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THE AFRICAN UNION-ICC CONTROVERSY BEFORE THE ICJ: A WAY FORWARD TO STRENGTHEN INTERNATIONAL CRIMINAL JUSTICE?

Sascha-Dominik Dov Bachmann & Naa A. Sowatey-Adjei[†]

Abstract: The International Criminal Court was set up as a court of last resort to prosecute the most serious crimes under international law when its member states are either unable or unwilling to act. The African Union initially welcomed the court due to the continent's history of violence and war. However, their soured when the ICC began indicting African heads of state and government officials. Since then, there has been a constant "battle" over whether such defendants could invoke immunity under customary international law. General criticism of the ICC by the African Union and other observers for its lack of focus has turned into region-specific criticism of the court as a "Western tool," singling out and targeting African leaders. Consequently, African states have started to refuse to cooperate with the Court. At an AU Summit in January 2018, a resolution was adopted to seek an Advisory Opinion from the International Court of Justice on the issue of immunity in respect to the ICC. This article will elaborate on the often-strained AU-ICC relationship prior to the 2018 AU Summit before examining three scenarios highlighting how an ICJ decision would affect the present AU-ICC relationship. The article concludes with recommendations and the observation that a compromise must be sought to end the current standoff and impasse.

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I. INTRODUCTION

The International Criminal Court (“ICC”)¹ was established as a court of last resort for the prosecution of serious international crimes, including genocide, war crimes, and crimes against humanity. However, nearly two decades after its establishment, the Court faces many setbacks; one of its key challenges being its near exclusive focus on Africa and its leaders.² This controversy with the African Union (“AU”) has been going on for nearly a decade and it never grows boring.³ It has been a challenge to keep track of all instances in which the African Union has objected to the ICC’s perceived interference and intrusions in the internal affairs of African countries, particularly their domestic criminal justice systems.⁴ During its 2018 ordinary summit in Addis Ababa, the AU-ICC controversy took a new turn, with the African Union opting for a more constructive, de-escalatory engagement using processes of international law and comity.⁵ The African Union declared that it would seek through the General Assembly of the United Nations (“UNGA”) an Advisory Opinion (“AO”) of the International Court of Justice (“ICJ”)⁶ on the question of immunity of African heads of state and governments as a bar to criminal prosecution before the ICC.⁷ The AU also sought an interpretative declaration from the ICC’s management oversight and legislative body, the Assembly of States Parties (“ASP”), on the statutory relationship between Article 27 of the Rome Statute,⁸ which removed

¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² Tim Murithi, *Africa Relations with the ICC: A Need for Reorientation?*, in PERSPECTIVES – POL. ANALYSIS & COMMENT. FROM AFR., Aug. 6, 2012, at 4.

³ Theresa Reinold, *African Union v International Criminal Court: Episode MLXIII(?)*, EJIL TALK BLOG OF THE EUR. J. INT’L L. (Mar. 23, 2018), <https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/>; see also PHILOMENA APIKO & FATEN AGGAD, EUROPEAN CTR. FOR DEV. POL’Y MGMT., THE INTERNATIONAL CRIMINAL COURT, AFRICA AND THE AFRICAN UNION: WHAT WAY FORWARD? 1 (2016).

⁴ Murithi, *supra* note 2, at 4–6.

⁵ APIKO & AGGAD, *supra* note 3, at 1.

⁶ See Priya Pillai, *The African Union, the International Criminal Court, and the International Court of Justice: At the Fault Lines of International Accountability*, AM. SOC’Y OF INT’L L. INSIGHTS (Aug. 22, 2018), <https://www.asil.org/insights/volume/22/issue/10/african-union-international-criminal-court-and-international-court>.

⁷ African Union [AU], Decisions, Declarations and Resolution, 30th Ordinary Sess. of the Afr. U Assembly, at 2 (Jan. 28–9, 2018).

⁸ *Id.*

immunity of state officials accused of core crimes, and Article 98,⁹ which addresses cooperation with respect to waiver of immunity of state officials and consent to surrender state officials. The African Union also sought clarification on how United Nations Security Council (“UNSC”) referrals affect the immunity of officials of states that are non-signatories to the Rome Statute.¹⁰ This latest move by the African Union may resemble a historic transition from hitherto politics of hostility to deescalation in its relations to the Court by resorting to the use of international law¹¹ as a form of proactive “lawfare.” Lawfare in general refers to the use and the abuse of the rule of law to achieve political goals as part of a wider strategic approach towards an adversary; it is often used within the remit of non-contact warfare but can also be used as a method of its own.¹²

Before 2018, earlier African Union responses to the ICC have always centered around the political allegation that the ICC was selectively and exclusively “prosecuting Africans.”¹³ The African Union even labelled the ICC a “neo-colonial court,”¹⁴ which seemed to be only interested in prosecuting Africans opposing Western influence and hence was using Africa as a “test laboratory” for international criminal justice.¹⁵ Consequently, in 2017, the African Union passed a resolution calling on all African States to

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ Reinold, *supra* note 3.

¹² Sascha-Dominik Dov Bachmann, Andrew Dowse, & Hakan Gunneriusson, *Competition Short of War – How Russia’s Hybrid and Grey-Zone Warfare are a Blueprint for China’s Global Power Ambitions*, 1 AUSTL. J. DEF. & STRATEGIC STUD. 41, 50 (2019). For a more detailed overview of the notion of “Lawfare,” see Andres B. Munoz Mosquera & Sascha Dov Bachmann, *Lawfare in Hybrid Wars: The 21st Century Warfare*, 7 J. INT’L HUMANITARIAN LEGAL STUD. 63, 63–87 (2016).

¹³ Sascha Dominik Dov Bachmann & Luke Nwibo Eda, *Pull and Push—Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges*, 43 BROOKLYN J. INT’L LAW 457, 465 (2018); see also Eki Yemisi Omorogbe, *The Crisis of International Criminal Law in Africa: A Regional Regime in Response?* 66 NETH. INT’L L. REV. 287, 287–311 (2019).

¹⁴ Omorogbe, *supra* note 13, at 287–311; Reinold, *supra* note 3.

¹⁵ Africa as a test case in general. See Max Du Plessis & Chris Gevers, *Kenyan ICC Cases a Good Test of an ICC Founding Principle*, EJIL TALK BLOG OF THE EUROPEAN J. INT’L L. (Feb. 8, 2011), <https://www.ejiltalk.org/kenyan-case-a-good-test-of-an-icc-founding-principle/>. For the overall focus on Africa, see Bachmann & Eda, *supra* note 13, at 524; for Africa as a “laboratory,” see Fabrice Tambe Endoh & ML Melvin Mbaio, *Political Dynamics in Kenya’s Post-Electoral Violence: Justice Without Peace or Political Compromise?*, 25 AFR. SEC. REV. 275, 280 (2016).

stop cooperating with the ICC in respect to executing warrants for the arrest of African suspects¹⁶ and to withdraw en masse from the ICC.¹⁷ South Africa was one of the first countries to respond to this call for mass withdrawal when it attempted to leave the ICC in 2017 under the Zuma government. This move, however, was later blocked by the South African Constitutional Court.¹⁸

The consequences of state withdrawals have been discussed in the relevant literature on international criminal justice.¹⁹ The AU argued that the ICC's interference in the internal affairs of Africa was scuttling the peace and reconciliatory efforts in Darfur and Eastern Democratic Republic of Congo.²⁰ Consequent to its opposition to the ICC, the African Union took the initial step to establish a regional criminal court for Africa by adding jurisdictional powers to the existing African Court of Justice and Human Rights, through the inclusion of core crimes to its jurisdiction. Such a new hybrid court—part human rights appeal court and part criminal court—has the potential to reduce the impact of the ICC on Africa.²¹ The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the “*Malabo Protocol*”)²² grants immunity from criminal prosecution to African heads of state—meaning that African leaders accused of core crimes will not

¹⁶ Benedict Chigara & Chidebe Nwankwo, “*To be or not to be?*” *The African Union and its Member States Parties’ Participation as High Contracting States Parties to the Rome Statute of the International Criminal Court* (1998), 33 NORDIC J. HUM. RTS. 243, 243 (2015).

¹⁷ African Union [AU], Decisions, Declarations and Resolution and Motion, 28th Ordinary Sess. of the Afr. U. Assembly, at 2 (Jan. 30–31, 2017); *see also African Union Backs Mass Withdrawal From ICC*, BBC NEWS (Feb. 1, 2017), <https://www.bbc.co.uk/news/world-africa-38826073>; Gwenyth Gamble Jarvi, *African Union Leaders Back Leaving ICC*, JURIST (Feb. 1, 2017), <https://www.jurist.org/news/2017/02/african-union-leaders-back-leaving-icc/>.

¹⁸ *See South Africa's Decision to Leave ICC Ruled “Invalid,”* BBC NEWS (Feb. 22, 2017), <https://www.bbc.co.uk/news/world-africa-39050408>.

¹⁹ Dapo Akande, *South African Withdrawal from the International Criminal Court – Does the ICC Statute Lead to Violations of Other International Obligations?*, EJIL TALK BLOG OF THE EURO. J. INT’L L. (Oct. 22, 2016), <https://www.ejiltalk.org/south-african-withdrawal-from-the-international-criminal-court/>.

²⁰ *Id.*; Bachmann & Eda, *supra* note 13, at 465 (with further sources).

²¹ Max Du Plessis, *Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes*, 235 INST. SECURITY STUD. 1, 8 (2012).

²² *See generally* AU, Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights, June 27, 2014, https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf [hereinafter *Malabo Protocol*].

be prosecuted before the proposed new African criminal court while they are still serving in their official capacities.²³ Article 46A *bis* of the *Malabo* Protocol provides that “no charges shall be commenced or continued before the court against any serving AU Head of State or Government, or anybody acting or entitled to act in such a capacity, or other senior state officials based on their functions, during their tenure in office.”²⁴ The general potential for international criminal justice and also the limitations of such a future Pan-African Criminal Court have been discussed in literature²⁵ and will be further scrutinized in this article. Prior to adoption of the *Malabo* Protocol, the disagreements between the African Union and ICC had reached new heights when the African Union accused European states of abusing universal jurisdiction by issuing arrest warrants against Africans in a bid to strengthen the hands of the ICC.²⁶ Then, the watershed moment came when the ICC issued arrest warrants against some African heads of state who were accused of crimes against humanity.²⁷ The African Union responded by accusing the ICC of violating the customary law principle of Heads of State Immunity regarding African leaders.²⁸

Two high profile cases demonstrate this current impasse between the AU and the Court. The first is the case of now ousted Sudanese President Omar Al-Bashir,²⁹ and the second is the Kenyan President Uhuru Kenyatta’s case.³⁰ The ICC recently confirmed that South Africa was legally required to

²³ *Id.*; *Malabo Protocol: Legal and Institutional Implications*, Snapshots, AMNESTY INT’L 1, 4 (2017), <https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF>.

²⁴ *Malabo Protocol* art. 46A *bis*, *supra* note 22.

²⁵ Eden Matiyas, *What Prospects For An African Court Under The Malabo Protocol?*, JUSTICEINFO.NET (May 31, 2018), <https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; Murithi, *supra* note 2, at 6.

²⁹ Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Warrant of Arrest for violating Art. 25(3)(a) of the Rome Statute, 1, 98 (July 14, 2008), https://www.icc-cpi.int/CourtRecords/CR2019_02856.PDF.

³⁰ See Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11, Case Information Sheet, (Mar. 13, 2015), <https://www.icc-cpi.int/CaseInformationSheets/kenyattaEng.pdf>; see also *ICC drops Uhuru Kenyatta charges for Kenya ethnic violence*, BBC NEWS (Dec. 5, 2014), <https://www.bbc.co.uk/news/world-africa-30347019>.

arrest Al-Bashir, but it declined to refer South Africa to the UNSC.³¹ Consequently, on May 8, 2019, the ICC also found that Jordan, as an Arab League state, breached its treaty obligation under the Rome Statute by failing to arrest Al-Bashir when he attended an Arab League summit in Amman.³²

By and large, the new development in the AU-ICC controversy (without commenting on the possible outcome/decision of the ICJ on African Union's request) will have serious implications for international criminal justice.³³ Legal commentators argue that the ICC's decisions on the questions of immunity of state officials have been inconsistent,³⁴ and even legally flawed³⁵ (four different, mutually exclusive rationales on immunity), prompting fears that if the ICJ was to make a finding that contradicts the ICC's position, ICJ and ICC may well be on the road to conflicting jurisprudence.³⁶ In addition, it is also unclear what the reaction of the African Union would be if the ICJ found in favor of the ICC or vice versa if the ICJ would rule find in favor of the African Union. Finally, many consider the African Union's step as capable of causing a stand-off between the ICC and ICJ despite any future AO of the ICJ being non-binding in nature.³⁷

³¹ See Windell Nortje, *South Africa's Refusal to Arrest Omar Al-Bashir*, 85 TOAEP POLICY BRIEF SERIES 1 (2017), <http://www.toaep.org/pbs-pdf/85-nortje/>; see also *ICC Panel Confirms: South Africa Legally Required to Arrest Al-Bashir*, COALITION FOR THE INT'L CRIM. COURT (July 6, 2017), <http://www.coalitionfortheicc.org/news/20170706/icc-panel-confirms-south-africa-legally-required-arrest-albashir>.

³² *ICC Reverses Jordan Non-Cooperation Referral for Failure to Arrest Al-Bashir*, INT'L CRIM. J. RESOURCE CENTRE (May 10, 2019), <https://ijrcenter.org/2019/05/10/icc-reverses-jordan-non-cooperation-referral-for-failure-to-arrest-al-bashir/>; see also *ICC: Jordan Was Required to Arrest Sudan's Bashir*, HUM. RTS WATCH (Mar 6, 2019), <https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir>.

³³ Nabil M. Orina, *Should the ICJ Render an Advisory Opinion on the Immunity Question re Articles 27 & 98 of the Rome Statute?*, INT. CRIM. JUST. AFRICA (Mar. 24, 2018), <https://www.icjafrika.com/single-post/2018/03/24/Should-the-ICJ-render-an-advisory-opinion-on-the-immunity-question-re-Articles-27-98-of-the-Rome-Statute>.

³⁴ *Id.*

³⁵ See Patryk I. Labuda's "Response" to Reinold's Article "*African Union v International Criminal Court: Episode MLXIII(?)*," EJIL TALK BLOG OF THE EUR. J. OF INT'L L. (March 23, 2018) <https://www.ejiltalk.org/african-union-v-international-criminal-court-episode-mlxiii/>.

³⁶ Reinold, *supra* note 3.

