

4-1-2012

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Recommended Citation

Jalloh, Charles Chernor (2012) "Africa and the International Criminal Court: Collision Course or Cooperation," *North Carolina Central Law Review*: Vol. 34 : No. 2 , Article 5.

Available at: <https://archives.law.nccu.edu/ncclr/vol34/iss2/5>

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AFRICA AND THE INTERNATIONAL CRIMINAL COURT: COLLISION COURSE OR COOPERATION?

CHARLES CHERNOR JALLOH*

I. INTRODUCTION

It gives me great pleasure to speak with you this evening on one of the most important questions for the success, and indeed the future, of the International Criminal Court (ICC). As you probably know, in terms of significance for international law, the ICC is arguably the most important international institution to be established in the 20th century since the creation of the United Nations in 1945. Its creation has therefore been described as a “Grotian” or watershed moment for international law. My presentation focuses on developments in Africa, the experimental farm for the ICC, since the Court’s establishment in July 2002.

By way of a roadmap, I will start, firstly, by providing some background about the African role in the global struggle for international justice, especially the establishment of the ICC. As part of this, I will highlight the continent’s efforts to ensure human security, in the aftermath of the Cold War. I suggest that the establishment of the African Union (AU), the regional body comprised of all countries on the continent excepting Morocco, is an integral part of this trend.

In the second part of my remarks, I will examine the key concerns raised by the AU about the ICC’s recent work in Africa. In this regard, I focus specifically on the fallout from the Sudan situation, in particular, the issuance of an arrest warrant for Sudanese President Omar al Bashir. I show that concern over the sequencing of peace

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Author Note: The content of this talk, which was delivered as the first R.J. Reynolds Distinguished Visiting Professor Lecture at North Carolina Central University School of Law in August 2010, was adapted from a larger published paper which appeared in the July 2009. For the full argument, see Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT’L CRIM. L. REV. 445, 445-99 (2009). The companion paper is Charles Chernor Jalloh, *Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction* 21 CRIM. L. FOR.1-65 (2010).

and justice in the Sudan situation is the main reason why various African leaders and some scholars now perceive the Court as nothing more than the new imperialism masquerading as international rule of law.

However, I generally contest the proposition that the Court is nothing more than a Western imperialist project. Thus, in the third part of my remarks, I argue that both the ICC and Africa, as represented by the AU, share a mutual interest in addressing heinous international crimes. In my view, there is therefore a mutual gain, or “win-win” in the long-term, or conversely, a “mutual vulnerability”, or “lose-lose”, for both the Court and Africa should they fail to cooperate in the short-term.

In the conclusion, I tentatively assess the current impasse between the ICC and the continent. Here, I raise concerns about the legal validity, or lack thereof, of the AU decision not to cooperate with the ICC, which was adopted at Sirte, Libya in July 2009.¹ That decision was reiterated by the Summit of African Heads of States meeting in Kampala, Uganda on July 25, 2010 and clearly goes against the spirit of accountability that is needed in Sudan.²

II. BACKGROUND INTO THE AFRICAN CONTRIBUTION TO THE EVOLUTION OF THE INTERNATIONAL CRIMINAL COURT

Africa, as a continent, supported the idea of the ICC long before its birth, in fact, while the ICC concept was in gestation in the belly of the international community.

As some of you may know, on February 2, 1999, Senegal became the first country in the world to ratify the *Rome Statute of the International Criminal Court* (the Rome Statute).³ Senegal’s speedy ratification symbolically capped African State support for a permanent ICC having jurisdiction over the “most serious crimes of concern to the international community as a whole.”⁴ The historic ratification by the

1. Assembly of the African Union [AU Assembly], Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.245(XIII) Rev.1, ¶ 10, at 2, Doc. Assembly/AU/13(XIII) (July 3, 2009, 13th Ordinary Session of the Assembly in Sirte), *available at* <http://www.au.int/en/decisions/assembly>.

2. AU Assembly, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296(XV) ¶ 5 at 1, Doc. Assembly/AU/10(XV) (July 27, 2010, 15th Ordinary Session. of the Assembly in Kampala), *available at* <http://www.au.int/en/decisions/assembly>.

3. U.N., *Treatises and International Agreements Registered or Filed and Recorded with the Secretariat of the United Nations Vol. 2187, I-38544*, 6 (2004), <http://treaties.un.org/doc/publication/UNTS/Volume%202187/v2187.pdf>.

