the International Criminal Court ('ICC' or 'the Court'): see generally Margaret M deGuzman 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265. National governments may also use the Court as a political tool against their opponents: see Matthew Happold, 'The International Criminal Court and the Lord's Resistance Army' (2007) 8 *Melbourne Journal of International Law* 159, 169, citing Paola Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949, 951-2.

¹⁴ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary Record of the 6th Plenary Meeting*, UN Doc A/CONF.183/SR.6 (20 November 1998) 104 [116]. See also Kristie Barrow, 'The Role of NGOs in the Establishment of the International Criminal Court' (2004) 2(1) *Dialogue* 11 <<http://www.polsis.uq.edu.au/dialogue/vol-2-1-4.pdf>>.

of favour with states. Part V assesses whether criticisms of the ICC by the AU and other African critics are justified. Part VI explores the principle of complementarity as a possible solution and queries whether the AU's attempt at complementarity on a regional level is consistent with the tenets of the *Rome Statute*. While the article concludes that the allegations of bias are not legally convincing, it notes that the problem goes beyond legal considerations and calls for greater cooperation on both sides, as well as maximising positive complementarity.

II AFRICA'S EARLY RELATIONSHIP WITH THE ICC

A *The Role of African States and Institutions in the Formation of the ICC*

Africa's call for the establishment of the ICC came from the highest levels of the continent's leadership. In September 1997, 14 states of the Southern African Development Community ('SADC') met and set out 10 basic principles that they wanted to be included in forming the ICC.¹⁵ In February 1998, representatives of 25 African states met in Dakar, Senegal where the 'Dakar Declaration for the Establishment of the International Criminal Court' ('*Dakar Declaration*') was adopted, calling for an effective and independent international criminal court.¹⁶ In the *Dakar Declaration*, it was noted that national legal systems have generally failed to hold perpetrators accountable for gross violations of international law. It affirmed a commitment to the establishment of the Court and stressed the importance of finalising the Court's statute at the then-approaching Rome Conference. In 2000, the OAU — now AU¹⁷ — at the 36th ordinary session of the Assembly of Heads of State and Government condemned the perpetration of crimes against humanity, war crimes and genocide on the continent and undertook to cooperate with relevant institutions set up to prosecute perpetrators.¹⁸ Africa's support for the ICC did not end with declarations. African states played a prominent role in crafting the *Rome Statute*. Lesotho, Malawi, Senegal, South Africa and Tanzania, among other African states, had previously participated in the discussion relating to the creation of the Court at a presentation of a draft statute by the International Law Commission to the

¹⁵ Khiphusizi Josiah Jele, 'The Permanent Mission of South Africa to the United Nations' (Speech delivered at the Sixth Committee of the 52nd General Assembly, New York, 21 October 1997).

¹⁶ Coalition for the International Criminal Court, 'Dakar Declaration for the Establishment of the International Criminal Court in 1998' (Declaration, 2 February 1998) <<http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>>. Furthermore, the first Organisation of African Unity ('OAU') Ministerial Conference on Human Rights in Africa, meeting on 16 April 1999 in Grand Bay, Mauritius, resulted in 'The Grand Bay Declaration and Plan of Action', which called on all African states to ratify the *Rome Statute*: African Commission on Human and Peoples' Rights, 'Grand Bay (Mauritius) Declaration and Plan of Action' (Declaration, April 1999).

¹⁷ The OAU was transformed into the African Union ('AU') at the Assembly of the Heads of State and Government Summit in Durban in 2002. The AU seeks to create greater solidarity among African states and to secure the economic and political unification of the continent: *Decision on the Establishment of the Peace and Security Council of the African Union*, Assembly Dec.2(I), 1st sess, AU Doc Assembly/AU/Dec. 1-5(I) (9-10 July 2002) paras 1-4.

¹⁸ *Declarations and Decisions Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government*, AHG Decl.4 (XXXVI), 36th sess, AU Doc AHG/Decl.1-6 (XXXVI) (10-12 July 2000).

UN General Assembly in 1993.¹⁹ Forty-seven African countries later were present at the Rome Conference during the drafting of the *Rome Statute* in July 1998. The vast majority of African states also voted in favour of adopting the *Rome Statute* at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court²⁰ and a number of them have also taken steps to implement enabling legislation to make it applicable in their respective domestic laws.²¹

The African Commission on Human and Peoples' Rights ('ACHPR') also showed its commitment to the ICC by repeatedly calling upon African states to ratify the *Rome Statute* and take legislative measures to make the *Rome Statute* applicable in their domestic laws. At its 24th ordinary session in October 1998, the ACHPR passed a resolution calling on African states to ratify the *Rome Statute* and to take 'legislative and administrative steps to bring national laws and policies into conformity' with it.²² In 2005, it adopted a resolution calling on African states to domesticate and implement the *Rome Statute*.²³ Indeed, African

¹⁹ Coalition for the International Criminal Court, 'Africa and the International Criminal Court' (Fact Sheet, 25 May 2009). See also International Law Commission, *Report of the International Law Commission on the Work of Its 46th Session*, UN GAOR, 49th sess., Supp No 10, UN Doc A/49/10 (1994) ch II(B)(f) ('*Draft Statute for an International Criminal Court*').

²⁰ Ibid.

²¹ See, eg, *Implementation of the Rome Statute of the International Criminal Court Act 2002* (South Africa); *Draft Legislation — Implementation of the Statute of the International Criminal Court* (Democratic Republic of Congo); *The International Criminal Court Bill* (Uganda) Act No 18 of 2006, 17 November 2006; *International Crimes Act 2008* (Kenya); *Détermination des Compétences et de la Procédure de Mise en Oeuvre du Statut de Rome relative à la Court Pénale Internationale par les Jurisdictions Burkinabè* [Law 052-2009/AN of 3 December 2009 relating to the Determination of the Competence and Procedure in Implementing the *Rome Statute of the International Criminal Court* by the Courts of Burkina Faso] (Burkina Faso), Decree No 2009-894/PRES, 3 December 2009. Senegal has declared that the jurisdiction of the ICC applies in its country — being a monist state, it does not need an enabling Act; Botswana is in the process of drafting legislation to domestically implement the *Rome Statute*. The Southern African Development Community ('SADC') held a Workshop on Ratification of the *Rome Statute of the International Criminal Court* in Pretoria on 5–9 July 1999, where a Model Enabling Act was adopted to assist SADC countries to put the relevant legislation in place: South African Development Community Workshop on Ratification of the *Rome Statute of the International Criminal Court*, 'ICC Ratification Kit — Model Enabling Act' (South African Development Community, 1999), reproduced in Sivu Maqungo, 'The Establishment of the International Criminal Court: SADC's Participation in the Negotiations' (2000) 9(1) *African Security Review* 42. For a more comprehensive list of the domestic enactment of the *Rome Statute* in African countries, see Lee Stone and Max du Plessis, 'The Implementation of the *Rome Statute* of the International Criminal Court (ICC) in African Countries' (Report, Institute for Security Studies, 1 March 2008) <<http://www.issafrica.org/cdromstatute/pages/document.pdf>>.

²² Assembly of Heads of State and Government, *Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 35th sess, OAU Doc AHG/215(XXXV) (12–14 July 1999) 26 (Resolution 27 of the 24th Ordinary Session of the African Commission on Human and Peoples' Rights: *Resolution on the Ratification of the Treaty on the International Criminal Court*) <<http://www.achpr.org/sessions/24th/resolutions/27/>>.

²³ Executive Council, *Report of the African Commission on Human and Peoples' Rights*, 8th sess, AU Doc Ex.CL/236(VIII) Rev.1 (16–21 January 2006) annex III ('*Resolutions Adopted during the 38th Ordinary Session*') 42 (Resolution 87 of the 38th Ordinary Session of the African Commission on Human and Peoples' Rights: *Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court*) <<http://www.achpr.org/sessions/38th/resolutions/87/>>.

states led the way in signing up to the *Rome Statute*, evidenced by the high number of African parties. Senegal was the first country to ratify it, doing so on 2 February 1999. In February 2005, Côte d'Ivoire, not then even a party to the *Rome Statute*, accepted by declaration the ICC's jurisdiction in relation to crimes committed in that country since 19 September 2002.²⁴ Further, on 10 December 2010, Alassane Ouattara — who was at the time involved in a conflict with the incumbent Laurent Gbagbo — sent a letter to the President, Registrar and Prosecutor of the ICC, in his capacity as the newly-elected President of Côte d'Ivoire, confirming the validity of the declaration and 'committing his country to full cooperation with the Court'.²⁵

B The Role of African Civil Society

African civil society also played a visible role in building the momentum that culminated in the establishment of the ICC and continues to encourage African states to ratify the *Rome Statute*.²⁶ African non-governmental organisations ('NGOs') even formed the Coalition for the Establishment of an International Criminal Court ('the Coalition'). The Coalition is made up of African NGOs and their Western counterparts and aims to encourage governments to ratify the *Rome Statute*.²⁷ Furthermore, the role played by African NGOs during the negotiations is further evidence of civil society's support.²⁸ For example,

²⁴ This declaration was made in terms of art 12(3) of the *Rome Statute*: see *Déclaration de reconnaissance de la Compétence de la Cour Pénale Internationale* [Declaration Accepting the Jurisdiction of the International Criminal Court] (Côte d'Ivoire) 18 April 2003. On 19 September 2002 the Patriotic Movement of Côte d'Ivoire attempted to overthrow the Government of then-President Laurent Gbagbo. Though they failed to take over the commercial capital Abidjan, they seized and remained in control of the northern half of the country. They were joined by other rebels and formed the *Forces Nouvelles*. Consequently, the country descended into a bitter civil conflict. While there was a lull in hostilities after the 2003 French-brokered peace deal, atrocities still continued. Elections in November 2010 were followed by an escalation in the conflict as Gbagbo refused to give up power to the widely recognised winner, opposition leader Alassane Ouattara. Forces loyal to Ouattara finally succeeded in pushing Gbagbo out of power in April 2011.