³⁷ Orina, *supra* note 33.

In light of these pressing issues, this article seeks to understand and discuss the implications of this new development in the AU-ICC controversy for the future of international criminal justice. In particular, the impact or effects it would have on the complementarity jurisdiction and relationship of the ICC with national legal and judicial authorities. The article will reflect on the AU-ICC relationship in light of the complementarity provision under Article 17 of the Rome Statute of the ICC. To that effect it will explore the relationship between Articles 27 and 98 of the Statute which form the cornerstone of the African Union's proposed submission to the ICJ. This leads then to the question of how the current AU-ICC standoff could be resolved in light of the potential outcome of a future ICJ ruling. Using three scenarios of a hypothetical decision by the ICJ, we look into the likely nature and possible new dimension in the AU-ICC relationship that is likely to develop from the outcome of the awaited decision of the ICJ on African Union's request. It will specifically consider what would be the likely reaction and new approach of the African Union to the ICC's policies on prosecution should the ICJ find against the African Union. It will also consider whether an ICJ decision finding in favour of the African Union could repair the already battered AU-ICC relationship. In its third part, the article will consider the potential implications of a future ICJ decision on the future of international criminal justice, in particular, the complementarity jurisdiction of the ICC. It will also consider the potential stand-off that the ICJ decision could cause between the World Court and the ICC and what impact it would have on the consistency and predictability of the international criminal justice system. The final part then looks at the potential effects of such an ICJ AO and their implications for the future of international criminal justice. The article concludes with some recommendations and the observation that a compromise has to be sought to end the current standoff and impasse.

II. THE AU-ICC RELATIONSHIP BEFORE THE 2018 AU DECISION TO SEEK AN ICJ ADVISORY OPINION

“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."³⁸

The role of African states in the establishment of the ICC in 1988 is more than often forgotten.³⁹ History has it that African states were very instrumental in pushing for the realization of the ICC.⁴⁰ This reflects the fact that currently out of the one hundred-and-twenty-four member states of the Court, thirty-three are African, which also represents the largest regional membership.⁴¹ During the period when the Rome Statute—which established the Court—was adopted, the Organization of African Unity (now African Union) was reeling from the aftermath of the Rwandan Genocide and the Arusha peace process in Burundi. These two crucial cases sought to persuade the African leaders of the essence of complementary justice related to both national and international bodies as an avenue of strengthening African jurisprudence.⁴²

A. Africa's Contribution to the ICC

African states were extensively involved in the preparations that preceded the diplomatic conference in Rome, where the Rome Statute of the ICC was finalized.⁴³ During the preparations, numerous activities that were related to the formation of the ICC were organized around the African continent. Other regional blocks later emulated this approach.⁴⁴ These activities sought to promote support for the draft text of the Statute, and also offer more explanation to the various issues raised in the draft. It is estimated that around ninety organizations (both governmental and non-governmental)

³⁸ Rowland J V Cole, *Africa's Relationship with The International Criminal Court: More Political Than Legal*, 14 MELBOURNE J. INT'L L. 670, 670 (2013).

³⁹ Paul Nantulya, *What's Next for Africa and the International Criminal Court*, AFR. CENTER (Dec. 17, 2017), <https://africacenter.org/spotlight/whats-next-africa-international-criminal-court-icc/>.

⁴⁰ Daniel D Ntanda Nsereko, *Triggering the Jurisdiction of the International Criminal Court*, 4 AFR. HUM. RTS. L. J. 256, 257 (2004); *see also* Hassan Jallow & Fatou Bensouda, *International Criminal Law in an African Context*, in AFRICAN GUIDE TO INTERNATIONAL CRIMINAL JUSTICE 41 (Max du Plessis ed., 2008).

⁴¹ Nantulya, *supra* note 39.

⁴² *Id.*

⁴³ Phakiso Mochochoko, *Africa and the International Criminal Court*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 243 (Evelyn A. Ankumah & Edward K. Kawaka eds., 2005).

⁴⁴ *Id.* at 247–48

based in Kenya, South Africa, Rwanda, Ethiopia, Nigeria, and Uganda were part of the coalition that lobbied in their various countries for the immediate establishment of an International Criminal Court.⁴⁵ The call for the establishment of the ICC came from the highest levels of leadership on the African continent.⁴⁶ Key among them was the Southern African Development Community (“SADC”), which was very vocal in its support for the ICC.⁴⁷ Fourteen member states of the SADC met in September 1997 and set out ten basic principles which they wanted to be included in the statute of the ICC.⁴⁸ Later on, a follow up meeting was held in Senegal in February 1998 with representatives of twenty-five African states attending this meeting. At this meeting, which produced a resolution generally referred to as the “Dakar Declaration,” there was a unanimous call for the establishment of an effective and independent international criminal court, which was approved by all.⁴⁹

It is worth noting that the support of Africa for the ICC did not end with these declarations. The African block was also instrumental in crafting the Rome Statute. Countries like Lesotho, Malawi, Senegal, South Africa, and Tanzania were involved in the discussions related to the establishment of the Court at a presentation of a draft statute organized by the International Law Commission (“ILC”) to the UNGA in 1993.⁵⁰

African support was further enhanced by the impressive show of support during the Rome Conference in July 1998, where 47 African countries were present during the drafting of the Rome Statute and a majority of them

⁴⁵ *Id.* at 248.

⁴⁶ Cole, *supra* note 38, at 673.

⁴⁷ Max du Plessis, *The International Criminal Court and Its Work in Africa: Confronting the Myths*, 173 ISS PAPER 4, 4 (2008).

⁴⁸ Khiphusizi Josiah Jele, The Permanent Mission of South Africa to the United Nations, Speech delivered at the Sixth Committee of the 52nd General Assembly (Oct. 21, 1997).

⁴⁹ Abdou Diouf, *Dakar Declaration for the Establishment of the International Criminal Court in 1998*, ¶ 4 (Feb. 2, 1988) <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>; African Commission on Hum. and Peoples’ Rights, *Grand Bay (Mauritius) Declaration and Plan of Action*, ¶ 1 (April 1999).

⁵⁰ COALITION FOR THE INT’L CRIM. CT., AFRICA AND THE INTERNATIONAL CRIMINAL COURT (2009); *see also* INT’L LAW COMM’N, REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FOURTH SESSION, 25-6 Doc. A/49/10, (July 22, 1994), <http://legal.un.org/ilc/> (accessed July 20, 2019) [hereinafter Draft Statute for an International Criminal Court].

voted in favor of adoption at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.⁵¹

After the Statute was open for adoption, Senegal became the first state party to ratify the Rome Statute on February 2, 1999, and several African countries followed suit thereafter.⁵² Côte d'Ivoire in February 2005, when it was not even a party to the Rome Statute, made a declaration that accepted the jurisdiction of the ICC in relation to crimes committed on its territory since September 19, 2002.⁵³ In December 2010, Alassane Ouattara, who was then involved in a leadership tussle with incumbent president Laurent Gbagbo, wrote to the ICC in his capacity as the recognized elected President of Côte d'Ivoire reaffirming the earlier declaration and his state's full cooperation with the Court.⁵⁴ This showed how much the African Union and its member states appreciated the establishment of the ICC.

Civil Society groups in Africa were also not left behind in this historic movement. They were very instrumental in building the momentum which led to the establishment of the ICC.⁵⁵ The African Commission on Human and Peoples Rights ("ACHPR") was one of those groups that was instrumental in its commitment to the ICC by consistently calling upon African countries to ratify the Rome Statute and to ensure that they take legislative measures to make the Statute applicable in the domestic laws of their respective countries.⁵⁶ During its 24th Ordinary Session, which was held in October 1998, the ACHPR passed a resolution that urged African countries to ratify the Rome Statute and to take "legislative and administrative steps to bring

⁵¹ *Id.*

⁵² du Plessis, *The International Criminal Court and Its Work in Africa*, *supra* note 47, at 5.

⁵³ The declaration was made under Rome Statute art. 12(3), *supra* note 1, 2187 U.N.T.S. at 99.

⁵⁴ Letter from Alassane Ouattara, President Côte d'Ivoire, to the Office of the Prosecutor of the ICC (Dec. 14, 2010), available at <https://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>. A further letter was sent to the Court by Ouattara on May 3, 2011, reconfirming the state's acceptance of its jurisdiction. For the situation in Côte d'Ivoire, see *Situations and Cases – Côte d'Ivoire*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/cdi> (last accessed Mar. 9, 2020) (Côte d'Ivoire eventually ratified the Rome Statute on Feb. 15, 2013).

⁵⁵ Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 450 (2009).

⁵⁶ Cole, *supra* note 38, at 674.

national laws and policies into conformity” with it.⁵⁷ This was followed by the adoption of a resolution in 2005 that also called on African countries to domesticate and implement the Rome Statute.⁵⁸ Other African Non-Governmental Organizations (“NGOs”) created the Coalition for the Establishment of an International Criminal Court (the “Coalition”).⁵⁹ The Coalition, made up of African NGO’s and their counterparts in the West, had the aim of encouraging African Governments to ratify the Rome Statute.⁶⁰

The effort by the African states and civil society groups, as well as NGOs, during the establishment of the ICC is indicative of the strong and consistent support for the Court. It demonstrates the need to advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity, and genocide and possibly put an end to the impunity with which some African leaders ruled their territories.⁶¹

B. *Origins of the AU-ICC Rift*

In the aftermath of the horrendous acts committed by the Nazis during the Holocaust, the world swore that never again would such horrific crimes be permitted to occur anywhere in the world.⁶² However, since the Holocaust, the world has witnessed the commission of further serious human rights violations and crimes such as crimes against humanity, war crimes, ethnic

⁵⁷ African Commission on Human and People’s Rights, *Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights – 1998-1999*, 26, OAU Doc. AHG/215(XXXV) (July 1999), <http://www.achpr.org/sessions/24th/resolutions/27/> (Resolution 27 of the 24 Ordinary Session of the African Commission on Human and Peoples’ Rights: Resolution on the Ratification of the Treaty on the International Criminal Court).

⁵⁸ African Commission on Human and People’s Rights, *Eighth Annual Activity Report of the African Commission 1994-1995*, 42, OAU Doc Ex.CL/236(VIII) (January 2006), <http://www.achpr.org/sessions/38th/resolutions/87/> (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).

⁵⁹ *About the Coalition*, COALITION FOR THE INT’L CRIMINAL COURT, <http://www.coalitionfortheicc.org> (last accessed Mar. 9, 2020) (the Coalition currently aims at garnering support for the Court and ensuring its fairness, making justice visible and universal).

⁶⁰ *Id.*

⁶¹ Cole, *supra* note 38, at 675.

⁶² Westen K. Shilaho, *The International Criminal Court and the African Union: Is the ICC a Bulwark Against Impunity or an Imperial Trojan Horse?*, ACCORD (July 31, 2018), <https://www.accord.org.za/ajcr-issues/the-international-criminal-court-and-the-african-union/>.

cleansing, and genocide. International Humanitarian Law has been violated in Africa, Latin America, the Middle East, and Eastern Europe, especially in the Balkans,⁶³ highlighting the shift from international to non-international armed conflict. There have also been unabated violations of human rights in Myanmar, Sudan, Eritrea, Equatorial Guinea, Cameroon, Libya, and Syria to cite just some examples.⁶⁴ This shows clearly that the world has learnt either little or nothing from the Holocaust, a failure to act and an omission which the former UNSG, Kofi Annan, castigated in his famous plea for the establishment of an International Criminal Court.⁶⁵ The establishment of the ICC in 2002 brought hope to many, especially African states, who expressed optimism that the perpetrators of genocide, various crimes against humanity and war crimes would finally be held responsible for their crimes.⁶⁶ Some countries quickly referred cases to the ICC: Uganda,⁶⁷ Democratic Republic of Congo (“DRC”),⁶⁸ and the Central African Republic.⁶⁹ These referrals were relatively uncontroversial and showed the commitment of African states commitment to the development of human rights as well as combatting impunity.⁷⁰

However, this seemingly goodwill relationship between Africa and the ICC began to turn sour when the ICC turned its focus on Africa’s political leaders and government officials, who under customary international law were

⁶³ *Id.*

⁶⁴ See Africa 2017/18, Amnesty Int’l, <https://www.amnesty.org/en/countries/africa/report-africa/> (report on human rights in Africa).

⁶⁵ Kofi Annan, *Advocating for an International Criminal Court*, 21 FORDHAM INT’L L.J. 363, 365 (1997).

⁶⁶ Ray Murphy, *Many Criticisms of International Criminal Court Have Validity*, IRISH TIMES (June 6, 2013), <https://www.irishtimes.com/opinion/many-criticisms-of-international-criminal-court-have-validity-1.1418128>.

⁶⁷ Press Release, ICC, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004).

⁶⁸ The ICC prosecutor had previously indicated that he would seek to begin an investigation under his *proprio motu* given to him in the Rome Statute, although he said that he would prefer a referral from the government. See Press Release, ICC, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (July 19, 2004).

⁶⁹ Press Release, ICC, ICC Arrest Jean-Pierre Bemba-Massive Sexual Crimes in Central African Republic Will Not Go Unpunished (May 24, 2008).

⁷⁰ Kurt Mills, *Bashir Is Dividing Us: Africa and the International Criminal Court*, 34 HUM. RTS. Q. 404, 410 (2012).

considered to possess some form of immunity.⁷¹ This impasse between the AU and the ICC began with the arrest warrant issued by Belgium for the DRC's then-minister for foreign affairs, Abdoulaye Yerodia Ndombasi, in 2000, which was not well taken by the African States.⁷² In 2008, Rose Kabuye, the Chief of Protocol to Rwandan President Paul Kagame, was arrested in Germany on a French arrest warrant for the 1994 destruction of the plane carrying the former president of Rwanda. This crime is thought to have triggered the Rwandan genocide.⁷³ The charges were dropped in 2009. This incident was raised at the United Nations by President Kagame who asserted that the criminal proceedings constituted the exercise of universal jurisdiction by European states with the sole intention of shaming the political leaders of Africa.⁷⁴

The impasse between the two institutions went on to another level with the referral (for investigation and even prosecution) by the United Nations Security Council to the ICC, the situation in Darfur, Sudan, under Chapter VII of the UN Charter and pursuant to Article 13(b) of the Rome Statute.⁷⁵ When it became obvious that the then-President of Sudan, Omar Hassan Ahmed al-Bashir, was to be investigated by the ICC, there was a concerted effort to stay the investigation by many in Africa and the Middle East because it was contrary to customary international law.⁷⁶

Tensions between the African Union and the ICC grew to a higher level when the ICC issued an arrest warrant for Al-Bashir, despite calls for a stay of investigations. These calls were made firstly because he was a sitting head of state and secondly because he belonged to a state not a party to the Rome Statute.⁷⁷ The arrest warrant issued by the Court over the Sudanese President

⁷¹ Shilaho, *supra* note 62.