4. Rome Statute of the International Criminal Court Preamble, July 17, 1998, 2187 U.N.T.S. 90, *available at* <http://untreaty.un.org/cod/icc/statute/rome.htm> [hereinafter Rome Statute].

West African state, from amongst a group of 120 countries that signed the ICC Statute at its adoption in Rome on July 17, 1998, demonstrated a keen awareness of the significance that the accomplishments of the ICC would imply for the world as a whole and for Africa in particular.

Indeed, as Professor Tiya Maluwa, the legal advisor to the Organization of African Unity (OAU) observed during the Rome negotiations, the continent of Africa had a special interest in the establishment of the ICC because its people had for centuries endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence which continue today despite the continent's post-colonial phase.⁵

Furthermore, fresh memories of the tragic and "preventable"⁶ 1994 Rwandan Genocide, in which the international community was forewarned about genocide but chose not to act, strengthened Africa's resolve to support the idea of an independent and effective international court that would punish, and hopefully deter, perpetrators of such heinous crimes in the future. Not surprisingly, the continent went on to play a significant and constructive role in the Rome negotiations that ultimately led to creation of the Court.⁷

Today, over a decade after the Rome Statute was adopted, African countries, many of which are either embroiled in devastating conflicts or newly emergent from them, have continued to invest their yearnings for peace and stability in the hope that the freshly minted ICC will become a success story, and one that will benefit them.⁸

There are, as of this writing, 115 States Parties to the Rome Statute, although that number is bound to change upwards over the next few years.⁹ Of all the world's regions, Africa has generated the largest support base for the Court at thirty-one (31) ratifying states. One of the most recent ratifications was from the African island nation of Sey-

5. Plenary, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See UN, *Statement Delivered by Tiyanjana Maluwa, OAU Legal Counsel*, (17 June 1998), <http://www.un.org/icc/index.htm>.

6. International Panel of Eminent Personalities, *Rwanda: The Preventable Genocide*, Organization of African Unity (July 7, 2000).

7. Hassan Jallow & Fatou Bensouda, *International criminal law in an African Context*, in AFRICAN GUIDE TO INTERNATIONAL CRIMINAL JUSTICE 15, 41-3 (Max du Plessis ed., 2008). See also Phakiso Mochochoko, *Africa and the International Criminal Court*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005); Sivu Maqungo, *The establishment of the International Criminal Court: SADC's participation in the negotiations*, 9 AFR. SEC. REV. 42, 42-53 (2000).

8. Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 447 (2009).

9. For a current and complete list of States Parties, see, ICC, *The States Parties to the Rome Statute*, <http://www.icc-cpi.int/Menus/ASP/states%20parties/> (last visited Feb. 26, 2012) [hereinafter *States Parties*].

chelles.¹⁰ The number of states constitutes over half of the continent's fifty-three (53) countries. Thirteen additional African nations have signed the Rome treaty.¹¹ To contextualize these numbers, Africa is followed by 25 states from Western Europe, 24 from Latin America and the Caribbean, 18 from Eastern Europe and only 15 from Asia.¹²

However, in my view, the significance of the continent's strong endorsement of the ICC is not adequately reflected by the numbers of African States that have endorsed the Court. It is better captured by the reality that countries in Africa are likely to be the frequent users, or what I call the "repeat customers," of the Court because of two main factors: 1) a relatively higher prevalence of conflicts and serious human rights violations, and 2) a general lack of credible legal systems to address them.

To appreciate the significance of the African support for the ICC in the broader geopolitical context, despite serious hostilities in which international crimes are routinely committed, countries in the Middle East and the Arab World have displayed little enthusiasm for the ICC, including, notably, Libya, the Arab North African target of the ICC's most recent United Nations Security Council referral.¹³ This is further exemplified by the fact that, to date, only one state from that entire region, Jordan, is today a party to the Rome treaty.¹⁴ Again, it is hoped that this situation will change in the future and that other countries from that conflict ridden region will also choose to join the Court.

Even more significantly, of the six situations currently under formal ICC investigation by the Prosecutor, all are in Africa,¹⁵ not to mention recent prosecutorial murmurings about a potential future investigation into "alleged mass killings" in Ivory Coast in West Africa.¹⁶ Of the six, three (Central African Republic (CAR), Uganda, and the Democratic Republic of Congo (DRC)) reflect the continent's wide embrace of the Court. The former three, all of which are contracting parties, broke the ice of impunity by successively giving work to the ICC through so-called "self-referrals" of their respective situations for

10. ICC, *Seychelles ratifies the Rome Statute of the International Criminal Court*, Press Releases 2010 (11.08.2010), available at <http://www.icc-cpi.int/>.