²⁵ Letter from President Alassane Ouattara to the Office of the Prosecutor of the ICC, 14 December 2010. A further letter was sent to the Court by Ouattara on 3 May 2011, reconfirming the country's acceptance of its jurisdiction: see *Situation in the Republic of Côte d'Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire)* (International Criminal Court) (Pre-Trial Chamber III, Case No ICC-02/11, 3 October 2011) [12]. Côte d'Ivoire eventually ratified the *Rome Statute* on 15 February 2013.

²⁶ Charles Chernor Jalloh, 'Regionalizing International Criminal Law?' (2009) 9 *International Criminal Law Review* 445, 450; William R Pace and Mark Thieroff, 'Participation of Non-Governmental Organizations' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (Kluwer Law International, 1999) 391, 392–8; Centre for Citizens' Participation in the African Union, 'Communiqué on CSO Consultation on the Year of Peace and Security in Africa' (Communiqué, January 2010) 5 <http://www.wanep.org/wanep/attachments/article/128/final_communique_yps_jan_2010.pdf>.

²⁷ Coalition for the International Criminal Court, *About the Coalition* <<http://www.iccnw.org/?mod=coalition>>.

²⁸ See *Establishment of an International Criminal Court*, GA Res 52/160, UN GAOR, 52nd sess, 72nd plen mtg, Agenda Item 150, Supp No 49, UN Doc A/RES/52/160 (28 January 1998) para 3; United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Non-Governmental Organizations Accredited to Participate in the Conference — Note by the Secretary-General*, UN Doc A/CONF.183/INF/3 (5 June 1998).

addressing the official opening of the 41st ordinary session of the ACHPR in Accra, Ghana, in May 2007, the NGO representative called on the Government of Sudan to cooperate with the ICC and surrender persons against whom warrants had been issued for international crimes committed in Darfur.²⁹ African NGOs also assisted in the development of the Court's *Rules of Procedure and Evidence*.³⁰ These examples are indicative of the history of strong and consistent support for the Court in Africa, from both political leaders and civil society.³¹

III LEGAL BASIS AND PROCEDURES FOR INSTITUTING PROSECUTION BEFORE THE ICC

The greatest source of Africa's displeasure with the ICC is the fact that it has been Afro-focused. Only Africans are wanted for prosecution or have been indicted before the Court. The AU and other opponents of the ICC broadcast this as evidence of the Court's bias against Africa. It is instructive at this juncture, therefore, to examine the legal procedures by which cases are brought before the Court.

A Referral and Investigation

Possible cases commence before the Court as 'situations' which have to undergo investigation if they are to be pursued further. Situations may be referred to the ICC in one of three ways. First, a state party may refer a situation to the Court.³² This most often occurs when the alleged crimes are committed in the territory of the state, an alleged offender is in the territory of the state, the offender is a national of the state or the victims are nationals of the state. The Office of the Prosecutor ('OTP') may then investigate the situation to determine whether a crime has been committed under the *Statute*.³³ Secondly, the OTP may initiate investigations *proprio motu*.³⁴ It can only do so 'on the basis of information on crimes within the jurisdiction of the court'.³⁵ Where the OTP intends to initiate proceedings, it must first make an application to the

²⁹ Hannah Foster, 'NGO Statement at Official Opening of the 41st Ordinary Session of the African Commission on Human and Peoples' Rights' (Speech delivered at the 41st Ordinary Session of the African Commission on Human and Peoples' Rights, Accra, 16 May 2007).

³⁰ Jalloh, 'Regionalizing International Criminal Law', above n 26, 450. See also International Criminal Court, *Rules of Procedure and Evidence*, ICC Doc ICC-ASP/1/3 (adopted 9 September 2002).

³¹ Africa's interest in and interaction with the ICC is marked by its representation in high-level positions. The continent's constituency in the Court is enviable, including a significant representation in terms of personnel. Five of the Court's judges are Africans. They are Fatoumata Dembélé Diarra (Mali), Akua Kuenyehia (Ghana), Joyce Aluoch (Kenya), Chile Eboe-Osuji (Nigeria) and Sanji Mmasenono Monageng, First Vice President (Botswana). The current United Nations High Commissioner for Human Rights, Navanethem Pillay (South Africa) and Judge Daniel Ntanda Nsereko (Uganda) of the Lebanese Tribunal are former judges of the Court. The Chief Prosecutor, Fatou Bensouda (The Gambia), formerly served as Deputy Prosecutor; and Deputy Registrar Didier Preira (Senegal) are also Africans: see International Criminal Court, *The Judges* <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20biographical%20notes.aspx>.

³² *Rome Statute* art 14.

³³ *Ibid* art 14(1).

³⁴ *Ibid* art 15.

³⁵ *Ibid* art 15(1). The *Rome Statute* calls on the prosecutor to analyse the seriousness of such information: at art 15(2).

Pre-Trial Chamber.³⁶ If the Chamber is satisfied that there is a reasonable basis for investigations to proceed, it will authorise the OTP to commence investigations.³⁷ However, even before approaching the Pre-Trial Chamber, the OTP must notify the state that could possibly exercise jurisdiction over the crimes concerned of their intention to seek the Pre-Trial Chamber's authorisation.³⁸ The state concerned may, within a month, inform the Prosecutor whether it is investigating the matter in question and request that the Prosecutor defer their investigation.³⁹ If no such information is received from the state concerned the Prosecutor may proceed with investigations after obtaining the consent of the Pre-Trial Chamber.⁴⁰ The Chamber should only grant such authorisation where it is satisfied that the state is unable or unwilling to conduct genuine investigations.⁴¹ Thirdly, the UN Security Council, acting under Chapter VII of the *Charter of the United Nations* ('*UN Charter*'), may refer a situation to the Court for investigation.⁴² It should be noted that what is referred are not individual criminal cases but, rather, 'situations'. This process gives the Prosecutor a wide scope in relation to investigations, prevents bias and politicisation of the complaints procedure⁴³ and ensures that the investigations commence from a general position of neutrality. African criticisms of Security Council referrals, however, are that they do not represent the will of the community of states.⁴⁴ The Security Council is heavily influenced by permanent members, several of whom are not parties to the *Rome Statute*. The AU's position reflects an emerging trend wherein developing countries are increasingly questioning the dominance of global politics by a few powerful nations.

The process of bringing a case before the ICC involves serious scrutiny of the evidence during pre-trial proceedings.⁴⁵ The powers of the Prosecutor to commence investigations are constricted and subject to judicial scrutiny.⁴⁶ Furthermore, they are required to defer to state jurisdiction in relation to the conduct of investigations and the initiation of prosecutions.⁴⁷ Therefore, the primary responsibility of states to prosecute crimes within the Court's jurisdiction is recognised and accorded preference. The provisions of art 15 of

³⁶ For a discussion of the decision to limit the prosecutor's powers to initiate proceedings *proprio motu* during the negotiation of the *Rome Statute*, see Allison Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 512–16.

³⁷ *Rome Statute* art 15(4).

³⁸ *Ibid* art 18(1).

³⁹ *Ibid* art 18(2).

⁴⁰ *Ibid*.

⁴¹ Daniel D Ntanda Nsereko, 'The International Criminal Court: Jurisdictional and Related Issues' (1999) 10 *Criminal Law Forum* 87, 113.

⁴² *Rome Statute* art 13(b).

⁴³ Elizabeth Wilmshurst, 'Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (Kluwer Law International, 1999) 127, 131.

⁴⁴ Dire Tladi, 'The African Union and the International Criminal Court: The Battle for the Soul of International Law' (2009) 34 *South African Yearbook of International Law* 57, 69.

⁴⁵ *Rome Statute* art 15(4).

⁴⁶ *Ibid* art 15(3), (4).

⁴⁷ *Ibid* art 18(1), (2), (3).

the *Rome Statute* clearly demonstrate that even where the Prosecutor commences investigations *proprio motu*, the investigations should be triggered by information received from reliable sources. They must analyse the gravity of the allegations and this further restricts their powers.

B Pre-Trial Proceedings

Upon completion of the investigations, the Prosecutor applies to the Pre-Trial Chamber for an arrest warrant or summons to be issued in respect of the suspect. They must satisfy the Chamber that there are reasonable grounds to believe that the suspect committed the crimes in question.⁴⁸ When the person appears before the Court, a hearing is held to confirm the charges. At the hearing, the Prosecutor should provide the Court with ‘sufficient evidence to establish substantial grounds to believe’ that the accused committed the crimes for which he or she is charged.⁴⁹

The evidence against an accused must pass through a vetting process of three stages. The Prosecutor, having satisfied the Pre-Trial Chamber that there is a reasonable basis for the institution of investigations,⁵⁰ must now convince the Court that there are reasonable grounds for the issuance of a warrant or summons.⁵¹ Finally, upon appearing in Court, and as a requirement for the confirmation of the charges, the Court must be satisfied that there is sufficient evidence to establish substantial grounds to believe that the accused committed the offence.⁵² With such rigorous judicial scrutiny (the independence and integrity of the judges have not been questioned), it is very doubtful that any case founded on feeble evidence would proceed to the trial stage. Even where cases proceed to trial, the burden continues to lie with the Prosecutor to prove the guilt of the accused beyond reasonable doubt. As will be seen later in this article, the decision of the ICC on whether or not to confirm charges is based on legal standards provided by the *Rome Statute*, which has led to the refusal to confirm a number of indictments.⁵³

IV AFRICAN CRITICISMS OF THE ICC — A POLITICAL DEBATE

This section highlights African criticisms of the Court. In so doing, the AU’s increasing ability to speak as a more united force than its predecessor, the OAU, must be recognised. Since the transformation of the OAU into the AU in 2002,⁵⁴ the continental body has increasingly sought to assert itself internationally. The AU seeks to foster an African renaissance⁵⁵ which embraces, among other things, the protection of the continent’s political and economic interests as well

⁴⁸ *Rome Statute* art 58(1)(a).

⁴⁹ *Ibid* art 61(5).

⁵⁰ *Ibid* art 15(3).

⁵¹ *Ibid* art 15(4).

⁵² *Ibid* art 61(5).

⁵³ See below Part V(A).