⁷² MAX DU PLESSIS, TIYANJANA MALUWA & ANNIE O'REILLY, *AFRICA AND THE INTERNATIONAL CRIMINAL COURT 3* (Chatham House 2013).

⁷³ Mark Tran, *Rwandan President Kagame Threatens French Nationals with Arrest*, THE GUARDIAN (Nov. 12, 2008), <http://www.guardian.co.uk/world/2008/nov/12/rwanda-france>.

⁷⁴ *Id.*; PLESSIS, MALUWA & O'REILLY, *supra* note 72.

⁷⁵ *Arab League Says Sudan Agrees to Investigate Darfur War Crimes*, SUDAN TRIBUNE (July 23, 2008), <https://www.sudantribune.com/Arab-League-says-Sudan-agrees-to,27983>.

⁷⁶ *Id.*

⁷⁷ Mills, *supra* note 70.

became the focal point of the African Union's concerns about its dissatisfaction with the approach used by both the UNSC and the ICC to tackle international criminal justice issues in Africa.⁷⁸

There were two fundamental and related questions that were asked by legal experts in the wake of the arrest warrant for Al-Bashir: 1) whether immunities granted as a matter of customary international law to a head of state may be waived by a treaty (in this case the Rome Statute), and 2) what was the impact of a referral by the UNSC as it pertains to the relationship between Articles 27 and 98(1) of the Rome Statute.⁷⁹

In order to find a solution to the issue at hand, the African Union Peace and Security Council ("PSC") then requested that the UNSC utilize its power provided for in the Rome Statute to defer the ICC process as this was to compromise any regional peace initiatives.⁸⁰ This was due to the fact that the Statute provides that:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.⁸¹

According to the African Union, this stay of investigation was requested in order not to "undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur" as well as alleviate the suffering caused by the conflict.⁸² To add to this, there had been earlier efforts at mediation to help resolve the crisis in Darfur, and there were concerns by

⁷⁸ Mba Chidi Nmaju, *Relevance of the Law of International Organisations in Resolving International Disputes: A Review of the AU/ICC Impasse*, 14 AFR. J. CONFLICT RES. 155, 155 (2014).

⁷⁹ Pillai, *supra* note 6.

⁸⁰ Mark Tran, *African Leaders Call for Withdrawal of Darfur Genocide Charges*, THE GUARDIAN (Jul 21, 2008), <https://www.theguardian.com/world/2008/jul/21/sudan.humanrights>.

⁸¹ Rome Statute art. 16, *supra* note 1, 2187 U.N.T.S. at 100.

⁸² Press Release, AU Peace & Security Council, *Communique of the 142nd Meeting of the Peace and Security Council*, at 2, PSC/MIN/Comm (CXLII) (July 21, 2008), available at http://www.iccnw.org/documents/AU_142-communicue-eng.pdf.

observers at that time that involving the ICC at that moment would further derail the efforts to maintain peace.⁸³

The approach taken by the African Union at that time can be described as a logical approach, bearing in mind that this was the first time the UNSC was using its power under Article 13 of the Rome Statute to activate the jurisdiction of the Court to investigate a situation within the territory of a state that was not party to the Statute.⁸⁴ Many African leaders spoke up against the ICC's alleged persecution of Al-Bashir, which was deemed to be contrary to the customary international law principle of Head of State immunity as a manifestation of the principle of sovereign equality under Article 2(4) UN Charter. This dissent was highlighted in a remark made by the late former Malawian President Bingu wa Mutharika, then-chairperson of the African Union, at the July 2010 AU Summit:

To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years . . . there is a general concern in Africa that the issuance of a warrant of arrest for . . . al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and under the African Union Charter. Maybe there are other ways of addressing this problem.⁸⁵

Notwithstanding, the UNSC failed to grant the deferral request, which was considered a legal matter and as a result of that, the African Union felt slighted by the action of the UNSC.⁸⁶ The growing dissent in Africa was further compounded by the subsequent referral of Libya by the UNSC to the Court in 2011. Here again, an African Union's request for deferral was not

⁸³ Charles Chernor Jalloh, Dapo Akande, & Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5, 6 (2011).

⁸⁴ Nmaju, *supra* note 78, at 159.

⁸⁵ du Plessis, *Implications of the AU Decision*, *supra* note 21, at 3.

⁸⁶ Max du Plessis & Christopher Gevers, *Balancing Competing Obligations: The Rome Statute and AU decisions*, Paper 225, INST. FOR SEC. STUD. 1, 2 (2011).

granted.⁸⁷ The African Union was ostentiously disappointed with the politics of referrals and alleged that the UNSC had been selective in its choice of referring cases which involved African states.⁸⁸ This was because the same power of deferral stated in the Rome Statute was used to protect peace keeping officers in Sudan from prosecution for any breach of international norms as a result of pressure from the United States.⁸⁹ The African Union then took a defiant stance and issued a decision that African states would not cooperate in the arrest and surrender of Al-Bashir.⁹⁰

What used to be a troubled relationship with the ICC had by this time become so toxic that the African Union commenced a non-cooperation policy towards the ICC. Since then, the Court has been criticized for pursuing a racist agenda against Africans and possessing an investigative system that is flawed and that also suffers from undue delays.⁹¹ Fatou Bensouda, the current Chief Prosecutor and an African hailing from the Gambia, has refuted these allegations, arguing that the African Union is bent on protecting the perpetrators of these heinous crimes.⁹² The intensity of the debate surrounding the impasse between African Union and ICC has worsened over the years and has negatively impacted the relationship between these two organizations and has the potential to be detrimental to the international legal order because most African states, as well as other states, have reservations about the legitimacy of the ICC's work and mission.⁹³

Also, this impasse has placed some African states that are signatories to the ICC in a difficult situation regarding their obligations to both the African Union and the ICC. States that are party to the Statute are under obligation to cooperate fully with the ICC in the investigation and prosecution of crimes that are within the jurisdiction of the Court.⁹⁴ However, the

⁸⁷ The UNSC referred the situation in Libya to the ICC by passing S.C. Res. 1970 (Feb. 26, 2011).

⁸⁸ du Plessis & Gevers, *supra* note 86, at 2.

⁸⁹ Rome Statute art. 16, *supra* note 1, 2187 U.N.T.S. at 100.

⁹⁰ du Plessis & Gevers, *supra* note 86, at 2.

⁹¹ Dire Tladi, *When Elephants Collide it is the Grass that Suffers: Cooperation and the Security Council in the Context of the AU/ICC Dynamic*, 7 AFR. J.L. STUD. 381, 383 (2014).

⁹² *Id.*

⁹³ Nmaju, *supra* note 78, at 160.

⁹⁴ Rome Statute art. 86, *supra* note 1, 2187 U.N.T.S. at 139.

Constitutive Act of the African Union on the other hand warns that sanctions will be imposed on any member state that does not comply with decisions of the African Union.⁹⁵

The anti-ICC stance taken by the African Union has further added to the disappointment of victims of violent crimes in seeing justice being denied. The impasse seems to further reinforce public opinion that such egregious crimes against humanity on the continent are to continue with impunity, a sentiment which should definitely not be the case.⁹⁶

C. Past Unsuccessful Attempts to Resolve the Impasse

For a while, the AU-ICC problem was not considered a priority by the Court and majority of its State Parties. Even though the Court faced some backlash due to the indictment of Al-Bashir, the Chief Prosecutor during that period, Luis Moreno-Ocampo, rebutted the claims. He stated that his position was to “apply the law without bowing to political consideration.”⁹⁷ The UNSC also proved unwilling to address the various concerns brought up by the African states.⁹⁸ However, in recent times, the Court (led by its current Chief Prosecutor, Fatou Bensouda) and Assembly of State Parties (“ASP”) have made efforts to attend to the issues raised by the African states more seriously. The Office of the Chief Prosecutor (“OTP”) has since called for dialogue between the two organizations, and this has been supported by a majority of the State Parties.⁹⁹ Although Bensouda is still following the strategy of her predecessor by emphasizing that she cannot take into account political considerations, she has duly acknowledged the issues of African states and has utilized her diplomatic leverage to ease the ongoing tensions.¹⁰⁰ One of

⁹⁵ du Plessis & Gevers, *supra* note 86, at 3.

⁹⁶ *Id.*

⁹⁷ KAMARI M. CLARKE, ABEL S. KNOTTNERUS & EEFJE DE VOLDER, *AFRICA AND THE ICC: PERCEPTIONS OF JUSTICE 1* (Cambridge Univ. Press, 2016).

⁹⁸ *Id.*

⁹⁹ *See generally* Fatou Bensouda, Prosecutor, Presentation at Legal Aid Conference – Africa and the International Criminal Court (“ICC”): Lessons Learned and Synergies Ahead, OTP (Sept. 10, 2014); Statements Made by other State Parties in: ASP General Debate of the Twelfth Session, (Nov. 20–6, 2013).

¹⁰⁰ Fatou Bensouda, Prosecutor, Keynote Address Institute for Security Studies – The ICC: A Response to African Concerns by Fatou Bensouda, OTP (Oct. 11, 2012).

the steps taken to amend the friction was the acceptance of the African Union's demands during the ASP annual meeting in 2013. Here, the rules of the Court's regarding the presence at trial for accused who occupy positions at the highest national level was amended.¹⁰¹ This amendment was made to help reduce the amount of time that Kenya's President Kenyatta and his deputy, Ruto, would have to spend at the Hague during the proceedings of their indictment before the charges were withdrawn in 2014 and 2016 respectively.¹⁰²

The amendment of rules regarding the presence of high ranking state officials as well as the withdrawal of the charges were welcomed by the African Union Assembly, but the Assembly still expressed dissatisfaction that the Council had not acted on the issues of deferrals.¹⁰³ To ensure that future requests for deferrals were not ignored by the UNSC, and to prevent other heads of states from being indicted, the African Union Assembly called for several amendments to the Rome Statute. Most crucially, it demanded that the UNGA be given the power to defer the proceedings of the Court and mandated that Heads of State be granted immunity from prosecution during their time in office.¹⁰⁴ The Assembly further made moves to fast track the establishment of the African Court of Justice and Human and Peoples' Rights ("African Court"). It is the African Union's aim that this Court will in future possess jurisdiction over the four main international crimes being tried by the ICC and potentially function as a regional alternative to the ICC as well.¹⁰⁵ The Amendment Protocol of this Court, which was adopted by the African Union Assembly in 2014, further provides immunity for sitting heads of state.¹⁰⁶ The subsequent withdrawal of charges by the ICC against Kenyatta in 2014 based on allegations of lack of cooperation from the Kenyan government by the Chief Prosecutor was also welcomed by the African Union and the tensions between the two organizations seemed to have lessened to an extent. However, the issue of immunity of heads of states has since not been settled and the

¹⁰¹ Abel S. Knottnerus, *Extraordinary Exceptions at the International Criminal Court: The (New) Rules and Jurisprudence on Presence at Trial*, 13 L. & PRAC. INT'L CTS. & TRIB. 261, 265 (2014).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Clarke, *supra* note 97, at 3.

¹⁰⁶ Protocol on the Statute of the African Court, *supra* note 24.

allegation that the ICC still has its focus only on Africa while several crimes against humanity continue to occur around the world is still considered true by many.¹⁰⁷

D. Why did the African Union opt for a New Approach?

The African Union, at its 30th summit in 2018, finally decided to make a request to the UNGA to seek an AO from the ICJ.¹⁰⁸ This was, however, not the first time the ICJ discussed seeking an AO from the Court. In 2012, the African Union Assembly requested the African Union commission to consider seeking an AO from the ICJ, which was eventually not followed up.¹⁰⁹ Kenya, on behalf of the African Union, subsequently made a formal request included in the provisional agenda of the 73 UNGA meeting held in September 2018, under the heading “Request for an AO of the International Court of Justice on the consequences of legal obligations of States under different sources of international law with respect to immunities of Heads of State and Government and other senior officials.”¹¹⁰

This is relevant because legal experts have welcomed the move by the African Union to seek an AO from the ICJ that they consider useful for political reasons. This is because there is currently so much distrust on this issue between the African Union and the ICC and it very unlikely that African states would accept a decision of the ICC on this matter.¹¹¹ Also, the decisions made by the ICC on the issue of immunity and the noncooperation of certain

¹⁰⁷ Taldi, *supra* note 91, at 396.

¹⁰⁸ Assembly of the African Union (“AU Assembly”), 30th Ordinary Session, Decision on the International Criminal Court, AU Assembly Doc. Dec.672 (XXX), 5(i) (Jan. 28–29, 2018), available at https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-689_e.pdf

¹⁰⁹ AU Assembly, 18th Ordinary Session, Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (“ICC”) Doc. EX.CL/710(XX), AU Assembly Doc.Dec.397(XVIII), 10 (Jan. 29–30, 2012), https://au.int/sites/default/files/decisions/9649-assembly_au_dec_391_-415_xviii_e.pdf.

¹¹⁰ Agenda A/73/144 of 73 UNGA: letter written by Kenya to be circulated amongst members of the UNGA signed by Lazarus Ombai Amayo (Ambassador Permanent Representative of the Republic of Kenya to the United Nations and Chair of the African Group for (July 18, 2018), <https://undocs.org/en/A/73/144>.

¹¹¹ Mark Kersten, *Negotiated Engagement — The African Union, the International Criminal Court, and Head of State Immunity*, JUST. IN CONFLICT, (March 5, 2018) <https://justiceinconflict.org/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/>.

states regarding the arrest warrant of Al-Bashir have so far been criticised as inconsistent and unpredictable by legal experts.¹¹² In its ruling on Malawi and Chad in 2011, the Court held that customary international law gives no exception for heads-of-state immunity in relation to international courts' jurisdiction.¹¹³ In a follow up decision in 2014 on the DRC, the Court held that UNSC Resolution 1593 (2005) implicitly waives the immunities enjoyed by the Sudanese President.¹¹⁴ On the other hand, in its decision on South Africa and Jordan (2017), the Court's majority determined that Sudan (as a non-state party) had rights and duties parallel to a state party by virtue of Resolution 1593 and that Article 98(1) would not apply. Even though the conclusions of all the decisions was that Al-Bashir was not immune from arrest and thus states failed in their duty to arrest him, many do not agree with the legal reasoning by the Pre-Trial Chamber as each ruling came to the same conclusion with divergent and (even) incompatible legal arguments.¹¹⁵ These "conflicting" determinations to the same issue do not augur well for jurisprudence, and hence an opinion by the ICJ would probably put the matter to rest.¹¹⁶

The legal issue of whether state obligations to the ICC—such as extradition—override conflicting customary international law, which may offer immunity to incumbent Heads of State and other key cabinet ministers remains contentious¹¹⁷ Another issue of concern is that, while the Judges of the Court have the ability to determine relevant state obligations to the ICC, it is not clear as to whether they are competent enough to ascertain whether a

¹¹² Orina, *supra* note 33.