11. ICC, *African States*, <http://www.icc-cpi.int/Menus/ASP/states%20parties/African+States/> (last visited Feb. 26, 2012).

12. *States Parties*, *supra* note 9.

13. See SC Res. 1970, ¶¶ 5-6, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

14. *States Parties*, *supra* note 9.

15. See ICC, *Situations and cases*, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Feb. 26, 2012) (listing ICC's cases, with relevant documentation).

16. Statement, Office of the Prosecutor, ICC, *Widespread or systematic killings in Cote d'Ivoire may trigger OTP investigation* (06.04.2011), <http://www2.icc-cpi.int/NR/exeres/85A578D5-946A-44C3-9908-1C2243062EF0.htm>.

investigations and prosecutions.¹⁷ In doing so, those nations put themselves more directly on the line to offer the first test cases to an untested court. This can be contrasted with the Sudan and, more recently Libya, both of which were recalcitrant and opposed to the ICC. Perhaps because they were imposed on those states by the UN Security Council acting under its mandate to ensure the maintenance of international peace and security.¹⁸

More recently, before the Prosecutor controversially applied to use his *proprio motu* power,¹⁹ Kenya had actually indicated its willingness to refer the 2007-2008 post-election violence, in which up to 1,200 people were killed in less than three months, to the ICC.²⁰ Its position has, however, been somewhat un-supportive since Prosecutor Luis Moreno-Ocampo announced a list of suspects at the end of 2010, three of whom have already made pre-trial appearances before the court.²¹

Since the Cold War ended, the prosecution of international crimes has been high on the agenda of African States. For instance, under Article 4(h) of the AU's Constitutive Act, member states ceded to the regional body the right to intervene in their territories based on a decision of the Assembly in respect of *grave circumstances*, namely: war crimes, genocide and crimes against humanity.²² The same clause was subsequently reiterated in other AU legal instruments, most notably Article 7(1)(e) of the Peace and Security Protocol.²³

17. See Claus Kress, 'Self Referrals' and 'Waivers of Complementarity': *Some Considerations in Law and Policy*, 2 J. INT'L CRIM. JUST. 944 (2004); Paola Gaeta, *Is the Practice of 'Self-Referrals' a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949 (2004).

18. Neither Sudan nor Libya is a Party to the Rome Statute. Although Kenya is in fact a Party, its government has expressed scepticism about the prudence of initiating ICC proceedings against the alleged perpetrators of the 2007 post-election violence including, for example, in the Dec. 22, 2010 Parliamentary resolution calling for a withdrawal from the Rome Statute. As of Apr. 8, 2011, the Kenyan government had not begun the withdrawal process. The Kenyan government did, however, file an admissibility challenge pursuant to Rome Statute Art. 19. See Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute, Situation in the Republic of Kenya, Doc. No. ICC-01/09-01/11-19 (Mar. 31, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>. For more on the admissibility challenge, see Steven Kay QC, *The Prosecutor v Kenyatta, Muthaura And Ali ICC*, International Criminal Law Bureau (April 6th, 2011), <http://www.internationallawbureau.com/blog/?p=2715>. That application is unlikely to succeed due to Kenya's refusal to investigate and prosecute those responsible for the post-election violence.

19. See *ICC Weekly Update #60*, INT'L CRIMINAL COURT, 1 (Dec. 20, 2010), <http://www2.icc-cpi.int/NR/rdonlyres/785B43BB-A1E9-4AD1-BDEE-1082178F4AA9/282823/Ed60Eng.pdf>.

20. Dan Taglioli, *Kenya Leaders Appear Before ICC to Deny Charges of Ethnic Killings*, JURIST (Apr. 7, 2011, 1:32 PM), <http://jurist.org/paperchase/2011/04/kenya-leaders-appear-before-icc-to-deny-charges-of-ethnic-killings.php>.

21. *Id.*

22. *Constitutive Act of the African Union*, AFRICAN UNION, 6-7 (July 11, 2000), http://www.au.int/en/sites/default/files/ConstitutiveAct_0.pdf.