⁵⁴ *Constitutive Act of the African Union*, opened for signature 11 July 2000, 2158 UNTS 3 (entered into force 26 May 2001) art 2 (‘*Constitutive Act*’).

⁵⁵ Indeed, the AU declared 2013 the ‘Year of Pan-Africanism and the African Renaissance’: African Union, *Panaficanism & African Renaissance: 21st AU Summit, 19–27 May 2013* (2013) African Union Commission <<http://summits.au.int/en/21stsummit/50th>>.

as the prospects of forging African solutions to African problems. Among the objectives of the AU, as stated in the *Constitutive Act of the African Union* ('*Constitutive Act*'), is to promote and defend issues of interest common to countries of the continent.⁵⁶ In light of this, the AU does not take kindly to outsiders dictating to the continent. Their consternation appears to be founded on geopolitical considerations regarding international involvement in Africa. The AU's criticisms of the ICC are discussed under four headings: that the ICC's approach is Afro-focused; that prosecution is inimical to peace processes; the allegation that the ICC is part of a conspiracy against Africa; and the Court's disregard for head of state immunity.

A *The Afro-Focused Prosecutorial Approach*

African statesmen, the AU and some publicists have expressed great discomfort with the ICC. Probably the most notorious criticism levelled relates to its exclusive focus on Africa.⁵⁷ Jean Ping, former President of the African Union Commission, has slammed the Court, arguing that 'we are not against the ICC, but there are two systems of measurement ... [T]he ICC seems to exist solely for judging Africans'.⁵⁸

A number of issues are clear. First, only Africans and situations in Africa have been referred to and brought before the ICC. All persons brought before the Court are Africans. They hail from the Central African Republic ('CAR'),⁵⁹ Côte d'Ivoire,⁶⁰ the Democratic Republic of the Congo

⁵⁶ Ibid art 3(d).

⁵⁷ See, eg, Chikeziri Sam Igwe, 'The ICC's Favourite Customer: Africa and International Criminal Law' (2008) 41 *Comparative and International Law Journal of Southern Africa* 294, 297.

⁵⁸ Alexis Arieff et al, 'International Criminal Court Cases in Africa: Status and Policy Issues' (Report, Congressional Research Service, 22 July 2011) 26, quoting Christophe Ayad and Thomas Hofnung, 'Nous sommes faibles, alors on nous juge et on nous punit', *Libération Monde* (online) 30 July 2009 <http://www.liberation.fr/monde/2009/07/30/nous-sommes-faibles-alors-on-nous-juge-et-on-nous-punit_573310> [Congressional Research Service trans].

⁵⁹ *Prosecutor v Bemba (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/05-01/08, 23 May 2008); *Prosecutor v Bemba (Warrant of Arrest Replacing the Warrant of Arrest Issued on 23 May 2008)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-01/05-01/08, 10 June 2008).

⁶⁰ *Situation in the Republic of Côte d'Ivoire (Warrant of Arrest for Laurent Gbagbo)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-02/11, 23 November 2011); *Prosecutor v Simone Gbagbo (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-02/11-01/12, 29 February 2012). The Government of Mali has also referred the situation in northern Mali to the ICC for investigation: see Letter from the Minister of Justice Malick Coulibaly to the Prosecutor of the ICC, 13 July 2012.

(‘DRC’),⁶¹ Kenya,⁶² Libya,⁶³ Sudan⁶⁴ and Uganda.⁶⁵ These relate to situations involving unrest, violence and grave breaches of human rights. Secondly, the

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- ⁶¹ *Prosecutor v Lubanga (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 10 February 2006); *Prosecutor v Katanga (Decision on the Joinder of the Cases against Katanga and Chui)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 10 March 2008). On 21 November 2012, Trial Chamber I considered a re-characterisation of the facts of the case relating to the mode of liability applicable to Germain Katanga. The Chamber was of the view (Judge Van den Wyngaert dissenting) that those charges would prolong the trial of Katanga and decided that it was unnecessary to prolong the case of Mathieu Ngudjolo Chui. To avoid the possible violation of Chui’s right to a trial within reasonable time, the Chamber severed the charges against him: *Prosecutor v Katanga (Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons)* (International Criminal Court, Trial Chamber II, Case No ICC 01/04-01/07, 21 November 2012). Chui was acquitted on 18 December 2012. The Court was of the view that the prosecutor had failed to prove beyond reasonable doubt the three counts of crimes against humanity and seven counts of war crimes with which he was charged: *Prosecutor v Ngudjolo (Judgment pursuant to Article 74 of the Statute)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-02/12, 18 December 2012). See also *Prosecutor v Ntaganda (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-02/06, 22 August 2006); *Prosecutor v Mbarushimana (Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 28 September 2010).
- ⁶² *Prosecutor v Ruto (Decision on the Prosecutor’s Application for Summons to Appear)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 8 March 2011); *Prosecutor v Muthaura (Decision on the Prosecutor’s Application for Summones to Appear)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 8 March 2011); *Prosecutor v Muthaura (Decision on the Confirmation of Charges pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 23 January 2012). On 11 March 2013, the Chief Prosecutor filed notice to withdraw charges against Francis Kirimi Muthaura. The charges were subsequently dropped: *Prosecutor v Muthaura (Prosecution Notification of Withdrawal of the Charges)* (International Criminal Court, Trial Chamber V, Case No ICC-01/09-02/11, 11 March 2013).
- ⁶³ *Prosecutor v Gaddafi (Warrant of Arrest for Muammar Gaddafi)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 27 June 2011). The arrest warrant against Muammar Gaddafi was terminated on 22 November 2011 following his death. See also *Prosecutor v Gaddafi (Warrant of Arrest for Saif Gaddafi)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 27 June 2011); *Prosecutor v Gaddafi (Warrant of Arrest for Abdullah Al-Senussi)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 27 June 2011).
- ⁶⁴ *Prosecutor v Harun (Warrant of Arrest for Harun)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 27 April 2007); *Prosecutor v Harun (Warrant of Arrest for Ali Kushayb)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 27 April 2007); *Prosecutor v Garda (Summons to Appear)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 7 May 2009); *Prosecutor v Banda and Jerbo (Summons to Appear for Banda)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 27 August 2009); *Prosecutor v Banda and Jerbo (Summons to Appear for Jerbo)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 27 August 2009); *Prosecutor v Al Bashir (Second Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010) (‘*Second Al Bashir Warrant*’).

evidence presented to the Pre-Trial Chamber in order to determine whether investigations should commence or whether warrants should be issued must support allegations of the perpetration of grave and serious crimes. Thirdly, African states, through self-referrals, bear significant responsibility for bringing alleged perpetrators of international crimes before the Court. For example, the case of *Prosecutor v Gbagbo (Warrant of Arrest)* was initiated with the full support and cooperation of the current Government of Côte d'Ivoire. Fourthly, the ICC interventions in Sudan and Libya were triggered by the UN Security Council exercising its Chapter VII powers.⁶⁶ The referral of Sudan to the Court was preceded by a recommendation by a UN Commission of Inquiry, which found that war crimes and crimes against humanity had been committed in Darfur.⁶⁷

The attempt to prosecute Al Bashir unleashed an unexpected backlash against the ICC. This 'Al Bashir factor' represents a tangled interaction between geopolitics and the duty to punish individuals responsible for gross violations of human rights. Following the issuance of the warrant, the AU requested that the Security Council suspend the warrant pending the negotiation of a settlement to end the Darfur conflict.⁶⁸ The request was not accorded a response. The AU therefore resolved not to cooperate with the Court with regards to the arrest of Al Bashir.⁶⁹ The Libya situation was also referred to the ICC by the Security Council, in response to crimes against humanity committed against civilians by the Gaddafi regime.⁷⁰

It is clear, therefore, that while all cases before the Court emanate from Africa, a broader examination of the processes resulting in the initiation of charges dilutes the contention that the ICC has intentionally focused on Africa. This argument is informed by political and regional considerations. This tension

⁶⁵ *Situation in Uganda (Amended Warrant of Arrest for Kony)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 27 September 2005); *Situation in Uganda (Warrant of Arrest for Vincent Otti)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/04, 8 July 2005); *Situation in Uganda (Warrant of Arrest for Okot Odhiambo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 8 July 2005); *Situation in Uganda (Warrant of Arrest for Dominic Ongwen)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 8 July 2005); *Situation in Uganda (Warrant of Arrest for Raska Lukwiya)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 8 July 2005). The fifth indictee, Raska Lukwiya, died in August 2006 and the proceedings against him were terminated: see *Prosecutor v Kony (Decision to Terminate the Proceedings against Raska Lukwiya)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/04-01/05, 11 July 2007).

⁶⁶ SC Res 1593, UN SCOR, 5158th mtg, UN Doc S/RES/1593 (31 March 2005) ('*Resolution 1593*') (by which the Security Council referred the situation in Darfur to the ICC for investigation).

⁶⁷ International Commission of Inquiry on Darfur, 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004' (Report, 25 January 2005).

⁶⁸ The request for deferral was made in terms of art 16 of the *Rome Statute*; the charges against Al Bashir relate to atrocities committed against the civilian population of the Darfur region in Western Sudan: see *Second Al Bashir Warrant* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 July 2010).

⁶⁹ *Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly Dec.245(XIII) Rev.1, 13th sess, AU Doc Assembly/AU/Dec. 243-267 (XIII) Rev.1 (3 July 2009) para 10.

⁷⁰ SC Res 1970, UN SCOR, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) ('*Resolution 1970*').

is symptomatic of wider considerations in the global order. Africa has previously been subject to a period of Western colonisation. As a consequence, the AU presently seeks to assert a united front for the continent, as Third World countries and emerging markets continue to demand a wider stake in the balance of international world order. Tensions are bound to occur as the goals of international criminal justice and geopolitical considerations intersect. Although the AU is not a significant power bloc, it has become a significant regional voice. Resultantly, the OTP finds itself in the unenviable position of contending with geopolitical considerations.