¹¹³ For a current overview on the subject, see Ndubisi Christian Ani, *Implications of the African Union's stance on Immunity for Leaders on Conflict Resolution in Africa: The Case of South Sudan and Lessons from the Habré case*, 18(2) AFR. HUM. RTS L. J. 438, 438–62. (2018).

¹¹⁴ Pillai, *supra* note 6.

¹¹⁵ Dapo Akande, *ICC Issues Detailed Decision on Bashir's Immunity (. . . At long Last . . .) But Gets the Law Wrong*, EJIL TALK BLOG EUROPEAN J. INT'L L. (Dec. 15, 2011), www.ejiltalk.org/icc-issues-detailed-decision-on-bashir's-immunity-at-long-last-but-gets-the-law-wrong.

¹¹⁶ *Id.*

¹¹⁷ Pillai, *supra* note 6; Omorogbe, *supra* 13, at 287–311; Christian Ani, *supra* note 113, at 438–62; Akande, *ICC Issues*, *supra* note 115.

state has relevant competing or conflicting responsibilities to other international bodies, such as the African Union.¹¹⁸

These views and concerns were well highlighted in the request Kenya made on behalf of the African Union to the United Nation General Assembly, which sums up the potential benefits to the future ICC-AU cooperation in general and the provision of a lasting resolution to the long-disputed issue of immunities and the conflicting obligations of States under international law. The relevance of the points raised by the AU request and its intended benefits are noteworthy and are provided below in full:

(a) “Members of the United Nations will benefit from a General Assembly request for an AO of the International Court of Justice that will provide clarity to the evident ambiguity and to competing obligations under international law and will assist States in carrying out their obligations without undermining either the call for ending impunity or the legal regime governing the immunities of Heads of State and Government and other senior officials.”¹¹⁹

(b) “By having recourse to the International Court of Justice, as the principal judicial organ of the United Nations, the General Assembly would also underscore its resolve to give effect to the mission entrusted to it by the Members of the United Nations to ensure the appropriate implementation of international legal norms within the work of the United Nations and its Member States.”¹²⁰

(c) “the divergence of States’ practices and relying on their own interpretation rather than recourse to available international justice mechanisms thereby undermine the international justice system and the legal regime governing relations between States in its entirety.”¹²¹

¹¹⁸ Akande, *ICC Issues*, *supra* note 115.

¹¹⁹ UNGA Agenda A/73/144, *supra* note 110, at 3.

¹²⁰ *Id.*

¹²¹ *Id.*

Another argument that has been put across in favor and support of the request for an AO is that the ICJ is in a better position to address all the international law issues put up by the African Union as well as other issues proceeding from the Rome Statute. These arguments are bolstered by the fact that the ICJ has previously handled similar questions related to the state of immunity under customary international law and also the status of Resolutions from the Security Council.¹²² Thus, the ICJ, a court that has no links to the Rome Statute and is the primary international tribunal on issues of general international law, is seen by many as the solution to making inroads on this contentious matter.¹²³

On July 9, 2018, Kenya, acting on behalf of the AU Group in New York, made the request to the UN General Assembly to have the African Union's decision to approach the ICJ included in the provisional agenda of the 73rd Session of the UNGA.¹²⁴ The request was granted and the African Union's request subsequently included in the provisional agenda number A/73/144.¹²⁵ It is worthy to note that the procedure of obtaining an AO from the ICJ will be an extensive one. First and foremost, the African group at the United Nations must lobby to gain a majority vote within the UNGA, and then the ICJ will have the prerogative whether to offer its opinion or otherwise.¹²⁶ However, the ICJ has never refused to give its (advisory) opinion on any case as long as its jurisdiction applies, like its predecessor, the Permanent Court of International Justice ("PCIJ"), and this case may not be an exception.¹²⁷

It can only be hoped that the aim of this call for an AO by the ICJ was not driven by the motivation to placate opportunistic states that have become disgruntled with the Court. Instead the sole motivation should be to find a way for the ICC, which depends solely on the cooperation of States to deliver on

¹²² Arrest Warrant Case of 11 April 2000 (*Dem. Rep. Congo v. Belg.*), 2002 I.C.J. Rep. 3, ¶¶ 54–55; See also Dapo Akande, *An International Court of Justice AO on the ICC Head of State Immunity Issue*, EJIL TALK BLOG OF THE EUROPEAN J. INT'L L. (March 31, 2016), <https://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue/>.

¹²³ Akande, *supra* note 115.

¹²⁴ UNGA Agenda A/73/144, *supra* note 110.

¹²⁵ *Id.*

¹²⁶ Reinold, *supra* note 3.

¹²⁷ Orina, *supra* note 33. For advisory opinions, see Anthony Aust, *Advisory Opinions*, 1 J. OF INT'L DISP. SETTLEMENT 123, 129 (2010).

its mandate of ending impunity for crimes against humanity, war crimes, genocide and aggression.¹²⁸

III. ASSESSING THE LIKELY NATURE OF THE AU-ICJ RELATIONSHIP AFTER AN ICJ DECISION

We will now discuss the likely implications that may arise in the light of a (potential) ruling either against or in favor of the African Union as well as the potential impact of the ICJ decision on pending cases involving Africans before the ICC. Also, the potential for the AU and the ICC to utilize such a ruling to foster a new consensus will be touched upon.

A. *The ICJ Finds Against the African Union*

There have been various opinions about the likely outcome of the ICJ ruling and what its impact would be on the current relationship between the two bodies. Some legal scholars suspect that the ICJ's final decision may not favor the African Union.¹²⁹ Even though the request of the African Union for an AO follows the above mentioned institutional due processes of both the AU and potentially the UN GA, it still carries the potential of a diplomatic confrontation. Requesting the ICJ to provide an AO on the issue of issue of immunities and the conflicting obligations of States has been described as similar to appealing against the ICC Pre-Trial Chamber's decision directly to the ICJ instead of approaching the Appeals Chamber of the ICC. Such a step would be tantamount to judicial confrontation.¹³⁰

In support of such predictions of an unfavorable outcome is the fact that, while the African Union disagrees with the ICC on this issue of head-of-state immunity, there are African courts that have issued rulings on this issue that lean in favor of the ICC's position.¹³¹ For instance, the Kenyan Court of

¹²⁸ Gerhard Kemp, *Immunity of High-Ranking Officials Before the International Criminal Court – Between International Law and Political Reality*, 23 INT'L CRIM. JUST. SERIES 61, 61 (2019).

¹²⁹ Reinold, *supra* note 3; *see also* Orina, *supra* note 33.

¹³⁰ Akande, *ICC Issues*, *supra* note 115.

¹³¹ Beitel van der Merwe, *Update: Immunity or Impunity for African Heads of State*, ICJ AFRICA (Feb. 24, 2018), <https://www.icjafrika.com/single-post/2018/02/24/Update-Immunity-or-Impunity-for-African-Heads-of-State>.

Appeal on February 6, 2018 held that “as a matter of general customary international law it is no longer in doubt that a Head of State will personally be liable if there is sufficient evidence that he authorized or perpetrated those internationally recognized serious crimes.”¹³² Hence the Kenyan Government acted with impunity when it failed to arrest Al-Bashir in 2010, thus breaching Kenyan domestic law, its constitution, and international treaties like the Rome Statute.¹³³ The Kenyan judgement resonates with the one from the South African Supreme Court of Appeal, which ruled unanimously that the South African government’s refusal to arrest Al-Bashir was inconsistent with its obligations to the Rome Statute, as well as Section 10 of the ICC Act.¹³⁴ Therefore, while many view the request to the ICJ as a promising move for political reasons, the legal decisions from national courts with authority in Africa does not augur well for the African Union’s chances to secure a promising outcome at the ICJ.¹³⁵

Correspondingly, others have posited that the Rome Statute does not provide the means by which the ICJ can be asked to provide an AO on an issue that the ICC is currently addressing. Furthermore, while the UNGA has the authority to make such a request, this move would be equivalent to sidestepping the authority of the ICC. Such a move would effectively allow the African Union to engage in a form of “forum shopping,” which may cause new tensions to arise between the ICJ and ICC.¹³⁶ Another perspective is that the request for an AO is an attempt of the African Union to control the ICC, and this would be equivalent to sidelining the Court to indulge another forum for adjudication.¹³⁷ Another issue under discussion is that the ICC is under no obligation to accede to the reasoning of the ICJ should it decide in favour of the AU. This potential backing of the ICC by the ICJ had been predicted by legal scholars as a move to avoid clashes between the two Courts, which

¹³² *Id.*

¹³³ *Attorney General and 2 Others v. Kenya Section of International Commission of Jurists* [2018] eKLR, Civil Appeal 105 of 2012 & Criminal Appeal 274 of 2011 (Feb. 16, 2018) <http://kenyalaw.org/caselaw/cases/view/148746/>; see Kemp, *supra* note 128, at 76.

¹³⁴ Van der Merwe, *supra* note 131.

¹³⁵ *Id.*

¹³⁶ Akande, *ICC Issues*, *supra* note 115.

¹³⁷ *Id.*

would eventually be an unhealthy reflection on their legacies in the event that they both adopt opposing legal positions on the same issue.¹³⁸

1. *The African Union could return to Its Plan to Establish a Regional Criminal Court*

As mentioned above, an unfavorable ruling for the African Union may serve as a catalyst for the establishment of an African regional criminal court. The quest for establishing a regional court to try crimes of international nature by the African Union began in the 1970s during the discussion on the African Charter on Human and Peoples' Rights.¹³⁹ Many commentators have, however, alluded to the fact that the Africa's quest for establishing a regional criminal court of its own was motivated politically and commenced as an import of the crises between the African Union and the ICC over the arrest warrant for Al-Bashir.¹⁴⁰ Even though it cannot be denied that the Al-Bashir case has intensified the desire of Africa to prosecute international crimes on its own, it may be misleading to say that this case is the underpinning of the African quest for jurisdiction over international crimes committed against humanity.¹⁴¹ Notwithstanding, the calls for a regional criminal court have intensified since 2009.¹⁴² Earlier in 2006, ideas started coming up for the court when The Summit of the African Union Heads of State and Governments met in Khartoum, Sudan, and agreed to set up a Committee of Eminent African

¹³⁸ *Id.*; Kersten, *supra* note 111..

¹³⁹ Ademola Abass, Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, 24 *EURO. J. OF INT'L L.* 933, 933 (2013).

¹⁴⁰ Chacha Bhoke Murungu, *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, 9 *J. INT'L CRIM. JUST.* 1067, 1073 (2011) (Murungu noted that "the origin of an African idea or priority to prosecute international crimes in Africa had begun in 2006); See Donald Deya, *Worth The Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes*, *OPENSOURCE ON INT'L CRIM. JUST.* 22, 22–24 (2012) ("[t]he first body to suggest that due consideration should be given to an additional international criminal jurisdiction for the African Court was the group of (African) Experts, who were commissioned by the African Union (AU) in 2007–2008 to advise it on the "merger" of the African Court of Human and Peoples' Rights with the African Court of Justice"). While Murungu clearly erred in thinking that 2006 was the first attempt ever for Africans to contemplate the idea of international prosecution, Deya limited his dateline to only when the idea was first suggested in the context of the proposed African Court.

¹⁴¹ Abass, *supra* note 139, at 936.

¹⁴² Decision on the Hissène Habré Case and the African Union, Assembly of the African Union, 6th Ordinary Session, Assembly/AU/Dec. 103 (VI) (2006).

Jurists on the Case of Hissène Habré (the “Committee”).¹⁴³ The Committee observed that “there is room in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.”¹⁴⁴ In the Committee’s opinion Articles 1 and 17 of the Rome Statute focus on the issue of complementarity of the jurisdictions of national courts and does not recognise regional jurisdictions. This position did not prevent the establishment of such regional courts in co-existence with the ICC because such a regional court may not be answerable to the ICC.¹⁴⁵

2. *The Need for Establishing An African Regional Criminal Court*

According to an expert on International Law and Organizations, Professor Ademola Abass, there are three central reasons that support the establishment of an African regional criminal court to prosecute crimes of international nature in tangent with the ICC.

Firstly, and as mentioned earlier, the desire to create this court was expressed in the 1970s with the African Charter on Human and Peoples’ Rights. However, the committee responsible for the Charter did not agree to the proposal to embrace a court as part of the Charter with international criminal jurisdiction in its provisions.¹⁴⁶ It argued that it was premature to establish such a court since the International Convention on the Suppression and Punishment of the Crime of Apartheid had already made a provision for “an international penal court”¹⁴⁷ and the United Nations at that time was considering establishing “an international court to repress crime against mankind.”¹⁴⁸ The proposal was therefore motivated by the crime of “Apartheid” in South Africa, which had then been regarded by the UNGA as

¹⁴³ *Id.*

¹⁴⁴ See Murungu, *supra* note 140, at 1075; Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, submitted to the Assembly of the African Union, Ordinary Session, July 2006.

¹⁴⁵ Hissène Habré Report, *supra* note 144.

¹⁴⁶ Keba M’Baye, *Draft African Charter on Human and Peoples Rights*, OAU Doc. CAB/ LEG/67/1 (C. Heyns ed., Hum. Rights L. in Afr.) (2002), at 65.

¹⁴⁷ G.A. Res. 3068 (XXVIII), art. 5 (July 18, 1976).