23. AU Assembly, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 8-9 (Jul. 9, 2002, First Ordinary Session in Durban), available at <http://>

By entrenching these provisions in the AU's primordial legal instruments, the continent became the first region in the world to provide a specific legal basis for military intervention during conflict to protect civilians.²⁴ In this way, despite obvious resource shortages that pose serious challenges for the observance of these legal obligations, as the Darfur situation starkly demonstrates, Africa stands as the first regional body to implement the much-vaunted doctrine of "Responsibility to Protect."²⁵ This is a significant step, both for Africa as a continent and the international community as a whole which needs to move in the direction of prioritizing human rights of vulnerable people everywhere.

We also see a concrete commitment to fight impunity at the level of individual African countries. Perhaps the best examples of this are the national processes that led, with the support of the international community, to the creation of the Special Court for Sierra Leone (SCSL)²⁶, the International Criminal Tribunal for Rwanda (ICTR)²⁷. This is in addition to the increasing practice of African States to prosecute serious crimes in various types of national or special military courts or war crimes units in countries such as Congo, Rwanda and Uganda.²⁸

From the international community's point of view, enhancing accountability for serious international crimes is the core justification for the permanent Court. In this regard, we may recall the statement of Canadian Judge Phillipe Kirsch, then the first President of the ICC, in

au.int/en/sites/default/files/Protocol_peace_and_security.pdf. [hereinafter AU Peace and Security Protocol].

24. See *The Responsibility to Protect*, INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, 31 (Dec. 2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

25. *Id.* at VII (providing that the doctrine of the Responsibility to Protect aims to balance concerns about state sovereignty with the imperative to act, if need be with force, to halt genocide and crimes against humanity). See also Kristina Powell, *The African Union's Emerging Peace and Security Regime: Opportunities and Challenges for Delivering on The Responsibility to Protect*, THE NORTH-SOUTH INST., 7-15 (May 2005), <http://responsibilitytoprotect.org/The%20African%20Union's%20Emerging%20Peace%20and%20Security%20Regime.pdf> (explaining the development of the doctrine of the Responsibility to Protect and the use of the doctrine within the African Union).

26. *Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, SPECIAL COURT FOR SIERRA LEONE, 1 (16 Jan. 2002), <http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176>.

27. U.N. Secretary-General, *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for the Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994*, 5 U.N. Doc. A/51/399 (Sept. 24, 1996).

28. See Press Release, Security Council, Success of Democratic Republic of Congo Peace Process Depends on Economic Recovery, Reconstruction, Effective Presence of State Inst.; Head of Mission Says First Stage of Drawdown – 2,000 Troops – Recommended, U.N. Press Release SC/9905 (Apr. 13, 2010) and United Nations, *The Justice and Reconciliation Process in Rwanda*, http://www.un.org/preventgenocide/rwanda/pdf/backgrounder_jr_rwanda.pdf.

his speech to the AU on June 17, 2006 that “without Africa the ICC would not exist as it does today; and because of the relationship between the Court and African States, cooperation with the [AU] is particularly important to the Court.”²⁹ The Prosecutor, Registrar and judges of the ICC have all acknowledged the importance of this evolving relationship.³⁰

III. “[M]ISUSE OF INDICTMENTS AGAINST AFRICAN LEADERS: CHANGING TONE OR POLITICAL RHETORIC?”

When the Rome Statute entered into force in July 2002, the ICC was universally acclaimed as an historic milestone, including by African states and civil society. Indeed, as Kofi Annan, then UN Secretary-General put it, the Court’s establishment was “a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.”³¹ Annan, a Ghanaian diplomat not known for hyperbole, subsequently proclaimed the ICC the “missing link in the international justice system.”³²

Unfortunately, just over a decade later, the Court has come under scathing criticism from various quarters in Africa. Today, some African nations, many of which are not even parties to the Rome Statute, are increasingly questioning what they perceive as an insensitive application of the international criminal law instrument to indict only weak individuals from generally poor African states.³³ For example, President Paul Kagame of Rwanda has gone so far as to suggest that the ICC is a “fraudulent institution” reminiscent of “colonialism” and “imperialism” that is seeking to undermine and to control Africa.³⁴ Although Rwanda is not a member of the ICC, his position is echoed by others, such as President Thomas Yayi of Benin, who lamented the “harassment” of African leaders and concluded that “[w]e have the

29. Quoted in A.M. Kambudzi, ‘The International Criminal Court and Africa: The AU and the ICC’ in M. Du Plessis and A. Louw (eds.), *THE INVESTIGATION AND PROSECUTION OF “CORE INTERNATIONAL CRIMES” AND THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN AFRICA* (Pretoria, Institute for Security Studies, 2007) at 29 at 34.