B *The Scuttling of Peace Projects*

The AU alleges that by prosecuting active players of ongoing or recently ended conflicts, the ICC risks prolonging or reigniting further conflict.⁷¹ This argument appears to be based on the premise that peace and stability outweigh justice.⁷² The complaint is that indictments scuttle the prospects of peace negotiations.⁷³ These sentiments were sounded when the Special Court for Sierra Leone ('SCSL') attempted to execute a warrant of arrest for former warlord and then-President of Liberia, Charles Taylor. This was seen as frustrating the opportunity to achieve a settled peace agreement to end the civil war in Liberia. The warrant was first made public while Taylor was in Ghana attending peace negotiations. Clearly, the SCSL, knowing that the warrant would not be executed in Liberia while Taylor was still a head of state and head of government, used the opportunity presented by his presence in Ghana to have him arrested. The Ghanaian Government refused to comply and promptly put Taylor back on a plane to Liberia.

The 'peace first' argument was again trumpeted by the AU in response to Al Bashir's warrant.⁷⁴ While the AU has cautioned Al Bashir to take measures to improve the human rights situation in Darfur,⁷⁵ little progress has been made in terms of a peace settlement. One would have thought that the AU would have actively intervened to fast-track the peace settlement and made significant steps towards alleviating the humanitarian situation, as a means of converting supporters of the arrest warrant into believers in the peace process. This would have to some extent frustrated the ICC in its quest for prosecution. The laying of charges against and subsequent trial of the sitting President of Kenya, Uhuru Kenyatta, and his Deputy President, William Ruto has also been criticised by the

⁷¹ See also *Communiqué of the 142nd Meeting*, AU Doc PSC/MIN/Comm(CXLII) Rev.1, para 9.

⁷² See, eg, Bruce Baker, 'Twilight of Impunity for Africa's Presidential Criminals' (2004) 25 *Third World Quarterly* 1487, 1490. See also *Communiqué of the 142nd Meeting*, AU Doc PSC/MIN/Comm(CXLII) Rev.1, para 3, 9.

⁷³ See, eg, *Communiqué of the 142nd Meeting*, AU Doc PSC/MIN/Comm(CXLII) Rev.1, para 3, 9; *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of The Sudan*, Assembly Dec.221(XII), 12th sess, AU Doc Assembly/AU/Dec.208–240(XII) (1–3 February 2009) para 2 ('*Decision on the Application by the ICC Prosecutor*').

⁷⁴ Ibid para 3; *Communiqué of the 151st Meeting of the Peace and Security Council*, PSC 151st mtg, AU Doc PSC/MIN/Comm.1(CLI) (22 September 2008) paras 7–8 ('*Communiqué of the 151st Meeting*').

⁷⁵ *Communiqué of the 151st Meeting*, AU Doc PSC/MIN/Comm.1(CLI), para 9.

AU on the basis that the Kenyan peace process is thereby threatened.⁷⁶ The AU has drawn attention to the fact that the 2007 post-electoral violence, which is the subject matter of the charges, was followed by a mediation process that resulted in a coalition government.⁷⁷ They argue that the trial therefore constitutes a threat to the reconciliation process as well as the stability of that country.⁷⁸

The assertion that the ICC stifles peace processes has also been echoed by academics. Odero argues that Al Bashir's warrant was ill-timed and undermines the Sudanese peace process.⁷⁹ He notes that Al Bashir, who has significant support in Sudan, has signed the *Darfur Peace Agreement*⁸⁰ with the Sudan Liberation Movement/Army — one of the rebel forces in Darfur — and previously signed a *Comprehensive Peace Agreement*⁸¹ with the Sudan People's Liberation Movement/Army in South Sudan. He argues that Al Bashir is not only part of the problem but also part of the solution,⁸² accusing the OTP of narrowing its interests in justice, at the expense of peace and security.⁸³ Odero states that international criminal justice cannot operate outside the realm of political realities.⁸⁴ However, he also notes that political interests and conflict resolution cannot function without regard to international criminal justice⁸⁵ — which, without peace, remains a dream that cannot be attained.⁸⁶

Of course, it appears to be a generally-settled principle of transitional justice that peace and justice are not mutually exclusive but can coexist.⁸⁷ However, it has been posited by those opposed to trials that prosecution scuttles peace

⁷⁶ *Decision on Africa's Relationship with the ICC*, AU Doc Ext/Assembly/AU/Dec.1–2(Oct.2013), para 5.

⁷⁷ *Ibid* para 7.

⁷⁸ *Ibid* paras 5, 7.

⁷⁹ Odero, above n 6, 153.

⁸⁰ *Darfur Peace Agreement*, Government of The Sudan–Sudan Liberation Movement/Army–Justice and Equality Movement (signed 5 May 2006) <<http://peacemaker.un.org/node/535>>. Note, however, that the *Darfur Peace Agreement* was actually entered into by only one of two factions within the Sudan Liberation Movement/Army (that led by Minni Arkou Minnawi. The leader of the second faction, Abdelwahid Mohamed en-Nour, as well as the Justice and Equality Movement, ultimately refused to sign: see James Thomas Hottinger, 'The *Darfur Peace Agreement*: Expectations Unfulfilled' (2006) 18 *Accord* 46, 48.

⁸¹ *Comprehensive Peace Agreement between the Government of the Republic of The Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army* (signed 9 January 2005) <<http://peacemaker.un.org/node/1369>> ('*Comprehensive Peace Agreement*').

⁸² Odero, above n 6 153. It must be noted, however, that Al Bashir continues to make territorial claims on South Sudan and has prevented the exportation of South Sudan's crude oil through Sudanese territory, in terms of the *Comprehensive Peace Agreement*. This has starved South Sudan of much needed revenue.

⁸³ *Ibid*.

⁸⁴ *Ibid* 154.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*. See also Dan Kuwali and Juan Pablo Pérez-León Acevedo, 'Smokescreens — A Survey of the Evolving Trends in Amnesty Laws in Africa and Latin America' (2008) 2 *Malawi Law Journal* 115, 119:

Impunity for crimes is without a doubt one of the key problems affecting Africa, and one that needs to be urgently addressed. As we have argued earlier, international law requires that those who are suspected of having committed war crimes, crimes against humanity, genocide and other breaches of international law should be investigated and, if there is sufficient admissible evidence, prosecuted.

⁸⁷ Odero, above n 6, 154.

processes.⁸⁸ While it has been argued that prosecution should be delayed in the interests of peace,⁸⁹ few have said at what stage prosecutions should fit into the peace process. This argument could be employed to facilitate impunity for perpetrators of human rights abuses. Peace processes usually involve the granting of amnesties. Therefore, should prosecution follow the conclusion of a peace process generated by amnesties, the OTP will be criticised for disregarding the terms of the agreement. However, it is not clear that the removal of the possibility of parties to a conflict being prosecuted will serve to encourage them to enter into peace negotiations.

C The Conspiracy Theory

Prominent among African critics of the ICC is President Paul Kagame of Rwanda. He describes the ICC as a fraudulent institution created for poor African states as a form of colonialism and imperialism aimed at control.⁹⁰ However, whilst shunning the ICC, his Government demonstrated its commitment to international justice by calling for the establishment of the ICTR.⁹¹ It seems that his Government was aware of the role international justice can play in post-conflict situations, especially as the judiciaries of such countries are usually severely weakened, with inadequate manpower within their legal professions.⁹² On the other hand, Kagame's Government has on occasion withdrawn cooperation when the ICTR has taken positions unpalatable to it, such as by preventing witnesses from leaving Rwanda.⁹³ This suggests that Kagame's attitude to the ICC stems from the fear of a legal order over which he has no leverage. Also, while the ICTR has mainly indicted Kagame's Hutu opponents, allegations abound that Kagame's Rwanda Patriotic Front ('RPF') committed several atrocities during the conflict in Rwanda, which might be attributed to his leadership.⁹⁴ Thus, when understood in context, Kagame's stance against the ICC does not appear to be based on evidence or principle, but on political considerations.

⁸⁸ Ibid 153.

⁸⁹ Ibid.

⁹⁰ David Kezio-Musoke, 'Kagame Tells Why He Is against ICC Charging Bashir', *Daily Nation* (online), 3 August 2008 <<http://allafrica.com/stories/200808120157.html>>. As has been noted, '[t]he pursuit of a new vision of international law predicated on the respect for human rights and concern for the plight of humanity is one which should be a common goal. Yet the vision continues to be questioned as imperialistic, colonialist and even racist': Tladi, 'The African Union and the ICC', above n 44, 58. See also Chacha Bhoke Murungu, *Immunity of State Officials and Prosecution of International Crimes in Africa* (LLD Thesis, University of Pretoria, 2011) 167 <<http://upetd.up.ac.za/thesis/available/etd-01252012-112603/unrestricted/00front.pdf>>.

⁹¹ Jalloh, 'Regionalizing International Criminal Law', above n 26, 466.

⁹² Kirsti Samuels, 'Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt' (Social Development Paper No 37, World Bank, 2006) 6–7.

⁹³ See David P Forsythe, *Human Rights in International Relations* (Cambridge University Press, 2nd ed, 2006) 104.

⁹⁴ See, eg, Human Rights Watch, *Rwanda Tribunal Should Pursue Justice for RPF Crimes* (12 December 2008) <<http://www.hrw.org/news/2008/12/12/rwanda-tribunal-sh-ould-pursue-justice-rpf-crimes>>; Human Rights Watch, *ICTR: Address Crimes Committed by the RPF — A Letter to the ICTR Prosecutor* (11 December 2008) <<http://www.hrw.org/en/news/2008/12/11/ict-address-crimes-committed-rpf>>; Howard W French, 'The Case against Rwanda's President Paul Kagame', *Newsweek* (online), 14 January 2013 <<http://www.newsweek.com/case-against-rwandas-president-paul-kagame-63167/>>.