¹⁴⁸ Org. of African Unity, Rapporteur’s Report of the Ministerial Meeting in Banjul, The Gambia, at para. 13, OUA Doc. CAB/LEG/67/Draft. Rapt. Rpt (II) Rev. 4, reprinted in C. Heyns (ed.), *Human Rights Law in Africa 1999*, at 94 (2002).

a crime against humanity¹⁴⁹ as early as 1966 and informed the debate in the 1970s. This view regarding the nature of which was also reaffirmed by the UNSC in 1984.¹⁵⁰ Apartheid existed in South Africa from 1948 until 1993, and even though it was recognized as an international crime, there was no internationally established court to prosecute the crime. A prosecution of the crime before any competent domestic or international tribunal never materialized.¹⁵¹ Hence, States were left on their own to pass legislation that would enable them to prosecute the crime of apartheid and to try criminals of apartheid on the basis of a form of universal jurisdiction. South Africa's system of racial segregation and discrimination, Apartheid, had a huge impact on the lives of South Africans as well as the African Continent. The failure to prosecute the crime of Apartheid during its "lifetime" in South Africa highlights the often-difficult reality of achieving criminal justice in Africa – not least due to political and other reasons. The crime of Apartheid can now be prosecuted as a crime against humanity under Article 7 (1) (j) of the Rome Statute.¹⁵² Thus, the need to create Africa's own criminal court was further heightened at that time, and according to some commentators, that need still pertains today.¹⁵³ Interesting in this context and highlighting the above political dynamics of bringing international justice to Africa is the observation that the new post Apartheid South Africa hasn't signed up to the Apartheid Convention post 1994 (despite the relevance of this UN Convention and its universal scope of application), leaving the ICC the only available avenue for any judicial redress.¹⁵⁴

Secondly, the Constitutive Act ("AU Act") of the African Union as well as other treaties provide the necessary legal basis to prosecute crimes of international nature.¹⁵⁵ The AU Act provides for "the right of the Union to

¹⁴⁹ G.A. Res. 2202 A (XXI), ¶ 1 (Dec. 16, 1966)

¹⁵⁰ S.C. Res. 556 (Oct. 23, 1984). For an overview see John Dugard, *Convention of the Supression and Punishment of the Crime and Apartheid*, U.N. AUDIOVISUAL LIBRARY INT'L L. 1, 1–2 (2008).

¹⁵¹ *Id.*

¹⁵² Rome Statute art. 7(1)(j), *supra* note 1, 2187 U.N.T.S. at 93.

¹⁵³ John Dugard, *Convention of the Supression and Punishment of the Crime and Apartheid*, U.N. AUDIOVISUAL LIBRARY INT'L L. 1, 1–2 (2008); *see also* Abass, *supra* note 139, at 938.

¹⁵⁴ Dugard, *supra* note 153.

¹⁵⁵ Abass, *supra* note 139, at 937.

intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.”¹⁵⁶ These crimes (apart from the “threat to legitimate order”) are in tangent with the international crimes over which the ICC has jurisdiction. It is therefore necessary for the African Union to take the necessary steps to address these violations stipulated in the AU Act. This is because in the instance where there had been no established international criminal tribunal like the ICC to prosecute these crimes, the obligation to prosecute these crimes would definitely fall on the African Union. One may argue that national courts have the jurisdiction to prosecute such cases but sadly these crimes are committed by people who hold political power, and efficient prosecution of such crimes has always presented a difficulty in Africa where political manipulation of the judiciary is rife.

In addition, other African states would not be willing to prosecute their fellow high-profile defendants on the basis of the much-criticized principle of universal jurisdiction, hence the need for the African Union to provide a system to deal with such issues.¹⁵⁷ Reference can be made to the case of Hissène Habré, the former president of Chad. An arrest warrant was issued for Habré by Belgium while he was seeking asylum in Senegal. Senegal declined to deport the accused to Belgium and with the advice of the African Union decided instead to prosecute the culprit.¹⁵⁸ Senegal also refused to give Habré back to Chad for prosecution even though both countries possessed the jurisdiction to do so, claiming head of state immunity which most African states subscribe to.¹⁵⁹ The decision of the African Union to allow Senegal to prosecute Habré was the only probable option because The Committee of Eminent African Jurists,¹⁶⁰ established by the African Union to specifically

¹⁵⁶ AU Act, art. 4(h).

¹⁵⁷ Abass, *supra* note 139, at 938.

¹⁵⁸ See African Union (“A.U.”) Assembly, 7th Ord. Sess., Doc. Assembly/AU/3/VII, (Dec. 2006).

¹⁵⁹ *But see* Comm. Against Torture, 36th Session, Decisions of the Committee Against Torture Under Article 22 of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment, Communication No. 181/2001 (2001) (condemning Senegal for refusing to extradite Habre to Belgium and holding Senegal violated Arts 5(2) and 7 of the Torture Convention to which Senegal is a party).

¹⁶⁰ Hissène Habré Report, *supra* note 144.

provide advice on all implications of the Habré case, reported that none of the two African courts possessed the powers to prosecute the accused.¹⁶¹ The Committee thus made a recommendation that would apply to future cases when stating that: “. . . the possibility of conferring criminal jurisdiction on the African Court of Justice [to confer criminal competence that can be adopted by states within a reasonable time-frame] to make the respect for human rights at national, regional and continental levels a fundamental tenet of African governance.”¹⁶²

In essence, Habré’s case reveals that neither the courts of Africa, which were set up to deal with such criminals—especially those found in power— nor the courts of other African states have the credibility to deliver justice when faced with such circumstances. Thus, there is the need to adhere to Committee recommendation to establish a regional court that can successfully prosecute such crimes.

Thirdly and lastly, it is worth noting that, apart from the general obligation that the AU Act and other treaties imposes on the African Union, there are other crimes that the African Union is obliged to prosecute that are peculiar to Africa and where the ICC has no jurisdiction. The fact that these crimes are not included in the Rome Statute are implications of the fact that the ASP does not find these crimes to be “serious” enough to come under the jurisdiction of the ICC, but they do occur in Africa all the time to the detriment of its development. One of these crimes included in this section is the so called Unconstitutional Change of Governments (“UCGs”) criminal offence, coup respectively, and its associated problems that have plagued most African countries to date, such as Zimbabwe, Libya, Burkina Faso, and Burundi being the most recently affected.¹⁶³

The extensive damage caused by these UCGs to the peace and stability of African countries caused the African Union to adopt the African Charter on

¹⁶¹ See Hissène Habré Report, *supra* note 144.

¹⁶² *Id.* ¶ 34.

¹⁶³ Yomi Kazeem, *What is a Coup? These 40 African Countries Could Help Explain*, QUARTZ AFRICA (Nov. 16, 2017), <https://qz.com/africa/1130009/what-is-coup-zimbabwe-joins-40-african-countries-that-have-had-coups/>.

Democracy, Election, and Governance (“ACDEG”) in 2003.¹⁶⁴ The Charter, which came into force in 2012, outlaws and criminalizes all acts which constitute UCGs¹⁶⁵. This would ensure that there is a reduction in the spate of armed conflicts as well as a better observance of the rule of law.¹⁶⁶ The Rome Statute allows for the prosecution of the so called “core crimes” as “the most serious crimes of international concern”¹⁶⁷ which are often committed with a nexus to an armed conflict but also in non conflict circumstances like the present persecution of ethnic Uighurs by China as a potential crime against humanity in terms of the Rome Statute¹⁶⁸. The ICC as a criminal court is first of all a judicial body that responds to crimes which have been committed with the futher ultimate goal of creating prevention through an element of deterrence for any future perpetrator of such crimes. By proscribing UCGs, the African Union has added to this preventive aim by ensuring that acts within the remit of UCGs precipitate crimes that the ICC has jurisdiction over.¹⁶⁹ It is, however, crucial that for the African Union to proscribe a crime such as UCG, which is not recognized universally as an international crime, its status under international law must first be taken into consideration.¹⁷⁰ The handling of UCGs is one of the few norms that can be described to have gradually evolved through custom and finally ending up in the categorization of the ACDEG. In the early days when UCGs were rampant on the African continent, there were several declarations made to condemn the act until its

¹⁶⁴ African Union [AU], 8th Ord. Sess., Doc. Assembly/AU/147 (VIII) (Dec. 2007), available at https://au.int/sites/default/files/decisions/9556-assembly_en_29_30_january_2007_auc_the_african_union_eighth_ordinary_session.pdf

¹⁶⁵ See also African Union [AU] Charter on Democracy, Elections, and Governance arts. 23–25 (2007), available at <https://au.int/sites/default/files/treaties/36384-treaty-african-charter-on-democracy-and-governance.pdf>

¹⁶⁶ Abass, *supra* note 139, at 939.

¹⁶⁷ Rome Statute arts. 1–5, *supra* note 1, 2187 U.N.T.S. at 91–92.

¹⁶⁸ Connor Dilleen, *Ignoring China’s Treatment of Uyghurs Sets a Dangerous Precedent*, ASPI STRATEGIST (Aug. 29, 2019), <https://www.aspistrategist.org.au/ignoring-chinas-treatment-of-uyghurs-sets-a-dangerous-precedent/>; Rome Statute arts. 1, 7, *supra* note 1, 2187 U.N.T.S. at 91–92, 93.

¹⁶⁹ Abass, *supra* note 139, at 939–41.

¹⁷⁰ *Id.*

status was finally confirmed by the entry into force of the treaty in 2012.¹⁷¹ UCGs have reduced over the last couple of years but there must come a time that they would be a thing of the past in order to aid the development of the African Agenda of maintaining peace and the rule of law at all times.

The foregoing sections have thus discussed the need to establish an African regional criminal court which would enable Africa to better handle its affairs without facing further “prejudice” as is currently alleged to be happening at the ICC. The move to establish this Court has been a long winding journey, however, it is the hope of many that it will finally come to fruition in the future.

3. *The Threats of Mass African Withdrawal from the ICC may become a reality*

It has also been speculated by legal commentators that a ruling against the African Union would finally lead to mass African exodus from the ICC.¹⁷² There have already been threats of such a move in the past following reports by the media in 2017 that the African Union had adopted a plan for mass withdrawal from the ICC.¹⁷³ Earlier on in 2016, three countries, Burundi, South Africa, and Gambia, put in applications to the UN Secretary General of

¹⁷¹ Assembly of Heads of State and Government [AHG], Declarations and Decisions Adopted by the Thirty-Fifth Assembly of Heads of State and Government, OAU Doc. AHG/DEC. 141 (XXXV) (1999); Assembly of Heads of State and Government [AHG], Declarations and Decisions Adopted by the Thirty-Fifth Assembly of Heads of State and Government, OAU Doc. AHG/DEC. 142 (XXXV) (1999); Assembly of Heads of State and Government [AHG], Declarations and Decisions Adopted by the Thirty-Fifth Assembly of Heads of State and Government, OAU Doc. AHG/DEC. 5 (XXXVI) (2000); Assembly of Heads of State and Government [AHG], Declarations and Decisions Adopted by the Thirty-Sixth Ordinary Session Assembly of Heads of State and Government, OAU Doc. AHG/DEC. 1 (XXXVI) (2001); Assembly of Heads of State and Government [AHG], *Decisions and Declarations*, OAU Doc. AHG/Dec. 235 (XXXVII), Annex 1(2002); Assembly of Heads of State and Government [AHG], *Decisions and Declarations*, OAU Doc. AHG/Dec. 1 (XXXVIII) (2002) (various declarations made since 1999).

¹⁷² Reinold, *supra* note 3.

¹⁷³ Aaron Maasho, *African Union Leaders Back Mass Exodus from International Criminal Court*, U.K. INDEP. (Feb. 1, 2017), <https://www.independent.co.uk/news/world/africa/african-union-international-criminal-court-a7557891.html>; *see also* Ludovica Iaccino, *African Union Approves Mass Withdrawal from ICC Over War Crimes “Bias,”* INT’L BUS. TIMES (Feb. 1, 2017), <https://www.ibtimes.co.uk/african-union-approves-mass-withdrawal-icc-over-war-crimes-bias-1604238>; Emmanuel Igunza, *African Union Backs Mass Withdrawal from ICC*, BBC NEWS (Feb. 1, 2017), <https://www.bbc.co.uk/news/world-africa-38826073>.

their intentions to leave the ICC. South Africa and Gambia later withdrew their applications, but Burundi went ahead and became the first state to withdraw from the ICC.¹⁷⁴ The possibility of a collective withdrawal, which has been in the works for some time, symbolizes the high-water mark of African Union opposition to the ICC.¹⁷⁵

One of the underlying issues that has fueled the move for a mass withdrawal is the UNSC. At the time of writing, three out of the five members of the Security Council (United States of America, Russia, and China) are not party to the Rome Statute due to their own particular reasons. However, the Rome Statute gives the UNSC powers to refer cases to the ICC¹⁷⁶ in the absence of referrals by State Parties or in cases where the crime has been committed outside the jurisdiction of the Court.¹⁷⁷ It is truly hypocritical and highlights the outdated nature of our post-1945 UN system that the states of Russia, US and China, which continue to refuse to be held accountable by the Rome Statute, are in a position to referee cases to the Court through their role as UNSC permanent members.¹⁷⁸ Even more troubling is the fact that the Security Council has not always been consistent in referring war crimes. On several occasions, the United States vetoed resolutions of the UNSC regarding war crimes committed by Israel on the territory of Palestine. Also, China and Russia have vetoed UN draft resolutions to refer the case of Syria and the Rohingya people in Myanmar to the ICC, despite the fact that African countries have consistently called for the UNSC to refer these cases.¹⁷⁹

This brings to the fore the question of whether Africa should continue to engage with the Court when it has no veto power to make decisions on

¹⁷⁴ Patryk I. Labuda, *The African Union's Collective Withdrawal from the ICC: Does Bad Law Make for Good Politics?*, EJIL TALK BLOG OF THE EURO. J. OF INT'L L. (Feb. 15, 2017), <https://www.ejiltalk.org/the-african-unions-collective-withdrawal-from-the-icc-does-bad-law-make-for-good-politics/>.

¹⁷⁵ *Id.*

¹⁷⁶ Rome Statute art. 13(b), *supra* note 1, 2187 U.N.T.S. at 99.

¹⁷⁷ *Id.*; Art 12 (2) clarifies that the ICC has only jurisdiction over crimes committed within the territory of a State Party or by a national of a State Party.

¹⁷⁸ Whitlaw Mugwiji & Maynard Manyowa, *Africa's Relationship with the ICC is Broken, Cockeyed and Cannot Continue*, KHULUMA AFRIKA (Oct. 30, 2016), <https://khulumaafrika.com/2016/10/30/time-to-leave-the-icc/>.

¹⁷⁹ *Id.*

issues, especially those pertaining to African countries.¹⁸⁰ Another example of selective referrals is the United Kingdom's alliance with the United States to go to war with Iraq. The then UN Secretary General, the late Kofi Annan, explicitly stated that the war on Iraq breached the UN Charter and was therefore illegal.¹⁸¹ A criminal prosecution of either former British Prime Minister Tony Blair or his senior military officers before the ICC for the crime of aggression was impossible, as this crime only came into existence in 2017.¹⁸² While the Iraqi campaign of 2003 clearly lacked legality, a prosecution under the Rome Statute was not possible, as this would have amounted to a violation of the Court's non-retroactivity principle.¹⁸³ Given the illegality and therefore immorality of the Iraq war and the apparent impunity for the decision makers at that time, it was only a question of time until African leaders, politicians and academics would point to this example of Western *hypocrisy*. Questions could be asked whether the Western powers that engage in such crimes were above the law. Some critics went even so far to view this as an example of the Court's use of selective justice and enforcement of the law in a rather "tyrannical" fashion.¹⁸⁴ Understandable as such criticism might be, it lacks the legal basis as stated above, but Western denial and lack of legitimacy regarding the justification for the war in Iraq continues to tarnish the ICC's overall legitimacy and future potential.