30. See Max du Plessis, *The International Criminal Court that Africa Wants*, INST. FOR SEC. STUDIES, 5-6 (Aug. 2010), <http://www.iss.co.za/uploads/Mono172.pdf>.

31. U.N. Secretary-General, Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court, ¶ 11 (Jul. 18, 1998), <http://www.un.org/icc/speeches/718sg.htm>.

32. Press Release, Transcript of Press Conference with President Carlo Ciampi of Italy and Secretary-General Kofi Annan in Rome and New York by Video Conference, U.N. Press Release SG/SM/8194, ¶ 3 (Nov. 4, 2002), <http://www.un.org/News/Press/docs/2002/sgsm8194.doc.htm>.

33. See David Kezio-Musoke, *Kagame Tells Why He is Against ICC Charging Bashir*, AFR. PRESS INT’L, Aug. 5, 2008, <http://africanpress.me/2008/08/05/kagame-tells-why-he-is-against-icc-charging-bashir/>. See also *infra* notes 35-38 and associated text.

34. *Id.*

feeling that this court is chasing Africa.”³⁵ In other words, while certainly exaggerated and largely unsupported by the facts, the growing perception is that Africans have become the sacrificial lambs in the ICC’s struggle for global legitimation.

Professor Mahmood Mamdani, a Ugandan scholar at Columbia University, has eloquently captured this sentiment. He argued in a recent article that the “ICC is rapidly turning into a Western court to try African crimes against humanity.”³⁶ To him, “the realization that the ICC has tended to focus only on African crimes, and mainly on crimes committed by adversaries of the United States, has introduced a note of sobriety into the African discussion” and fuelled concerns about a “politicized justice” and even bigger questions about the “relationship between law and politics.”³⁷

Without suggesting that the ICC is above constructive criticism, I have elsewhere contested Professor Mamdani’s exaggerated assessment. In particular, he advances a position that fails to reflect the nuances of the role that African states have played in seeking the involvement of the Court in their crises. I have also rejected the implications of his argument that the ICC should be rebranded the International Criminal Court for Africa or the African International Criminal Court. Be that as it may, Africa’s dream for a strong, independent and effective tribunal that would assist it to secure enduring peace through the application of international justice to various conflict or post-conflict situations appears, at best, to be facing major challenges. At worst, the dream seems to be turning into a nightmare as some AU leaders agonize over the “misuse of indictments against African leaders.”³⁸

For analytical purposes, the concerns raised by AU states tend to come in two shades. First, what I call legal challenges; and second, political challenges. As a lawyer, let me first mention the legal challenges before saying a word or two about the political matters:

1. The issue of state consent and ICC jurisdiction over nationals of non-parties; especially Sudan³⁹ and Chapter VII, which goes be-

35. *Benin President Expresses Scepticism [sic] Over ICC*, SUDAN TRIB., Sept. 28, 2008, <http://www.sudantribune.com/Benin-president-expresses,28762>.

36. Mahmood Mamdani, *How the ICC’s “Responsibility to Protect” is Being Turned Into An Assertion of Neocolonial Domination*, PAMBAZUKA NEWS (Sept. 17, 2008), <http://www.pambazuka.org/en/category/features/50568>.

37. *Id.*

38. *AU’s Peace and Security Council Resolution on Sudan President Indictment*, SUDAN TRIB., Jul. 21, 2008, <http://www.sudantribune.com/AU-s-Peace-and-Security-Council,27982>.

39. Although the OTP recently announced its investigation into crimes allegedly committed in Libya during the non international armed conflict currently taking place there, this discussion will focus on Sudan, in which a sitting head of state has actually been issued an arrest warrant. It

yond ICC to concerns about the role of the Security Council in international peace and security.

2. ICC jurisdiction over a sitting head of state, in particular Bashir, and the intersection of and lack of clarity between Articles 27 (which removes immunities for government officials) and 98 of the Rome Statute (which bars the Court from requesting a state to act in a manner that contravenes its customary international law obligation owed to other states).
3. The selection of indictees and the hiccups of the Lubanga trial. This concern seems to come up among those who think that higher profile persons, from all sides in the concerned conflicts, needs to be prosecuted in The Hague.
4. There is also the question of whose justice will apply; distant trials tend to enhance the perception of “white man’s” (in)justice.