It has been argued that the goal of international law is to control poor nations⁹⁵ and that the ICC presently fulfils this mission.⁹⁶ Mamdani describes the ICC as part of a modern Western colonial and politicised process.⁹⁷ He expresses concern about the politicisation of the ICC. He talks about a bifurcated global system wherein sovereignty is sacrosanct in the developed parts of the world but suspended in Africa and the Middle East and in which the people of Africa are regarded as beneficiaries of an external humanitarian charity. The big (Western) powers have posed as the protectors of human rights internationally and the ICC has become their tool to target Africans. It has targeted adversaries of the United States and turned a blind eye to atrocities committed by regimes supported by the US. This argument is based on the thesis that international law was used by the West in the past to assert its domination over Africa and, thus, the ICC may well be a replication of that process.⁹⁸

Barker warns of the potential negative effects of the globalisation of justice and concomitant weakening of the sovereign of smaller or weaker states. According to him, international justice is likely to be increasingly determined by the values and requirements of the West, rather than by any objective principle.⁹⁹ Accordingly, international relations will be defined more by power than the notion of the equality of states.¹⁰⁰

Already we have seen alleged exercises of international law in the name of humanitarian intervention that in fact look more like an exercise of power masquerading as law. When international law is defined in terms of what some state leaders believe to be just and conscionable, then international law is reduced to the pragmatic requirements of powerful states.¹⁰¹

Arguably, this view is generalised and lacks concrete relevance to the argument it seeks to make. It is more of a political outburst and fails to consider the legal processes required to confirm charges against persons appearing before the Court.

D *Sovereign Immunity and the 'Al Bashir Factor'*

Another significant factor that contributed to the deterioration of Africa's relationship with the ICC was the indictment of Al Bashir. While top government officials have been indicted in Kenya and Libya, Al Bashir's indictment forms a singular irritant to the AU, in that he is a sitting head of state.¹⁰² Three factors serve to explain the ICC's impasse with Sudan.

⁹⁵ See, eg, Mahmood Mamdani, 'Darfur, ICC and the New Humanitarian Order: How the ICC's "Responsibility to Protect" is Being Turned into an Assertion of Neocolonial Domination', *Pambazuka News* (online) (17 September 2008) <<http://www.pambazuka.org/en/category/features/50568>>. See also Odero, above n 6, 154–6.

⁹⁶ Mamdani, above n 95.

⁹⁷ *Ibid.*

⁹⁸ See Antony Anghie and B S Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 84, 94; Odero, above n 6, 155.

⁹⁹ Baker, above n 72, 1497.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Note that Uhuru Kenyatta, another indictee of the Court, was recently elected as President of Kenya and assumed office on 9 May 2013.

First, Sudan is not a party to the *Rome Statute* and has consistently rejected the arrest warrant.¹⁰³ The issue of sovereignty has been a longstanding stumbling block to the international criminal justice system and was a serious obstacle to the realisation of the ICC.¹⁰⁴ Unlike the governments of CAR, DRC and Uganda, the Sudanese Government does not support the decisions of the Court. However, Sudan has a legal obligation to comply with resolutions of the Security Council pursuant to art 25 of the *UN Charter*.¹⁰⁵ This includes *Resolution 1593* by which the situation in Darfur was referred to the Court.¹⁰⁶ It called on Sudan and other parties to the *Rome Statute* to cooperate with, and provide necessary assistance to, the Court.

Secondly, Al Bashir has immunity as a sitting head of state. Under customary international law, serving heads of state enjoy immunity from the courts of foreign states,¹⁰⁷ including immunity from criminal prosecution and arrest.¹⁰⁸ However, international human rights law requires that all persons involved in the perpetration of gross violations of human rights be held accountable for such crimes.¹⁰⁹ According to the *Rome Statute*, state officials cannot rely on the defence of sovereign immunity.¹¹⁰ Furthermore, it has been contended that the obligation to prosecute perpetrators of atrocities has attained the status of customary international law and overrides sovereign immunity.¹¹¹ While serving heads of state may generally enjoy immunity from prosecution in foreign courts, they may be prosecuted in international tribunals that have jurisdiction to try

¹⁰³ See *Report of the African Union High-Level Panel on Darfur (AUPD)*, PSC 207th mtg, AU Doc PSC/AHG/2(CC VII) (29 October 2009) [17] ('*Report of the AU High-Level Panel*'); Jalloh, 'Regionalizing International Criminal Law', above n 26, 482, 485.

¹⁰⁴ See Marlene Wind, 'Challenging Sovereignty? The USA and the Establishment of the International Criminal Court' (2009) 2 *Ethics & Global Politics* 83, 96–101.

¹⁰⁵ Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333, 335; Nsereko, 'The ICC: Jurisdictional and Related Issues', above n 41, 111; Max du Plessis and Christopher Gevers, 'Making Amend(ment)s: South Africa and the International Criminal Court from 2009 to 2010' (2009) 34 *South African Yearbook of International Law* 1, 22–3; Nsereko, 'Triggering the Jurisdiction of the ICC', above n 6, 268; Zhu Wenqi, 'On Co-Operation by States not Party to the International Criminal Court' (2006) 88(861) *International Review of the Red Cross* 87, 91.

¹⁰⁶ *Resolution 1593*, UN Doc S/RES/1593.

¹⁰⁷ Akande, 'Legal Nature of SC Referrals', above n 105, 334; Hazel Fox, *The Law of State Immunity* (Oxford University Press, 2nd ed, 2008) 667; Dapo Akande, 'International Law Immunities and the International Criminal Court' (2004) 98 *American Journal of International Law* 407, 409.

¹⁰⁸ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment)* [2008] ICJ Rep 177, 236–7 ('*Djibouti v France*'); *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 19–22; *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 90 UNTS 327 (entered into force 17 September 1946) art 4.

¹⁰⁹ Jens M Iverson, 'The Continuing Functions of Article 98 of the *Rome Statute*' (2012) 4 *Goettingen Journal of International Law* 131, 149. See also Antonio Cassese, 'International Criminal Justice: Is It Really So Needed in the Present World Community?' (Report, London School of Economics, 2000).

¹¹⁰ *Rome Statute* art 27.

¹¹¹ Chacha Murungu, 'Immunity of State Officials and the Prosecution of International Crimes' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 33, 44–6.

them.¹¹² The Pre-Trial Chamber, in granting the Prosecutor's request to arrest Al Bashir, made it clear that his position as head of state was no bar to its exercise of jurisdiction over the case.¹¹³ It has been suggested that immunity was also lifted by *Resolution 1593*.¹¹⁴ It has also been contended that the referral effectively bound Sudan as if it were a party to the *Rome Statute*.¹¹⁵ Thus international criminal law has intruded upon the principle of sovereign immunity and the functional immunity of state officials — and the notion that no state can be subject to any law to which it did not consent has been severely undermined.¹¹⁶ This is attributable to the idea that the international community has a responsibility to see that international crimes are punished.¹¹⁷ In this regard, international criminal law has intruded upon the sacred preserve of sovereign immunity and the functional immunity of state officials.

African leaders appear unable to accept the inroads made into the immunity of sitting heads of state by the Al Bashir warrant. Perhaps, had the African leadership anticipated that the ICC would pierce head of state immunity from prosecution, they would not have been so enthusiastic about its inception. The self-referral trend demonstrates that they were content with a Court that would punish those who have committed international crimes — as long as their names did not appear on the Court's wanted list. It is not surprising, therefore, that the AU recently made clear declarations that, first, sitting heads of state should not be tried before any international court or tribunal¹¹⁸ and, secondly, that African states intending to make self-referrals to the Court should inform and seek prior advice from the AU.¹¹⁹ Thirdly, the Al Bashir referral, by which the AU was particularly aggrieved, has raised questions as to the appropriateness of Security Council referrals.¹²⁰ The lack of response by the Security Council to the AU's request that the prosecution process be deferred pursuant to art 16 of the *Rome*

¹¹² *Djibouti v France* [2008] ICJ Rep 177, 199–207; *Prosecutor v Taylor (Decision on Immunity from Jurisdiction)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-03-01-I-059, 31 May 2004) [45]–[53]; Murungu, 'Immunity of State Officials and the Prosecution of International Crimes', above n 111, 45.

¹¹³ *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [41]–[45]. See also *Prosecutor v Al Bashir (Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 12 December 2011) [43].

¹¹⁴ Jalloh, 'Regionalizing International Criminal Law', above n 26, 483.

¹¹⁵ Ibid; Dapo Akande, 'The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?' (Working Paper, Oxford University, 30 July 2008) 3 <<http://www.csls.ox.ac.uk/documents/Akande.pdf>>.

¹¹⁶ Baker, above n 72, 1489.

¹¹⁷ Ibid.

¹¹⁸ *Decision on Africa's Relationship with the ICC*, AU Doc Ext/Assembly/AU/Dec.1(Oct.2013), para 10(i).

¹¹⁹ Ibid para 10(viii).

¹²⁰ *Decision on the Application by the ICC Prosecutor*, AU Doc Assembly/AU/Dec.221(XII), para 1; *Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly Dec.245(XIII) Rev.1, 13th sess, AU Doc Assembly/AU/Dec.243–267 (XIII) Rev.1 (1–3 July 2009) para 2 ('*Decision on the Meeting of African States Parties to the Rome Statute*').

Statute further exacerbated matters.¹²¹ The AU questioned the moral authority of the Security Council to refer cases to the Court.¹²² After all, the Security Council consists of a small minority of states as opposed to the General Assembly. It has also been suggested that the power of referral would carry greater democratic legitimacy if it was exercised by the General Assembly.¹²³ The problem with this argument lies in the fact that General Assembly referrals might not necessarily have binding effect.

Security Council referrals have been further criticised on the basis that some of its major players — the permanent veto-holding members — are not themselves parties to the *Rome Statute*.¹²⁴ However, the veto power is a negative vote and cannot compel referral, only prevent it. As far as Security Council referrals are concerned, it is possible that a permanent member could in theory dictate the regional focus of the Court by preventing referral in respect of some regions. However, the unequal balance of powers in the Security Council forms part of the political debate and should not form the basis of legal criticism against the Court. In light of this the AU has requested an amendment to art 16 of the *Rome Statute*,¹²⁵ proposing that the General Assembly in addition to the Security Council be granted power to defer matters pending before the Court. This proposal, however, appears to have received a lukewarm response even from African states.¹²⁶

It must be noted that, though the AU insists on a political settlement in Sudan, the African Union High-Level Panel on Darfur ('AUPD') in its report to the AU's Peace and Security Council recommended the setting up of a hybrid court to try perpetrators of the violence in Darfur.¹²⁷ The decision to appoint the AUPD was taken by the Peace and Security Council of the AU in July 2008 and confirmed by the Assembly of the AU in February 2009.¹²⁸ The AUPD, under the chair of former South African President Thabo Mbeki, had a mandate to examine the Darfur situation and make recommendations on how best the issues of accountability and combating impunity on the one hand, and reconciliation and healing on the other, could be addressed.¹²⁹ The call for a hybrid court, as opposed to trial in the domestic courts of Sudan, was based on the views of the

¹²¹ See *Report of the AU High-Level Panel*, above n 103, [242].