Also often forgotten in this debate are the actual victims of these crimes. These victims have no access to justice and the tensions between the African Union and the ICC have incapacitated the African Union by making it lose focus, which has frustrated the efforts to make the necessary reparations to the

¹⁸⁰ *Id.*

¹⁸¹ Ewen MacAskill & Julian Borger, *Iraq War was Illegal and Breached UN Charter, Says Annan*, THE GUARDIAN (Sept. 15, 2004), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq>.

¹⁸² The crime of aggression was included as Article 8 *bis* in the Rome Statute in 2010 and came into force in 2018. Secretary General, Adoption of Amendments on the Crime of Aggression, C.N.651.2010.TREATIES-8 (Nov. 29, 2010) (communicating through depository notification the adoption of Resolution RC/Res.6 of Assembly of States Parties to the Rome Statute of the International Criminal Court amending the Rome Statute to include, among other provisions, Article 8 *bis*); see also Sascha-Dominik Bachmann & Yasser Abdelkader, *Reconciling Quasi-States With the Crime of Aggression Under the ICC Statute*, 33 EMORY INT'L L. REV. 91, 97 (2018).

¹⁸³ Rome Statute art. 22, *supra* note 1, 2187 U.N.T.S. at 104 (non-retroactivity principle of *nullum crimen sine lege*, enshrined as legality principle).

¹⁸⁴ *Id.*

victims. Hence, it has been suggested that severing ties with the ICC could possibly give the African Union to chance to organize its internal affairs appropriately thereby bringing justice and peace to the victims.¹⁸⁵

However and despite the seeming justified stance of the African Union, the threats of a mass withdrawal due to these challenges would not augur well for both the African Union and the ICC and various legal experts have asserted that such a move would definitely be the “death” of the ICC and in international criminal justice.¹⁸⁶ This would also be detrimental to international criminal law because to some it is “better to have an imperfect court than none at all. It's like saying because we don't catch all the criminals, we shouldn't hold trials.”¹⁸⁷ Former ICC Chief Prosecutor, Luis Moreno Ocampo, has also described the move as a dangerous one and described the action of the African Leaders as “hypocritical.”¹⁸⁸ His comments remind one of the overall strong support the ICC initially enjoyed in Africa. One should also bear in mind that there have been cases of “trade offs” between the Court and post conflict governments with sometimes dubious human rights records themselves during the initial years of the Court’s existence. This immunity in exchange for collaboration could indeed be seen as hypocritical.¹⁸⁹ He warned that victims of these atrocities would continue to suffer under the leadership of those who perpetrate these crimes if they are not held accountable for their actions.¹⁹⁰ It is therefore expedient for the ICC and the African Union to find middle grounds on this issue of immunity of heads of states thereby anchoring justice firmly to the process of long-term global peace.

¹⁸⁵ Mugwiji, *supra* note 178.

¹⁸⁶ Iaccino, *supra* note 173.

¹⁸⁷ Karen Allen, *Is this the End for the International Criminal Court?*, BBC NEWS (Oct. 24, 2016), <https://www.theguardian.com/world/2004/sep/16/iraq.iraq> (see statement by Thuli Madonsela, South Africa’s former anti-corruption chief).

¹⁸⁸ *Id.* (See quote by the former ICC Chief Prosecutor Luis Moreno Ocampo).

¹⁸⁹ Adam Branch, *The ICC Can't Live with Africa, but It Can't Live Without It Either*, THE CONVERSATION, (Mar. 14, 2017), <http://theconversation.com/the-icc-cant-live-with-africa-but-it-cant-live-without-it-either-74210>.

¹⁹⁰ Allen, *supra* note 187.

B. If the ICJ Finds in Favor of the African Union

What would happen if the opposite came true and the ICJ was to find in favor of the African Union? Some legal experts have posited that such a finding would be beneficial to the wider international legal discourse as such.¹⁹¹ At least, it would serve as a vindication of the political opposition of the African Union to the ICC. As stated *supra*, a favorable ruling may support the legal reasoning of the African Union and hopefully put to rest all the issues surrounding immunities of heads of states under international law. It would also mean that such an ICJ ruling would be in tangent with the African Union argument whereas heads of states are immune from prosecution by either the ICC or national authorities seeking to cooperate with the ICC.¹⁹² In the case of immunity from prosecution by the ICC, the African Union has always argued that customary international law grants immunity from the jurisdiction of international tribunals. In the case of immunity before national courts, the African Union has made three assertions over the years: firstly, asserting that there exists such immunity for head of states (and other governmental heads) under customary law; secondly, previous Afrocan Union treaties and decisions (like the OAU General Convention on the Privileges and Immunities of the OAU) grant immunities to heads of states; and finally, these immunities are spelt out in Art 98 of the Rome Statute and therefore should take effect at all times when the need arises.¹⁹³ Thus African States were, and are still, under no obligation to arrest Al-Bashir, and the Pre Trial Chamber failed to take Art 98 into consideration when it issued the arrest warrants for Al-Bashir in 2009 and 2010.¹⁹⁴ A ruling in favor of the African Union would potentially highlight the fact that the issues raised by the African Union over the years have been legally right would probably set a precedent that would guide future legal discourse.

There have been legal opinions that a ruling in favor of the African Union would vindicate the political stance of the African Union questioning

¹⁹¹ Akande, *ICC Issues*, *supra* note 115; *see also* Tladi, *supra* note 91.

¹⁹² Akande, *ICC Issues*, *supra* note 115.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

the legitimacy of the ICC. Over the years, the practices utilized by the ICC have caused legal experts to question the legitimacy of the Court.¹⁹⁵ The ICC has to be seen as an institution wrenched between the demands of legalism, legitimacy respectively, and the demands arising out of the broader political and diplomatic context of the environments in which it operates.¹⁹⁶ It is yet to strike a balance between the two conflicting demands which is threatening its survival.¹⁹⁷ The ICC's legitimacy has also been questioned over the past years due to its inability to dutifully construct the rules and apply them in strict compliance as stipulated in the Rome Statute. Indeed, the practices employed by the Court have departed from the text of the law on many occasions and this has caused various party states and observers to further question the Court's method of interpreting the law.¹⁹⁸

In the Pre Trial Chamber decisions made on the arrest of Al-Bashir in ICC states the Court arrived at the same conclusion while using varied and conflicting legal arguments with which many legal experts have since disagreed.¹⁹⁹ This has further fueled the assertion that the Court is more political than legal.²⁰⁰ For instance, the Court buckled under political pressure from the United States when the Chief Prosecutor attempted to investigate potential war crimes by US soldiers in Afghanistan.²⁰¹ The United States issued various threats and stated that it would impose restrictions on any ICC staff who investigated US or allied personnel. These counter measures did, however, constitute an improvement from a 2002 announcement by the Bush Administration that it would even use military force to "free" U.S. Service Members detained by or on behalf of the Court under U.S. legislation that

¹⁹⁵ Thomas Obel Hansen, *The International Criminal Court and the Legitimacy of Exercise*, LAW & LEGITIMACY 1, 1 (2014).

¹⁹⁶ Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L., 941, 943–45 (2010).

¹⁹⁷ See generally Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (1986).

¹⁹⁸ *Id.* at 8–12.

¹⁹⁹ Akande, *ICC Issues*, *supra* note 115.

²⁰⁰ Hansen, *supra* note 195, at 4; Nouwen, *supra* note 196, at 961.

²⁰¹ Alex Whiting, *An ICC Investigation of the U.S. in Afghanistan: What does it Mean?*, JUST SECURITY (Nov. 3, 2017), <https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/>.

became infamously known as the “Hague Invasion Act.”²⁰² It followed its threats by revoking the Chief Prosecutor’s U.S. visa in April, 2019.²⁰³ The ICC quickly relented, and the Panel of Judges announced a few weeks later that it had rejected the Chief Prosecutor’s request would no longer pursue the case of Afghanistan.²⁰⁴

These acts giving political preference to powerful nations demonstrates how the Court has become a tool for Western domination to the detriment of lesser states. Another example of political dominance is the Kenyan case. President Kenyatta and his deputy, Ruto, made a statement that they would only cooperate with the Court if their trials are conducted on alternative days.²⁰⁵ The Trial Chamber thus reversed its stance on the issue²⁰⁶ without resorting to any form of clarification, which caused many to ask whether the judges or the accused were in charge of the case. Following the lack of cooperation from the Kenyan Government in producing evidence, the Chief Prosecutor was forced to abandon the case in the long run.²⁰⁷ This case also questions the legitimacy of the Court when it bases its decisions on statements made by political leaders who stand accused. Moving forward, there is the need for the ICC as an institution to gain back its legitimacy by impartially identifying and applying its legal rules objectively devoid of any political considerations and pressures.

²⁰² Sascha-Dominik Bachmann, *Today’s Quest for International Criminal Justice — A Short Overview of the Present State of Criminal Prosecution of International Crimes*, INT. L. & ARMED FORCE 289, 307 (2010).

²⁰³ Patrick Wintour et al., *US Revokes ICC Prosecutor’s Visa Over Afghanistan Inquiry*, THE GUARDIAN (Apr. 5, 2019), <https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor>.

²⁰⁴ *ICC Says Will Not Investigate US Troops in Afghanistan*, VOA NEWS (Apr. 12, 2019), <https://www.voanews.com/usa/icc-says-will-not-investigate-us-troops-afghanistan>.

²⁰⁵ Thomas Obel Hansen, *The Price of Deference: Is the ICC Bowing to Pressure in the Kenya Cases?*, JUSTICE IN CONFLICT (Sept. 16, 2013), <http://justiceinconflict.org/2013/09/16/the-price-of-deference-is-the-icc-bowing-to-pressure-in-the-kenya-cases>.

²⁰⁶ Endoh & Mbao, *supra* note 15, at 180.

²⁰⁷ Hansen, *The Price of Deference*, *supra* note 205.

C. *A Ruling as a Potential Draw and Compromise*

Apart from the two alternatives favoring one of the two parties to the dispute, there is further possibility that the ICJ's AO would not declare one institution victorious over the other but recommend a conciliatory compromise. Both the African Union and the ICC have posited various legal arguments to support their stance on the issue of immunity. Thus, the ICJ may try to find a middle ground where both parties can reach a consensus in order to forge ahead with the quest of dealing with perpetrators that are involved in war crimes which is very important to both parties. It is the view of some legal commentators that a) the ICJ will exercise its discretion in a manner that would ensure uniformity of the law by taking into consideration the legal arguments from both organizations and b) will make its decision from the perspective of customary international law.²⁰⁸ In effect, the relationship between Articles 27 and 98 of the Rome Statute would be clarified in a manner that would avert further controversy.²⁰⁹

1. *Reduction of Future Tensions Between the ICC and Other National Jurisdictions Beyond Africa*

Due to (mostly unfounded) allegations of bias and lack of effectiveness against the ICC, states which have not ratified the Rome Statute seem to be in no hurry to do so. Far from becoming a World Court with global reach as some feared, the ICC's deficiencies in terms of its jurisdiction, the conduct of preliminary investigations, and its overall inability to shake off the perceptions of constituting "selective justice" have already impacted negatively on its overall legitimacy around the world.²¹⁰ The AO by the ICJ would therefore provide much need clarification and generally set a (non-binding) "precedent," which could be referred to in other jurisdictions beyond Africa in the future. Whatever the outcome is, there should be a guiding principle on head-of-state immunity under international law and specifically

²⁰⁸ Akande, *ICC Issues*, *supra* note 115..

²⁰⁹ Orina, *supra* note 33.

²¹⁰ Anthony Wang, *On the Failed Authority of the International Criminal Court*, INT'L POL'Y DIG. (Jun. 15, 2018), <https://intpolicydigest.org/2018/06/15/on-the-failed-authority-of-the-international-criminal-court/>.

for heads of states that are not party to various treaties regarding international criminal justice. This would generally put to rest the legal tussle between the two organizations. Also, the tensions between the African Union and the ICC would be averted in similar future cases beyond Africa. Likewise, other states may be encouraged to engage with the ICC without fearing the loss of sovereignty.

2. *The Impact of the ICJ Decision on Pending Cases From Africa Before the ICC*

It has been argued in some quarters that the request of the African Union is not an attempt to either defy the ICC or undermine its credibility but should rather be seen as a product of negotiated engagement with the Court.²¹¹ Thus the AO from the ICJ would present an improved ICC that would be established on solid legal grounding.²¹²

From the discussions in the previous sections, there is the likelihood that the ICJ may agree with the ICC's position on immunity of heads of states and other leaders of government. However, there are also views that there would be more clarity on the issue from the AO that would settle matters, which would also help the ICC work within a better framework that is more acceptable to all parties to the Statute than before.²¹³

Questions have since been asked as to what happens to cases that are still pending before the Court if, per chance, the African Union does not agree with the AO and decides to carry out its agenda of a mass withdrawal.²¹⁴ According to South African law professors Chenwi and Sucker, it could happen that some accused persons may escape ICC prosecution.²¹⁵ However,

²¹¹ Ben Lee, *Negotiated Engagement — The African Union, the International Criminal Court, and Head of State Immunity*, BENRLEEUSA (Mar. 5, 2018), <https://benrleeusa.wordpress.com/2018/03/05/negotiated-engagement-the-african-union-the-international-criminal-court-and-head-of-state-immunity/>.

²¹² *Id.*

²¹³ Akande, *ICC Issues*, *supra* note 115..

²¹⁴ Orina, *supra* note 33.