Regarding the political challenges, there are three primary ones:

1. The argument that ICC-style justice crowds out possibilities for reconciliation, such as the Lord’s Resistance Army in Uganda, and adding Sudan’s Darfur region to the list.
2. The perceived “double-standard” and U.S. exceptionalism, especially in the face of UN Security Council intervention in the inner workings of the Court through the ability to refer and defer cases pursuant to Articles 13 and 16 of the Rome Statute.
3. The depredations and scars of colonialism, which frankly, have remain unaddressed in international relations between former European and African states.

I mention but will not cover all these issues in the limited time we have for this lecture. In addition, there have been various additional criticisms of the Court in each of the situations under its current scrutiny. However, Sudan has been the most challenging for the ICC. Let me therefore take the Sudan situation as a case study to illustrate the

is, however, entirely possible that Gaddafi will be charged in the future as well. The rapidly evolving situation in Libya will not be a focus of this particular discussion and was not, to remind the reader, at issue at the time these remarks were initially delivered. See *Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi*, INT’L CRIMINAL COURT, (Nov. 22, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1274559.pdf> (terminating prosecution due to his death).

challenges of achieving justice in Africa in this climate of hostility and suspicion of the motives behind international justice.

Case Study: the ICC, Bashir Warrant and the Challenges of the Sudan Situation

Since the Security Council referred the situation in Darfur, Sudan to the ICC in March 2005,⁴⁰ the Prosecutor has successfully issued various arrest warrants arising from his investigations.⁴¹ However, but for one recent voluntary appearance, there seems to be little, or no, prospect for their execution – at least at this stage until African states choose to help enforce the indictments.

The latest and most significant warrant was that for incumbent Sudanese President Omar Hassan Al Bashir.⁴² The Bashir warrant has proven to be highly controversial within legal and political circles, in Africa and elsewhere.⁴³ Among the more contentious issues, lawyers have debated the accuracy of the Prosecutor's characterization of his alleged criminal conduct in Darfur as genocide and whether or not the Sudanese leader's immunities would evaporate once the arrest warrant is issued.⁴⁴ Others have debated whether an indictment unlikely to be executed in the short-term is a pragmatic prosecutorial strategy

40. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

41. See, e.g., *Warrant for Arrest for Ahmad Harun*, INT'L CRIMINAL COURT, (Apr. 27, 2007), <http://www2.icc-cpi.int/iccdocs/doc/doc279813.PDF>.

42. See Press Release, ICC Office of the Prosecutor, ICC Issues a Warrant of Arrest of Omar Al Bashir, President of Sudan (Mar. 3, 2009), [43. See *infra* note 50 and associated text, and Part 5.](http://www.icc-cpi.int/Menus/Go?id=16072fd9-0b88-4cdb-87b4-a24de2f1d7cf&lan=en-GB; Situation in Darfur, the Sudan, Case No. ICC-02/05-157, Public Redacted Version of the Prosecutor's Application under Article 58 (Jul. 14, 2008), http://www.icc-cpi.int/iccdocs/doc/doc559998.pdf; Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf; Prosecutor v. Al Bashir, No. ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf.</p>
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44. See Rep. of the Int'l Comm'n of Inquiry on Darfur to the U.N. Secretary-General at 4 (Jan. 25, 2005) (concluding that the crimes in Darfur did not reveal the specific intent to commit genocide). This immediately spawned a debate. After the Prosecutor's public application for an arrest warrant, commentators questioned whether Bashir's alleged crimes amounted to genocide. See, e.g., Andrew T. Cayley, *The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide*, 6 J. INT'L CRIM. JUST. 829 (2008) and Alex de Waal, *Darfur, the Court and Khartoum: The Politics of State Non-Cooperation, in Courting Conflict? Justice, Peace and the ICC in Africa* (Nicholas Waddell and Phil Clark eds., 2008). In its decision approving the arrest warrant, the ICC Pre-Trial Chamber found that the information supplied by the ICC Prosecutor did not show reasonable grounds to believe that the Sudanese government acted with specific intent to destroy, in whole or in part, the Fur, Masalit and Zaghawa groups. Charges for genocide were therefore not included for the arrest warrant. Nonetheless, the Chamber left a window open for an amendment or modification in light of any new information submitted subsequently under Rome Statute Art. 58(6). See *Prosecutor v. Al Bashir, Decision on the Prosecution's Application for a Warrant of Arrest*, ¶¶ 206-208.