¹²² *Decision on the Meeting of African States Parties to the Rome Statute*, AU Doc Assembly/AU/Dec.245 (XIII) Rev.1, para 8.

¹²³ See Tladi, 'The African Union and the ICC', above n 44, 69.

¹²⁴ Of the five permanent members of the Security Council, China, Russia and the United States are not parties to the *Rome Statute*. For commentary, see Jalloh, 'Regionalizing International Criminal Law', above n 26, 491.

¹²⁵ The issue was tabled by South Africa at the 8th Assembly of States Parties ('ASP') at The Hague in November 2009 and the 9th ASP in New York in 2010. For further discussion on the proposals: see generally du Plessis and Gevers, above n 105; Dapo Akande, Max du Plessis and Charles Chernor Jalloh, 'An African Expert Study on the African Union Concerns about Article 16 of the *Rome Statute* of the ICC' (Position Paper, Institute for Security Studies, 2010) <http://www.issafrica.org/uploads/PositionPaper_ICC.pdf>.

¹²⁶ Akande, du Plessis and Jalloh, 'An African Expert Study on the AU', above n 125, 17.

¹²⁷ *Report of the AU High-Level Panel*, above n 103, [246]–[251].

¹²⁸ *Communiqué of the 142nd Meeting*, AU Doc PSC/MIN/Comm(XCLII) Rev.1, para 11; *Decision on the Application by the ICC Prosecutor*, AU Doc Assembly/AU/Dec.221(XII), para 7.

¹²⁹ *Report of the AU High-Level Panel*, above n 103 (Introductory Note by the Chairperson of the Commission).

AUPD that the victims did not have faith that the Sudanese judiciary would be able to fairly address the crimes they had suffered.¹³⁰ Perhaps the AUPD should have recommended referral to the ICC. This would have strengthened the need to secure a streamlined and effective international criminal justice system as opposed to the proliferation of ad hoc tribunals.

V DOES AFRICA HAVE A CASE AGAINST THE ICC?

A *Referral of the Substantive Cases before the ICC*

The situations in Uganda, DRC and CAR were self-referrals.¹³¹ The Government of Mali has also referred the situation in that country to the ICC.¹³² The situations in Sudan and Libya were referred by the Security Council.¹³³ The Sudanese referral was made on the basis of the recommendations of the UN Commission of Inquiry and against the background that Sudan had not made genuine efforts to effect meaningful prosecution of the perpetrators of human rights abuses in Darfur.¹³⁴ Moreover, whilst the situation in Kenya was initiated by the OTP,¹³⁵ their actions were based on information received from African sources, principally from former UN Secretary-General Kofi Annan, who chaired a panel to resolve the post-electoral violence.¹³⁶ Similarly, the Côte d'Ivoire situation was initiated by the OTP;¹³⁷ but, as has been highlighted earlier, *proprio motu* prosecution requires Pre-Trial Chamber confirmation on the basis of the evidence and deference to the relevant state's willingness to prosecute.

We have seen that the preliminary hearing ensures that the allegations have merit and that the Court would not issue warrants or confirm the charges unless it were satisfied that there were reasonable grounds to establish that an accused is criminally responsible for the offences. This was demonstrated when the Court declined to confirm the charges against Henry Kiprono Kosgey and Mohammed

¹³⁰ Ibid [18]–[20].

¹³¹ See, eg, International Criminal Court, 'President of Uganda Refers Situation concerning the Lord's Resistance Army (LRA) to the ICC' (Press Release, ICC-OTP-20040129-43, 29 January 2004); International Criminal Court, 'Prosecutor Receives Referral concerning Central African Republic' (Press Release, ICC-OTP-20050107-86, 7 January 2005).

¹³² Letter from the Minister of Justice Malick Coulibaly to the Prosecutor of the ICC, 13 July 2012.

¹³³ *Resolution 1593*, UN Doc S/RES/1593; *Resolution 1970*, UN Doc S/RES/1970.

¹³⁴ *Resolution 1593*, UN Doc S/RES/1593; United Nations, 'Report of the International Commission of Inquiry on Darfur to the Secretary-General' (Report, 25 January 2005) 6.

¹³⁵ *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09, 31 March 2010).

¹³⁶ Xan Rice, 'Annan Hands ICC List of Perpetrators of Post-Election Violence in Kenya', *The Guardian* (online), 10 July 2009 <<http://www.theguardian.com/world/2009/jul/09/international-criminal-court-kofi-annan>>.

¹³⁷ *Situation in the Republic of Côte d'Ivoire (Decision Assigning the Situation to Pre-Trial Chamber II)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-02/11, 20 May 2011).

Hussein Ali (Kenya),¹³⁸ Bahar Idriss Abu Garda (Sudan)¹³⁹ and Callixte Mbarushimana (DRC).¹⁴⁰ Also, the Court did not confirm some of the charges in relation to Joseph Arap Sang of Kenya.¹⁴¹ As also noted above, the confirmation hearing demands that the Prosecutor establish substantial grounds that an accused committed the crimes alleged. This relatively high standard of proof ensures that the allegations are credible. At the same time, this does not detract from the fact that all defendants are presumed innocent and that the Prosecutor has the burden of proving their guilt beyond reasonable doubt¹⁴² — a standard higher than that employed in the pre-trial proceedings. The acquittal of Mathieu Chui also demonstrates that the Court proceeds on the evidence presented before it.¹⁴³ In the case of Chui, the Court found that the Prosecutor had failed to prove the charges of crimes against humanity and war crimes beyond reasonable doubt.¹⁴⁴ This decision has attracted severe criticism from those who believe that the victims have been denied justice.¹⁴⁵ The ICC also initially refused to confirm the charges against Laurent Gbagbo, former President of Côte d'Ivoire.¹⁴⁶ The Court noted that, while there was insufficient evidence to confirm the charges against him, the evidence 'does not appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges'.¹⁴⁷ Thus the Court postponed the case to allow the Prosecutor to collect further evidence. This postponement of the case to give the

¹³⁸ *Prosecutor v Ruto (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 23 January 2012); *Prosecutor v Muthaura (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 23 January 2012).

¹³⁹ *Prosecutor v Garda (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 8 February 2010).

¹⁴⁰ *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011).

¹⁴¹ Pre-Trial Chamber II found that there were no reasonable grounds to believe that Joseph Arap Sang was an indirect co-perpetrator in respect of crimes against humanity because his contribution to the crimes was not essential: *Prosecutor v Ruto (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 23 January 2012) [299]. However, Sang remains indicted on other charges: at [367].

¹⁴² It is a cardinal principle of law in domestic and international courts and tribunals that, in order to secure a conviction in a criminal case, the prosecution must prove its case against the defendant beyond reasonable doubt. The Appeals Chamber of the ICC made a distinction between the standard required to establish 'reasonable grounds to believe' that a person committed a crime within the jurisdiction of the Court as required by art 58(1) of the *Rome Statute* and proof beyond reasonable doubt: see *Prosecutor v Al Bashir (Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecutor's Application for a Warrant of Arrest)* (International Criminal Court, Appeals Chamber, Case No ICC-02/05-01/09-OA, 3 February 2010).

¹⁴³ International Criminal Court, 'ICC Trial Chamber II Acquits Mathieu Ngujolo Chui' (Press Release, ICC-CPI-20121218-PR865, 18 December 2012).

¹⁴⁴ *Ibid.*

¹⁴⁵ See, eg, Amnesty International, 'ICC Acquits Congolese Armed Group Leader' (Public Statement, AFR 62/017/2012, 19 December 2012).

¹⁴⁶ *Prosecutor v Laurent Gbagbo (Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 3 June 2013).

¹⁴⁷ *Ibid* [15].

Prosecutor time to collect further evidence might raise concerns that the she is being unduly favoured.

B *The 'Reverse Analogy' Argument*

It has been argued that Africa is being targeted to the exclusion of other regions.¹⁴⁸ The AU justifiably questions why perpetrators of grave human rights violations in other regions are not being prosecuted. However, focusing on the anger that a sitting African head of state (one of their own) is being prosecuted overlooks the fact that African states continue to refer situations to the Court, as the more recent referrals of Côte d'Ivoire and Mali demonstrate. Further, that argument appears to suggest that the fact that others have not been prosecuted for similar crimes is in itself a reason not to prosecute. Of course, this position does not provide a defence in law. Nonetheless, international criminal law straddles the realms of international relations and state interests. Political realities as well as the contention that smaller or weaker states are unfairly targeted might well be causes for concern. The imbalance in political influence between developed and developing nations, and the appearance that leaders in other parts of the world are unlikely to be indicted for similar crimes, obviously causes problems of legitimacy for the ICC in Africa. For example, one wonders whether the situation in Libya that led to the Security Council's referral of the matter to the ICC¹⁴⁹ was more serious than atrocities being committed in Syria.¹⁵⁰ Yet Syrian leader Bashar Al Assad, who is responsible for at least some of the mass atrocities in Syria,¹⁵¹ faces no real threat of prosecution at present.¹⁵² Further, the OTP has been criticised for its failure to take action in relation to reports of violations of human rights committed by the US and its allies in Iraq.¹⁵³ While the former Prosecutor determined that American human rights violations in Iraq did not reach sufficient numbers to warrant prosecution,¹⁵⁴ opponents of the Court argue that the atrocities in CAR were also insufficient.¹⁵⁵ One may also ask whether the number of victims in Syria has exceeded this threshold.