²¹⁵ Lillian Chenwi & Franziska Sucker, *Lessons from the Al-Bashir Debacle: Four Issues for ICJ Clarification*, 51 RESEARCH GATE 240, 264 (2018).

according to Article 127(2) of the Rome Statute, prosecution is still possible for cases that were ongoing at the time of withdrawal and also future cases that relate to alleged crimes committed while the state concerned was still a party to the Statute.²¹⁶ Therefore, a withdrawal would definitely not affect the exercise of jurisdiction by the ICC as the duty to cooperate with the Court would continue.²¹⁷ Taking the case of Burundi, which finalized its withdrawal on October 27, 2017, the ICC confirmed that its investigation into “[a]lleged crimes against humanity committed in Burundi or by nationals of Burundi outside Burundi since 26 April 2015 until 26 October 2017 had not been affected and were currently ongoing despite the withdrawal becoming effective.”²¹⁸ To add to this, there still lies the possibility of referrals of such cases from the UNSC by states not party to the Rome Statute, but who have United Nation membership, which would result in prosecutions subject to the principle of complementarity.²¹⁹

Therefore, current cases pending before the ICC, whether from party states or non-party states, would still continue despite what the outcome of the AO would be with a renewed strength to hold accountable all who are involved in war crimes, crimes against humanity and genocide.

3. *Repairing the Damaged Relationship between the African Union and ICC*

All hope is not yet lost in this current deadlock between the African Union and the ICC. It has been suggested that if the ICC pays more attention to the issues raised by the African Union, it would lead to the restoration of the relationship that has been marred allegations of selective justice.²²⁰ This could be done through more constructive dialogue involving more of the ICC

²¹⁶ Rome Statute art. 127(2), *supra* note 1, 2187 U.N.T.S. at 158.

²¹⁷ *Id.*

²¹⁸ INT’L CRIMINAL COURT, *Situation in the Republic of Burundi, ICC-01/17* (Jul. 2018), <https://www.iccpi.int/burundi>; AU Assembly, Decision on the International Criminal Court, Doc. EX.CL/1068 (XXXII), Decision No. Assembly/AU/Dec.672 (XXX), Thirtieth Ordinary Session (Jan. 28–9, 2018)

²¹⁹ Chenwi, *supra* note 215, at 265.

²²⁰ Bachmann & Eda, *supra* note 13, at 533–35.

supporting voices within the African Union²²¹ and a focus on the need to take “African” concerns more seriously when assessing the ICC-AU relationship. Various attempts have been made in the past but have yielded no results.²²² Therefore, there should be a conscientious effort on the part of both institutions to ensure that outcomes of these meetings are enforced efficiently and effectively.²²³

Also, both the African Union and the ICC should make an effort to shift grounds on the issue of criminal justice delivery. Thus, the two organizations must seek to revamp their approaches to international criminal justice and move from past contentious issues of interorganizational confrontation to peace and justice building of today and the future. The complementarity regime that the ICC was established upon must be implemented by both parties. This would involve the strengthening of national courts to effectively take jurisdiction over war crimes, genocide, and crimes against humanity.²²⁴ This would ensure that the perpetrators of these crimes are held totally accountable thereby hopefully removing the root causes of conflict in Africa.²²⁵

A future AO from the ICJ may have various implications whether it rules in the favor of the African Union or not. Whatever the outcome might be, it is the hope of many that both parties would take notice of various recommendations that would be made and work hand in hand to make the rule of law achievable on the African Continent and the world at large.

4. *Utilizing the ICJ Ruling to Foster a New AU-ICC Consensus*

The different perspectives on the issues stemming from this case demonstrate that “the importance of getting the immunity question right cannot be overstated,” since “[i]t implicates not just the first trial of a head of

²²¹ *Id.* at 541.

²²² Mostly by AU states’ leaders and courts—the latter evident from the two cited AU courts decisions (Kenya and South Africa). See APIKO & AGGAD, *supra* note 3, at 8–9.

²²³ Labuda, *supra* note 174..

²²⁴ Bachman & Eda, *supra* note 13, at 541.

²²⁵ *Id.*

state by the ICC, but the relationship between African states and the ICC more broadly.”²²⁶

The outcome of the ICJ ruling should aim at fostering a new consensus for the African Union and the ICC. The African states and the African Union have expressed commitment to pursuing accountability for such crimes, as shown in earlier sections, their overwhelming support for the creation of the ICC, and currently holding the largest regional representation. Although the ICC is currently faced with a lot of challenges, it still remains a tool for justice and a solution in a continent where the quest for justice can be described as “searching for a needle in a hay stack.”²²⁷ Despite the numerous reservations that the African Union and African observers have expressed about the Court and its seeming lack of credibility, there are still many that have the view that future generations would support the ICC as a complementary global legal organization.²²⁸ This is because there would never come a time that the legal solutions to conflicts in Africa would be sufficient but surely “there can be no solution without justice.”²²⁹ The upcoming ICJ ruling should therefore bring both institutions to a renewed point where seeking and delivering justice should be the key focus at all times without political interference. As at the time of writing and for the interim, it is clear that the ICC would remain the only institution that has jurisdiction over the crimes that are committed with impunity in Africa. The cooperation of the African Union is therefore needed to ensure that the judgement of reason always outweighs that of power.²³⁰ This is further emphasized by Justice Robert H. Jackson’s statement at the commencement of the Nuremberg trials;

“That four generations flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive

²²⁶ Christopher Gevers, *The ICC Pre-Trial Chamber's Non-Cooperation Decision on Malawi*, WAR AND LAW (Feb. 16, 2012), <http://warandlaw.blogspot.com/2012/02/icc-pre-trial-chambers-non-cooperation.html>.

²²⁷ du Plessis, *The International Criminal Court and Its Work in Africa*, *supra* note 47, at 2.

²²⁸ Bachmann & Eda, *supra* note 13, at 533.

²²⁹ Mehari Taddele Maru, *The International Criminal Court and African Leaders: Deterrence and Generational Shift of Attitude*, 124 ISPI ANALYSIS PAPER 1, 8 (2014).

²³⁰ Bachman & Eda, *supra* note 13, at 534.

enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to reason....”²³¹

It is therefore the obligation of African states parties to the Rome Statute to cooperate with the ICC in a concerted effort at building a better institution that will deliver justice to states and victims that have been at the receiving end of violence perpetrated with impunity by some African leaders.

IV. POTENTIAL EFFECTS OF AN ICJ DECISION ON THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE

A. *Effects on the ICC Complementarity Jurisdiction*

The future of international criminal justice lies in the efficient and effective implementation of the complementarity principle by the national courts. Article 17 of the Rome Statute provides that substantive rules that make up the complementary regime and also qualifies the relationship between the ICC and national jurisdictions.²³² The Statute grants states the authority to conduct their own trials with regards to the core crimes that are stipulated under the Statute with the aid of financial, technical, and professional support from the international community.²³³

In light of a future ICJ decision, it is submitted that this principle of complementarity of ICC would be firmly established, that the ICC is only a complementary institution and should serve as such. If the African Union in the future moves on to establish the African Criminal Court with jurisdiction over international criminal acts or if the national courts become more empowered to settle these issues on their own, the ICC would face a lesser task of the Office of the Prosecutor having to go out “fishing” for targets and

²³¹ Justice Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945) (transcript available at <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribuna>).

²³² See Rome Statute art. 17, *supra* note 1, 2187 U.N.T.S. at 100–01 (granting jurisdiction to the ICC only in cases where other courts are unwilling or unable to prosecute). The ICC is a court of last resort for the prosecution of the most serious crimes, as stated above.

²³³ Bachmann & Eda, *supra* note 13, at 467.

cases as it has currently been accused of doing.²³⁴ These various regional groups, as well as states, would also have the capacity to try these crimes themselves and on their own territories which has been described as very crucial to enhancing the judicial process and beneficial to victims as well.²³⁵ There may, therefore, come a time when the ICC would become an institution that deals with these crimes only when the State is unable to and not unwilling to try the crimes. Also, the ICC could serve as an institution that offers technical, professional and financial support for States that require these in the performance of their duties as well as further strengthening the legal systems of states party to the Rome Statute. In effect States' sovereignty would be preserved while impunity is curbed to its minimum.²³⁶

B. Effects on the Question of State Immunity and Immunity of State Officials

A fundamental principle of the Rome Statute is that all defendants are equal before it.²³⁷ This provision of the Statute codifies the rule of customary international law, that whatever immunities an official might otherwise possess under international law cannot be implored as a restriction or a form of protection from criminal responsibility, *ratione materiae*.²³⁸ The Rome Statute, which also deals with "Irrelevance of Official Capacity," provides that:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from

²³⁴ Jarvi, *supra* note 17.

²³⁵ Extraordinary Chambers in the Courts of Cambodia, *Introduction to the ECCC*, ECCC.GOV, <https://www.eccc.gov.kh/en/introduction-eccc> (last visited July 17, 2019).

²³⁶ Oscar Solera, *Complementary Jurisdiction and International Criminal Justice*, 84 IRRC 145, 157 (2002).

²³⁷ Rome Statute art. 25, *supra* note 1, 2187 U.N.T.S. at 105.

²³⁸ Leila Nadya Sadat, *Heads of State and Other Government Officials Before the International Criminal Court: The Uneasy Revolution Continues*, 19 LEGAL STUD. RESEARCH PAPER SERIES 1, 4 (2019).

criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.²³⁹

In recent times the meaning of this article has been under serious contention. Individuals who have been affected by this article have protested its application to their cases and have often applied Article 98 as their defense. Article 98 provides that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.²⁴⁰

The application of Article 98 has led many parties' signatories to the Rome Statute to declare their inability and unwillingness to give up or arrest individuals who may possess immunity under international law to the ICC without the agreement of their own nation state. The most recent is Jordan who refused to arrest Al-Bashir and defended itself by pleading "fundamental rules and principles of international law."²⁴¹ Also, in the past, the lawyers in the George W. Bush administration depended on Article 98 to negotiate Bilateral Immunity Agreements ("BIAs") with other countries in order to avert any future surrender of any U.S. citizen to the Court.²⁴² It has therefore been posited that the forthcoming AO from the ICJ would seek to clarify the relationship between Articles 27 and 98 in order to set to rest the issue of the immunity of state officials²⁴³

However, there is extensive literature that supports the argument that states and state officials, should not be granted immunity for the most serious

²³⁹ Rome Statute art. 27(1), *supra* note 1, 2187 U.N.T.S. at 106.

²⁴⁰ *Id.* art. 98 (1).

²⁴¹ Sadat, *supra* note 238, at 5.

²⁴² Leila Nadya Sadat, Summer in Rome, Spring in The Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court, 21 WIS. INT'L L.J. 557, 575 (2003).

²⁴³ Akande, *ICC Issues*, *supra* note 115.

crimes of an international nature.²⁴⁴ As stated earlier, the current controversy is viewed by many as an agenda that is more political than legal. From the history of the application of international criminal law, which dates back to the Nuremberg and Tokyo Tribunals of 1945 until now, there is a clear principle of the removal of all manner of immunities from any person who commits the core crimes which are *jus cogens* before any international criminal court.²⁴⁵ This is proven from the work done by the International Law Commission and the establishment of ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”), as well as the Tokyo and Nuremberg tribunals.²⁴⁶ The late Professor Cherif Bassiouni (former consultant to the U.S. Departments of State and Justice) also supported this principle of removal of immunities from state officials when he stated in his book written after the Nuremberg Trials that “a new rule of customary international law was established, namely that international immunities do not apply to international prosecutions for certain international crimes.”²⁴⁷ It is therefore clear that the ICJ AO may not necessary stray from what has been developed in past and would give its ruling based on these guiding principles.

The ICC must, at all costs, resist the political pressure that has been exerted upon it from various quarters. Instead, it should adhere to “what the law is”²⁴⁸ true to the standards of treaty interpretation under Article 21 of the Rome Statute as well as the Vienna Convention On the Law of Treaties.²⁴⁹

It is true that the text Article 98(1), when interpreted in conjunction with Article 27, causes some form of ambiguity. However, as Article 27 is seen as codifying a rule of customary international law, which seeks to deny individuals the opportunity to rely on immunities that are attached to their

²⁴⁴ Sadat, *supra* note 238, at 33; Orina, *supra* note 33; Pillai, *supra* note 6.

²⁴⁵ Bachmann, *supra* note 202, at 289–90 (overview of international criminal justice since the Nuremberg trials); *see also* Sascha-Dominik Bachmann, *The German Criminal Charges Against Donald Rumsfeld – the Long Road to Implement International Criminal Justice at the Domestic Level*, J. SO. AFR. L. 255, 264–65 (2008) (overviewing the question of immunities).

²⁴⁶ Bachmann, *supra* note 202, at 290.

²⁴⁷ CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 73 (Ardsley New York Trans'n'l Publishers, 2003).

²⁴⁸ *Marbury v. Madison*, 5 U.S. 137, 138 (1803).

²⁴⁹ Sadat, *supra* note 238, at 38.

positions as leaders in Government with regards to core crimes, the interpretation of Article 98 must take this into account.²⁵⁰

The fact remains that people are not immune from prosecution before an international court for core crimes that are under the jurisdiction of the Rome Statute. Therefore, in the event that an individual who hails from a ICC state stands accused, they must obviously be rendered to the Court as a result of Article 27(2) and customary international law.²⁵¹ For individuals that hail from states that are not party to the Rome Statute, it is the duty of the UNSC to temporarily remove the immunity of such individuals and allow them to be prosecuted before an international court. This power of the UNSC is vested upon customary international law and was the foundation of the ICTY and the ICTR's authority and from records, these ad hoc tribunals pursued high ranking leaders of governments, which included heads of states.²⁵² Thus through its referral system, the UNSC is reinforcing customary international law as stipulated in Article 27 that official position is irrelevant to an individual being charged before an international court.²⁵³ The question of immunity of state officials may be described as the most important question facing international criminal law today. To this end, it is the hope of civil society groups and citizens of many countries that the forthcoming ruling of the ICJ will further enforce the ICC's position, as well as that of the International Law Commission—that immunity does not apply to any state official who is accused of international crimes, such as genocide, crimes against humanity, and war crimes.²⁵⁴

C. *Potential Uncertainties in the International Criminal Justice System*

There have, however, been certain views that the forthcoming AO would pose uncertainties in the international criminal justice system. Even

²⁵⁰ See Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmed Al Bashir (July 14, 2018).

²⁵¹ Sadat, *supra* note 238, at 39.

²⁵² Both Slobodan Milosevic and Jean Kambanda were heads of government at the time of their indictment by the Security Council.

²⁵³ Rome Statute art. 27, *supra* note 1, 2187 U.N.T.S. at 106.