However, arguments based on these comparisons are not legally sustainable. No legal system recognises a defence to the effect that a person is not to be held accountable for an offence simply because others who are equally guilty of

¹⁴⁸ See, eg, Igwe, above n 57, 295.

¹⁴⁹ *Resolution 1970*, UN Doc S/RES/1970.

¹⁵⁰ See Spencer Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13 *Melbourne Journal of International Law* 59, 61, 72.

¹⁵¹ When the Syrian uprising commenced on 15 March 2011, the Syrian regime responded by deploying soldiers who used live ammunition against civilian protesters. The situation has devolved into a civil war with opponents of the regime arming themselves. The Syrian regime is reported to have used heavy weaponry, air bombardment and chemical weapons against civilians. Over 100 000 persons are believed to have been killed since the start of the conflict.

¹⁵² The ICC has not announced any pending charges in relation to the Syrian situation, even though the situation has dragged on for over two years with atrocities being witnessed.

¹⁵³ Otero, above n 6, 156–7.

¹⁵⁴ Letter from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, 9 February 2006 <http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>.

¹⁵⁵ See, eg, deGuzman, above n 13, 281–9 (where the author points out the ICC's inconsistency in the consideration of gravity in the selection of cases and notes that the prosecutor and the Court have failed to articulate a coherent understanding of the gravity threshold).

similar offences are not brought to account. Nevertheless, one may say that a different kind of fairness applies to international criminal justice. In domestic settings, international courts are mainly seen as foreign-imposed.¹⁵⁶ Therefore, they need to ensure a fair measure of neutrality. This applies not only in relation to targeting all culpable sides to a particular conflict. It also requires targeting perpetrators of human rights violations everywhere, regardless of region.¹⁵⁷ Thus, the targeting of a particular region for international crimes whilst similar crimes committed in other regions are left unpunished may well conflict with the international principle of equality among states,¹⁵⁸ thereby creating credibility problems for the ICC. However, this 'selective justice' argument has to contend with the fact that quite a number of the cases before the ICC were self-referrals. In addition, the extension of the 'prosecutorial net' to other regions will not of itself solve the problem. It might only invite further antagonism against the ICC, without necessarily pacifying its critics in Africa.

VI SEEKING SOLUTIONS

A Complementarity and the Primacy of Domestic Jurisdictions

The primary responsibility to protect persons from violations of human rights rests with states,¹⁵⁹ in recognition of the sovereign responsibilities and duties of states.¹⁶⁰ States jealously guard their sovereignty and this is a primary reason why the prosecution of individuals at the supranational level remains a vexing issue.¹⁶¹ It is not surprising, therefore, that African regional courts generally

¹⁵⁶ The AU prefers that Africans who are accused of violations of international law be tried on the continent in African domestic or regional courts rather than outside the continent: see *Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly Dec.243(XIII) Rev.1, 13th sess, AU Doc Assembly/AU/Dec. 243–267 (XIII) Rev.1 (1–3 July 2009) para 4 ('*Abuse of the Principle of Universal Jurisdiction*'); *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly Dec.213(XII), 12th sess, AU Doc Assembly/AU/Dec.208–242(XII) (1–3 February 2009) para 9 ('*Decision on the Implementation of the Assembly Decision*'); Tladi, 'The African Union and the ICC', above n 44, 61.

¹⁵⁷ The ICC has announced that it is conducting preliminary investigations in a number of non-African countries. These countries include Afghanistan, Colombia, Georgia, Guinea, Honduras, Nigeria and the Republic of Korea: see International Criminal Court, *Situations and Cases* <http://www.icc-cpi.int/EN_MENUS/ICC/SITUATIONS%20AND%20CASES/Pages/situations%20and%20cases.aspx>.

¹⁵⁸ See Odero, above n 6, 156.

¹⁵⁹ *Rome Statute* Preamble; Nseroko, 'The ICC: Jurisdictional and Related Issues', above n 41, 114; Assembly of States Parties, International Criminal Court, *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*, 12th sess, ICC Doc ICC-ASP/12/61 (27 November 2013) [10] ('*Special Segment as Requested by the African Union*').

¹⁶⁰ International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect' (Report, December 2001) xi; Tladi, 'The African Union and the ICC', above n 44, 62.

¹⁶¹ James L Cavallaro and Stephanie Erin Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, 769; Solomon Tamarabrahkemi Ebrobrah, *Legitimacy and Feasibility of Human Rights Realisation through Regional Economic Communities in Africa: The Case of the Economic Community of West African States* (LLD Thesis, University of Pretoria, 2009) 32; Sunday Babalola Ajulo, 'The Economic Community of West African States and International Law' (1989) 27 *Journal of Modern African Studies* 233, 245.

possess very limited powers and often come into conflict with other regional bodies.¹⁶² The inevitable collision between the sovereignty of states over their criminal justice systems and supranational criminal adjudication is addressed by the *Rome Statute* through recognition of the primacy of the domestic legal system.¹⁶³

One solution is for African states to commit to prosecuting international crimes in their domestic courts, rather than engaging in a prolonged confrontation with the ICC. The need for prosecution will remain as long as there is ongoing impunity on the continent.

In terms of arts 1 and 17 of the *Rome Statute*, complementarity enables states to retain jurisdiction over crimes committed in their territories and by their nationals.¹⁶⁴ The purpose of the Court is to complement national jurisdictions that are unable or unwilling to prosecute international crimes.¹⁶⁵ By affirming the principle of complementarity, the parties to the *Rome Statute* demonstrate that they do not intend the ICC to actively step into the shoes of national prosecutors.

It must be noted that the application of the principle of complementarity by the ICC has not escaped criticism.¹⁶⁶ William Burke-White accuses the Prosecutor of deviating from the policy of proactive complementarity. He states that contrary to earlier statements endorsing the policy of proactive complementarity, the Prosecutor has deviated from the principle, focusing instead on direct prosecution of international crimes. He posits a constructive application of the principle, arguing that the Court should instead engage in proactive complementarity and encourage states to prosecute international crimes.¹⁶⁷ Burke-White urges the Prosecutor 'to encourage and at times even assist national governments in prosecuting international crimes themselves'.¹⁶⁸ He argues that the present passive application of the complementarity principle pits the Court as playing a supporting role, waiting to take action where states are

¹⁶² Makau Mutua, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 *Human Rights Quarterly* 342, 351–7. The enforcement of judgments of regional courts in domestic nation states is usually made difficult by procedural obstacles: see, eg, *Gramara (Private) Limited v Government of the Republic of Zimbabwe* [2010] ZWHHC 1 (High Court of Zimbabwe); *Jones v Krok* [1995] 1 SA 677 (Supreme Court of Appeal); *Purser v Sales* [2001] 3 SA 445 (Supreme Court of Appeal).

¹⁶³ *Rome Statute* art 17(1); Hans-Peter Kaul, 'The International Criminal Court: Current Challenges and Perspectives' (2007) 6 *Washington University Global Studies Law Review* 575, 576–7.

¹⁶⁴ Max du Plessis, 'Complementarity: A Working Relationship between African States and the International Criminal Court' in Max du Plessis (ed), *African Guide to International Criminal Justice* (Institute of Security Studies, 2008) 123, 129; Nsereko, 'The ICC: Jurisdictional and Related Issues', above n 41, 114; Nidal Nabil Jurdi, 'Some Lessons on Complementarity for the International Criminal Court Review Conference' (2009) 34 *South African Yearbook of International Law* 28, 29; Murungi, above n 5, 88.

¹⁶⁵ Kaul, above n 163, 577.

¹⁶⁶ For an analysis and discussion of various criticisms of the principle, see Benson Olugbuo, 'Positive Complementarity and the Fight against Impunity in Africa' in Chacha Murungu and Japhet Biegon (eds), *Prosecuting International Crimes in Africa* (Pretoria University Law Press, 2011) 249. See also Jurdi, above n 164, 29–31.

¹⁶⁷ William W Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53, 55.

¹⁶⁸ *Ibid* 56.

unable or unwilling to prosecute.¹⁶⁹ He advocates for a proactive application of the principle, wherein the Court should rather encourage and assist states to prosecute.¹⁷⁰ This proposition seems attractive but may potentially damage the relationship between the Court and states if viewed as interference by the latter. The Court would have to employ skilful diplomacy and tread with caution if it were to adopt this approach.

It has been suggested that the Court should outsource capacity-building assistance in respect of states to third parties such as NGOs.¹⁷¹ While this proposition is attractive, it undermines the role entrusted to the Court to achieve the principles of the *Rome Statute*.¹⁷² A better option appears to lie in Jurdi's proposal that the Court provide technical assistance to states through the office of the Court's registrar.¹⁷³ In this regard, the registrar can coordinate between states and the relevant organs of the ICC while ensuring that the organs do not act beyond their usual judicial roles.¹⁷⁴ More importantly, African States should seriously consider developing their legal framework and capacity to prosecute international crimes in their respective national courts.

B Regional Complementarity?

The AU is in the throes of fashioning its own version of complementarity by extending the jurisdiction of the African Court on Human and Peoples' Rights ('African Court') to include international crimes such as genocide, crimes against humanity and war crimes, which will be heard in a specially created criminal chamber.¹⁷⁵ It appears, therefore, that the intention is to keep the ICC out by creating a regime of regional complementarity. The question here is whether there is a genuine intention to prosecute Africans who are guilty of grave violations of human rights at home or simply to stand in the way of the ICC. What is clear is that the AU's vexation with the ICC is not limited to the Court itself, but extends to what is perceived as the dilution of international justice by Western arrogance and the relics of imperialism. The increase in the use of universal jurisdiction by European courts to indict African leaders for international crimes¹⁷⁶ has naturally triggered unpleasant reactions from the

¹⁶⁹ Ibid.

¹⁷⁰ Ibid. See also *Special Segment as Requested by the African Union*, ICC Doc ICC-ASP/12/61 [10]; Jenia Iontcheva Turner, 'Nationalizing International Criminal Law' (2005) 41 *Stanford Journal of International Law* 1, 1 (citations omitted):

An isolated and dominant ICC may lack legitimacy and have little direct impact on countries recovering from violent conflict. A less hierarchical international criminal justice system that relies significantly on national governments is likely to be better informed by diverse perspectives, more acceptable to local populations, and more effective in accomplishing its ultimate goals.

¹⁷¹ Mark S Ellis, 'International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions' (2009) 1 *Hague Journal on the Rule of Law* 79, 81–2.

¹⁷² Jurdi, above n 164, 53.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ *Decision on the Meeting of African States Parties to the Rome Statute*, AU Doc Assembly/AU/Dec. 245 (XIII) Rev.1, para 5.

¹⁷⁶ See, eg, *Abuse of the Principle of Universal Jurisdiction*, AU Doc Assembly/AU/Dec. 243 (XIII) Rev.1, para 4.

AU.¹⁷⁷ According to the AU, these indictments amount to an abuse of universal jurisdiction and are counterproductive to international relations and compromise the immunities of African leaders.¹⁷⁸ The AU prefers to maintain the dignity and sovereignty of the African continent and would rather have prominent Africans tried on the continent than in foreign courts.¹⁷⁹

It is expected that the question of whether the proposed criminal jurisdiction will find legal basis under the *Rome Statute* will arise. The *Rome Statute*'s articulation of the principle of complementarity engages with domestic courts.¹⁸⁰ No reference is made to regional courts. Evidently, the *Rome Statute* did not contemplate complementarity at the regional level. However, normative justification for granting the African Court criminal jurisdiction may well be found in the *UN Charter*. The *UN Charter* permits regional arrangements or agencies that are necessary for the maintenance of international peace and security so long as they are not inconsistent with the purposes and principles of the UN.¹⁸¹ One must also point out that international tribunals and their instruments have no hierarchy.¹⁸² Thus, the African Court may well become a rival to the ICC.

The prosecution of international crimes on a continental level probably derives validity from the *Constitutive Act*. It rejects impunity¹⁸³ and mandates the AU to intervene in member states in the event of grave crimes such as war crimes, crimes against humanity and genocide.¹⁸⁴ However, the establishment of criminal jurisdiction within the purview of the African Court raises theoretical and principled questions relating to the object and purpose of regional courts vis-a-vis international or internationalised criminal tribunals. It must be noted that regional tribunals and treaty bodies are intended to determine whether states parties have, among other things, violated their human rights obligations and to

¹⁷⁷ Ibid; *Progress Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, EX CL 540 (XVI), 14th sess, AU Doc EX.CL/540 (XVI) (25–29 January 2010) [1].

¹⁷⁸ See generally *Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly Dec.271(XIV), 14th sess, AU Doc Assembly/AU/Dec.268–288 (XIV) (31 January – 2 February 2010); *Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly Dec.335(XVI), 16th sess, AU Doc Assembly/AU/Dec.332–361(XVI) (30–31 January 2011); Council of the European Union, 'The AU-EU Expert Report on the Principle of Universal Jurisdiction' (Report No 8672/1/09, 16 April 2009) [33]–[38]. For an analysis of the AU's contention in relation to the abuse of universal jurisdiction, see Charles Chernor Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 *Criminal Law Forum* 1, 11–54.

¹⁷⁹ *Decision on the Meeting of African States Parties to the Rome Statute*, AU Doc Assembly/AU/Dec. 245 (XIII) Rev.1, para 12.

¹⁸⁰ *Rome Statute* art 1.

¹⁸¹ *UN Charter* art 52(1). While this article of the *UN Charter* makes no reference to tribunals or judicial actions, the notion that an international tribunal may be created under ch VII of the *UN Charter* to contribute to the restoration of international peace received support from the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia when it noted that the ICC was lawfully set up under art 41 of the *UN Charter*: see *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995).

¹⁸² Every international tribunal operates as a separate legal regime.

¹⁸³ *Constitutive Act* art 4(o).

¹⁸⁴ Ibid art 4(h).

provide redress for victims.¹⁸⁵ Their purpose does not necessarily extend to whether human rights violations constitute criminal behaviour. In this regard, their functions differ from international criminal tribunals.¹⁸⁶ This position was supported by the AU when, in adopting the *Protocol on the Statute of the African Court of Justice and Human Rights* in 2008,¹⁸⁷ it rejected the proposal of the experts who had sought to endow the court with criminal jurisdiction.¹⁸⁸

A severe problem lies with the relationship between the African Court, endowed with criminal jurisdiction, and the ICC.¹⁸⁹ The relationship may possibly be one of competition rather than cooperation. Another issue is whether the proposed criminal chamber of the African Court can genuinely prosecute high ranking officials who perpetrate human rights violations in Africa, such as political figures and military commanders. On the other hand, the emergence of a strong and independent African Court and a Prosecutor capable of prosecuting international crimes without political interference will be of great service to the continent and, more importantly, will create an African solution to the problem of African impunity.

VII CONCLUSION

The fact that only Africans have been charged before the ICC is bound to provoke cynicism. However, there is substantial evidence to support the charges that have been brought before the Court. It has also been seen that cases undergo substantial judicial scrutiny before reaching the trial stage. The scrutiny of prosecutorial allegations and the fact that a good number of the cases are self-referrals makes the allegation of bias hard to sustain. The stance of the AU is clearly directed by political considerations. Thus the problem goes beyond the application of legal rules of procedure and evidence and the determination of criminal responsibility. Both the AU's response to the Court and the interaction of international criminal justice and geopolitical considerations result in tensions that are bound to occur in the Court's dealings with nation states. So while it may be argued that other regions have not received the attention of the Court, a regional spread in prosecution may create more problems than solutions for the Court. Essentially, the dream of a single international court bringing individual

¹⁸⁵ Coalition for an Effective African Court on Human and Peoples' Rights et al, 'Implications of the African Court of Human and Peoples' Rights Being Empowered to Try International Crimes Such as Genocide, Crimes against Humanity, and War Crimes' (Opinion, 2009) 14 <http://www.africancourtcoalition.org/images/docs/submissions/opinion_african_court_extension_jurisdiction.pdf>, citing Juan Méndez, 'Session 5: Regional Courts and Commissions' (Paper presented at the Consultative Conference on International Criminal Justice, New York, 9–11 September 2009) 1.

¹⁸⁶ Méndez, above n 185, 1–2.

¹⁸⁷ *Protocol on the Statute of the African Court of Justice and Human Rights* (signed and entered into force 1 July 2008). This *Protocol* merges the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single court, thus replacing the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, opened for signature 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force 25 January 2004) and the *Protocol of the Court of Justice of the African Union* (signed and entered into force 11 July 2003).

¹⁸⁸ Coalition for an Effective African Court on Human and Peoples' Rights et al, above n 185.

¹⁸⁹ Both courts will potentially seek to exercise jurisdiction in relation to the same situations and same defendants.

offenders to justice is not that easy after all, especially where the most wanted are powerful figures, including sitting heads of state. The fact remains that states, regardless of region, will guard their sovereignty and the immunity of their officials. Therefore, the reaction of the AU reflects a possible trend to be expected from states regardless of region. Africa's relationship with the ICC demonstrates that the idea of having a single and permanent international criminal court acting as a dominant source of international law enforcement is unpalatable to states. Indeed, major players in the Security Council have demonstrated this by not signing up to the *Rome Statute* and the US has clearly expressed its preference for ad hoc tribunals.¹⁹⁰ Clearly, Africa's quagmire with the ICC is mainly of a political nature. Consequently, the once common vision of using international law to bring an end to impunity is now bifurcated by political interests. However, in the midst of all the political wrangling, the plight of the victims of atrocities accentuates the need for deterrence.

Accountability remains an integral part of the protection of human rights and the perpetrators of violence should not escape justice through peace settlements and amnesties. Fortunately, the various AU documents rejecting the ICC do commit to the fight against impunity.¹⁹¹ Therefore, prosecuting violators of human rights cannot be seen as foreign imposition. The fight against impunity is universal in nature and regional and political tensions compromise the rights of victims of human rights abuses. One can safely surmise that the AU's criticisms of the ICC are a reaction to Al Bashir's indictment and an attempt of African leaders to rally around one of their own. The fact remains that the Court can play a significant role in maintaining peace and security in Africa. Those bearing the greatest accountability for the gravest human rights abuses cannot be left unpunished and the ICC provides a suitable forum for achieving accountability.

¹⁹⁰ The US has traditionally supported ad hoc tribunals as opposed to a permanent international criminal court. Supporting the Libyan Government's efforts to try the son of the former Libyan leader Saif Al-Islam Gaddafi in Libya as opposed to the ICC, US official Stephen Rapp said:

Our preference is to try cases in the national system if you can have a process there that meets minimal standards of fair justice. The Libyan government says they can do that ... We certainly would like to see the Libyans provide a fair and appropriate justice at the national level. It won't be the same thing that happens in The Hague but The Hague is only for a relative handful of cases and the international system we see developing is one where countries do these cases themselves with international assistance, sometimes with international participation.

Stephen Rapp, quoted in Chris McGreal, 'US Backs Libya in Dispute over Trial Location for Saif Al-Islam Gaddafi', *The Guardian* (online), 7 June 2012 <<http://www.theguardian.com/world/2012/jun/06/us-libya-saif-al-islam-gaddafi-trial>>. See also Julian Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 *Washington University Law Review* 777, 782.

¹⁹¹ See, eg, *Decision on the Meeting of African States Parties to the Rome Statute*, AU Doc Assembly/AU/Dec.246 (XIII) Rev.1, para 4; *Communiqué of the 142nd Meeting*, AU Doc PSC/MIN/Comm(XCLII) Rev.1, para 2; *Decision on the Implementation of the Assembly Decision*, AU Doc Assembly/AU/Dec.213(XII), para 3.

However, the Court needs African support to maintain its credibility, especially at this early stage. It must therefore engage with the African leadership and seek to find a workable solution to the impasse. One possible solution is the use of positive complementarity, whereby the Court can assist African states in strengthening domestic legislation and building capacity to try international crimes in their respective domestic jurisdictions.