²⁵⁴ Adil Ahmad Haque, *Immunity for International Crimes: Where Do States Really Stand?*, JUST SECURITY (Apr. 17, 2018), <https://www.justsecurity.org/54998/immunity-international-crimes-states-stand>.

though the African Union has raised various issues that are legally correct and call for further legal deliberation and clarification, the ICJ generally agrees with the African Union only on some issues—but it may eventually lean towards the position of the ICC in its final decision.²⁵⁵ According to the international legal expert, Professor Akande, such a move could create conflicts for future jurisprudence.²⁵⁶ In the light of this, questions have been asked as to what actions states should take in future situations where a cooperation request conflicts with the requested state's obligation under customary or conventional international law to grant immunity. States sometimes use different interpretations of various treaties to fit their own purposes for opportunistic or diplomatic reasons.²⁵⁷ In the *Arrest Warrant Case of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, the ICJ assessed immunity from prosecution for an acting minister of foreign affairs, finding that absolute immunity for heads of state from criminal prosecution in a domestic court exists under customary international law.²⁵⁸ However, such immunities may not bar criminal prosecution in all cases, such as before an international court with jurisdiction, including the ICC.²⁵⁹

When a state has agreed to the obligations of an international treaty that waives immunity, such as the Rome Statute, this may fall within the exception pointed out by the ICJ. However, there is still room for confusion based on the treaty provisions.²⁶⁰ In relation to the ICC and its indictment of Al-Bashir, Sudan is not a party to the Rome Statute. Some scholars argue that the UNSC resolution rendered Sudan akin to a State Party; hence, Sudan should be seen as bound by the Rome Statute.²⁶¹ This line of reasoning is mainly based on the fact that UN member states, and therefore also Sudan, are required to carry out Chapter VII measures by virtue of Article 25 of the UN Charter.²⁶² This is further supported by the assertion that Article 103 of the UN Charter determines that, in the event of a conflict, obligations under the UN Charter

²⁵⁵ Reinold, *supra* note 3.

²⁵⁶ Akande, *ICC Issues*, *supra* note 115.

²⁵⁷ Chenwi, *supra* note 215, at 255.

²⁵⁸ *Arrest Warrant Case of April 11, 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. Rep. 3, 54–5.

²⁵⁹ *Id.*

²⁶⁰ Pillai, *supra* note 6.

²⁶¹ *Id.*; see also Ndubisi Ani, *supra* note 111, at 439–41.

²⁶² *Id.*

are paramount over all obligations “under any other international agreements.”²⁶³ However it can be argued that, while the UNSC has the power and right under the UN Charter to impose treaty obligations on nonstate parties when acting under Chapter VII,²⁶⁴ rendering Sudan a state party via the UNSC referral resolution and hence applying Article 27 of the Rome Statute to Sudan in ICC proceedings, could be problematic under international law. The general principle of international law of *pacta tertiis nec nocent nec prosunt* stipulates that “[a] treaty does not create either obligations or rights for a third State without its consent,” which is enshrined in Article 34 of the Vienna Convention on the Law of the Treaties.²⁶⁵ This position²⁶⁶ regarding Sudan as a non-state having to comply with state obligations arising from the Rome Statute after a Chapter VII UNSC referral has been decided in the negative by the ICC in *Prosecutor v. Omar Hassan*. There, the Court found that “the conclusion that Resolution 1593 altered Sudan’s legal position is inescapable—and . . . this is consistent with the basic structure of international law because Sudan consented to the UN Security Council exercising such a power.”²⁶⁷

In the context of immunity and the prosecution of international crimes, and more specifically, in respect of national proceedings, the Al-Bashir case brings to the fore the question of hierarchy between sources of international law. More precisely, whether or not there is a hierarchy between international treaty provisions and customary international law rules, and if not, what are

²⁶³ Paola Gaeta, *Does President Al-Bashir Enjoy Immunity from Arrest?*, 7 J. INT’L CRIM. JUST. 328, 326 (2009).

²⁶⁴ See, e.g., UNSC Resolution 1373 (2001) (imposing obligations on all States arising from the International Convention for the Suppression of the Financing of Terrorism 1999, UN Doc. A/RES/ 54/109; 39 ILM 270 (2000); TIAS No. 13075; UNSC Resolution 1874 (2009) (imposing on North Korea the Treaty on Non-Proliferation of Nuclear Weapons 1968 (729 U.N.T.S. 161; 7 ILM 8809 (1968); 21 UST 483) after it had announced its withdrawal); UNSC Resolution 1757 (2007) (giving effect to the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon 2007 (2461 U.N.T.S. 257) after the Lebanese parliament refused to ratify it).

²⁶⁵ Chenwi, *supra* note 215, at 260 (referring to the Vienna Convention on the Law of the Treaties).

²⁶⁶ Gaeta, *supra* 263.

²⁶⁷ *Prosecutor v. Omar Hassan*, ICC-02/05-01/09. Public Prosecution Response to the Observations of Eleven Amici Curiae, Office of the Prosecutor decision, ¶ 18 (July 16, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_03719.PDF.

the applicable conflict resolution principles?²⁶⁸ This constitutes a norm conflict in the strict sense since a state that is bound by these two rules “cannot simultaneously comply with its obligations.”²⁶⁹

The current impasses between the African Union and the ICC have brought to the fore the various challenges with the interpretation of these treaties. This is however for the greater good because this enhanced dialogue would serve as support to the development of the jurisprudence of international criminal law.

D. Potential “Supremacy” Battle Between the ICC and ICJ

Another issue that has been raised by some legal scholars is that this move by the African Union would lead to a potential battle of supremacy between the ICC and the ICJ.²⁷⁰ This has been foreseen as happening should the ICJ make an attempt of circumventing the ICC’s jurisdiction on this matter by offering a deferring opinion.²⁷¹ This could lead to a potential conflict in approaches between the two courts which is similar to the ICTY’s rejection in the *Tadić* case of the ICJ’s test for effective control as formulated in the *Nicaragua* case.²⁷²

Also, the potential interaction between the ICJ and the ICC could turn out to be complex. This is true because, despite the fact that both courts are supranational in nature, they operate in different spheres when it comes to the areas of jurisdiction and subject matter.²⁷³ The ICJ is a court that adjudicates disputes between states. Meanwhile, the ICC is a penultimate criminal court that establishes foremost individual criminal responsibility and then (indirect) state liability arising from potential non-compliance with duties arising from the Statute.²⁷⁴ To date there has been little or no interactions between these two Courts and none were envisioned till now. To some scholars, the question

²⁶⁸ *Id.* at 259.

²⁶⁹ Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 426 (1953).

²⁷⁰ Akande, *ICC Issues*, *supra* note 115

²⁷¹ Orina, *supra* note 33, ¶ 6.

²⁷² *Id.*

²⁷³ Pillai, *supra* note 6.

²⁷⁴ *Id.*

that would be put to the ICJ for clarification deals directly with legal issues that the ICC already adjudicates on. What remains for the international legal community to see is whether the ICJ would in effect function as an appellate court for the ICC and whether this would augur well for the international criminal justice system.²⁷⁵ Whether this would be feasible and what its future impact would be, will unfold as the case makes progress.

E. International Criminal Justice in the aftermath of An ICJ Advisory Opinion

The adoption of the Rome Statute marked an uneasy compromise in international law and practice.²⁷⁶ After two decades of prosecuting crimes of international nature, many have questioned the Court's impact and whether international criminal justice has improved.²⁷⁷ It has been posited that the ICC is currently going through crisis, and the Court needs overhauling in order to regain its "glory" and credibility in the eyes of the international community as the apex criminal court dealing efficiently and effectively with various international crimes.²⁷⁸ The move taken by the African Union has therefore been described as a chance for the ICC to utilize the ICJ's AO as an opportunity to review its format of operation in order to dispel allegations of bias and racism.²⁷⁹

Also, many have regarded the upcoming opinion of the ICJ as a course of action that would serve to improve the development of international criminal justice. This is because the legal questions that form the current basis of the discord between the African Union and the ICC are multifaceted and advance significant issues related to justice and international accountability in general. It is without doubt that the clarification that this AO would bring to the issue of immunity of heads of states under the Rome Statute and customary international law would have wider implications on international law as well

²⁷⁵ *Id.*

²⁷⁶ Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 412 (2000).

²⁷⁷ Sadat, *supra* note 238, at 46.

²⁷⁸ Allen, *supra* note 187.

²⁷⁹ See Statement from Madonsela, *supra* note 161.

as international institutions beyond the scope of the legal question which is currently under dispute.²⁸⁰

For international criminal justice to develop from the level where it currently operates in light of such an ICJ decision, it would be prudent for all members of the United Nations to embrace the work of the ICC. The support for the ICC is currently low with the majority of world powers going to great lengths to disassociate themselves from the Court. This has further discredited the Court in several ways and hindered its progress as well. Efforts should be made to ensure that the ICC is well structured in its deliberations thereby making it relevant in the development of international criminal justice.

V. SOME RECOMMENDATIONS

The impasse that has developed between the African Union and the ICC over the past decade and its global effects continue to bring to the fore the challenges that the ICC encounters within the African legal context as well as the political and institutional landscape. The current political environment in Africa can be described as unfavorable to the development of law and justice on the continent. The complementarity principle of the ICC has failed to work on the African continent due to the opposition of some political leaders who are often, directly or indirectly, complicit in the commission of crimes under the Statute. The immunity principle proffered by the African Union has helped in shielding some of the masterminds of such crimes. The entrenched stance taken by both parties has not helped in resolving the matter and has in turn tarnished the image of the ICC. This could lead to its collapse if nothing is done and the African Union follows through with its plans of setting up its own criminal court and decides to withdraw from the ICC. It is therefore evident that certain measures need to be enforced to rebuild the confidence in the ICC as well as meet the expectations of peace and justice with special emphasis on Africa. The request for an AO from the ICJ was a step in the right direction, notwithstanding the outcome. In addition, the following measures,

²⁸⁰ Pillai, *supra* note 6.

if implemented, could reasonably aid in ensuring that the international justice system is improved.

A. Enhancing the capacity of member states to prosecute ICC crimes

We recommend that the various institutions that deal with legal issues at the member state level in the African Union should be empowered to prosecute the crimes of the Rome Statute domestically, the standard in Europe and the United States. Such empowerment does require the availability of the necessary resources. The various actors—institutions, human resource etc.—should be equipped with the necessary, infrastructure, skills development, and support to carry out the appropriate legal activities to ensure that such crimes are investigated and prosecuted efficiently and effectively. In addition to such resourcing, there is the need for a wider approach that promotes the role of the main institutional implementing and enforcing bodies. Such an approach calls for a total reform in the judicial services of many nation states. The judiciary should also be supported to be independent of the executive and the legislative arms of government. It is also recommended that the necessary legal training and retraining of judges, court officials, police, prison officers, and special prosecutors should be carried out frequently to empower them perform their duties of prosecuting such crimes as well as guarding the rights of citizens. The special prosecutors and judges must ensure that they are continuously abreast with the rules and regulations of the International Criminal Law and are putting them into practice in their work. Governments should also ensure that the necessary support in terms of resources are put in place for all offices of special prosecutors and attorney general departments to enable them to prosecute these crimes of international nature.

B. Suspension of the Establishment of a Regional Criminal Court in Africa

We also recommend that the African Union suspend its efforts to establish a regional criminal court or a criminal arm of the current African Court in the interim. In the objectives stated in its withdrawal strategy listed in the previous section, the establishment of an African criminal court is imbedded in sections (iii) and (iv) and the challenge of a possibility of selectivity, unfairness and double standards can definitely not be ruled out. This possibility is highlighted by the fact that the Amended Protocol provides immunity for heads of governments and their officials while they are in power

(which would be for very long periods because as it is familiar with Africa, there is a culture of leaders staying in power for very long periods). Under customary international law, personal immunity may only be raised before national courts of foreign states in relation to an indictment for international crimes. However, the African Union in the Amendment Protocol has extended this power to an international court which is contrary to established customary international law. As a result, several scholars have rightly viewed this provision as “a major setback in the advancement of international criminal justice,” which can only be construed as in tangent with the interests of those African leaders who are fearful of facing the law due to a culture of impunity they have created during their leadership.²⁸¹ What the African Union has done speaks to the same challenge that it currently has with the UNSC, namely serving the interests of others to the detriment of ensuring justice.²⁸² What the African Union should pursue is to empower its nation states to be able to prosecute such crimes in their own jurisdiction without unnecessary manipulation of the judicial systems.

VI. CONCLUSION

The issue of immunity for heads of states and other government officials has been an ongoing tussle between the African Union and the ICC for over a decade. Over the years the two parties have remained entrenched in their positions with the African Union finally calling on its members not to cooperate with the ICC and threatening to withdraw from the ICC. This has resulted in a loss for both parties because the African Union has focused its attention over the years in fighting the ICC by resisting its efforts in Africa while abandoning its mission to ensure that victims of these crimes receive the necessary justice and perpetrators are not shielded from facing the law and that peace and the rule of law are upheld on the African continent. The ICC, on the other hand, has faced various challenges in performing its duties due to the lack of cooperation from the countries and also its inability to properly clarify the law during its deliberations. There has been bad blood between the two organizations for a long period and the African Union has finally decided

²⁸¹ Garth Abraham, *Africa's Evolving Continental Court Structures: At the Crossroads?*, 209 SO. AFR. INST. INT'L AFF. OCCASIONAL PAPER 14 (2015).

²⁸² Chenwi, *supra* note 215, at 227.

to request for an AO from the ICJ on this contentious issue which has been considered a right step towards the development of international criminal justice.

Therefore, there is a general feeling that the ICJ, which is not bound by the Rome Statute and which is regarded as the foremost international tribunal on matters related to general international law, is the answer to making progress on this contentious issue.²⁸³

This article has sought to discuss what led to this impasse between the two parties, it has also assessed the likely nature of the relationship that would exist between the two parties in light of the upcoming ruling and its implication on the future of international criminal justice.

The central argument that permeates the article is that regardless of the outcome of an AO from the ICJ, the African Union and the ICC should forge a new consensus to build a better framework for the ICC to operate in. Adding to that, it is clear that the future of international criminal justice is imbedded in states becoming better equipped to adjudicate such crimes and to seek for help of the ICC when it becomes impossible to handle such matters. This would ensure that the complementarity principle of the Rome Statute is fully adhered to. Even though most African states currently lack the capacity to implement the provisions of the Rome Statute due to the “absence of effective legislative framework for implementation, limited expertise on the part of investigators, prosecutors, and judges, [and] the national judicial systems lack of resources as well as corruption[,] which has permeated all sectors of the economy,”²⁸⁴ it is the hope that moving forward regional bodies like the African Union will promote international criminal justice by allowing reason to prevail over politics, joining hands with the rest of the international community to ensure that the rule of law is maintained. A compromise must be sought and found.

²⁸³ Akande, *ICC Issues*, *supra* note 115.

²⁸⁴ OVO CATHERINE IMOEDMHE, *THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT: NATIONAL IMPLEMENTATION IN AFRICA* 199 (2017).