in the long-term, as well as the propriety of a Security Council deferral – as requested by AU leaders.⁴⁵

Even more significant to the future of the ICC as a nascent institution was the political reaction within regional organizations. In particular, following the Prosecutor's application for an arrest warrant for President Bashir in July 2008, the AU Peace and Security Council, the primary decision-making organ for conflict resolution in Africa, immediately adopted a decision calling on the UN Security Council to deploy Article 16 of the Rome Statute to "defer the process initiated by the ICC."⁴⁶

In a number of strongly worded decisions, the AU observed that while it endorses criminal accountability for gross human rights violations, given the "delicate nature" of the processes currently underway in the Sudan, the search for justice should be pursued in a way that complements, rather than impedes, efforts to secure a lasting peace in the country. It emphasized that ICC jurisdiction is based on complementarity and that a prosecution in the current climate "may not be in the interest of the victims and justice" because it could lead to greater destabilization in Sudan and the region.⁴⁷

Richard Goldstone, the first Prosecutor for the ICTY/ICTR, has argued that there is in fact no peace process to speak of in Darfur.⁴⁸ I think that is an exaggeration, as can be seen by the various successful attempts to address the conflict at a political level through, for example, the Abuja Peace Process. In any event, whatever our individual views, the AU apparently sees the ICC as being on a collision course with its own peacemaking efforts. Tanzanian President Jakaya M. Kikwete, speaking for African leaders in 2008, publicly clarified that

45. Christopher Gosnell, *The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan?*, 6 J. INT'L CRIM. JUST. 841 (2008) and Annalisa Ciampi, *The Proceedings Against President Al Bashir and the Prospects of their Suspension Under Article 16 ICC Statute*, 6 J. INT'L CRIM. JUST. 885 (2008).

46. AU Peace and Security Council, Communiqué of the 142nd Meeting of the Peace and Security Council, ¶¶ 3, 5, 9, 11(i), PSC/MIN/Comm. (CXLII) (July 21, 2008); AU Assembly, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, ¶¶ 2, 3, Assembly/AU/Dec.221 (XII) (Feb 3, 2009); AU Peace and Security Council, Communiqué of the 175th Meeting of the Peace and Security Council, ¶¶ 4-6, PSC/PR/Comm. (CLXXV) (Mar. 5, 2009). See also Communiqué, African Union, The Chairperson of the Commission Expresses Deep Concern at the Decision of the ICC Pre-Trial Chamber I on Sudan and its Impact on the Ongoing Peace Processes in Sudan (Mar. 4, 2009).

47. The AU has been seeking a peaceful resolution to the Darfur crisis and, as part of this, deployed the first hybrid peacekeeping force between the UN and a regional organization to Sudan in July 2007 pursuant to S.C. Res. 1769, U.N. Doc. S/RES/1769 (July 31, 2007).

48. See Richard Goldstone, Editorial, *Catching A War Criminal in the Act*, N.Y. TIMES, Jul. 15, 2008, <http://www.nytimes.com/2008/07/15/opinion/15goldstone.html> and Louise Arbour, Editorial, *Justice v. Politics*, N.Y. TIMES, Sept. 16, 2008, <http://www.nytimes.com/2008/09/16/opinion/16iht-edarbour.1.16197765.html>.

“[j]ustice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace.”⁴⁹ Unfortunately, partly due to the bad human rights record enjoyed by some African leaders, some question the good faith of AU leaders when they make these statements.

The AU has also secured the support of other regional bodies, including the League of Arab States, the Organization of Islamic Conference and the Non Aligned Movement, ostensibly to rein in the ICC. Likely because of Sudanese backroom lobbying, all those organizations had for their own reasons already, or have since, publicly joined the AU chorus singing down the wisdom of indicting President Bashir at this time.⁵⁰

The situation only got worse when, in 2009, the now besieged Libyan Leader Muammar Gaddafi was named chairperson of the AU. It was during his time in that position that AU States adopted, in Sirte in July 2009, the controversial decision suspending cooperation with the ICC in respect of the arrest and surrender of the Sudanese leader. Basically, all AU Member States were instructed not to enforce the warrant. This has raised concerns whether some African states are being put in a situation where they might have conflicting obligations between two different organizations: on the one part, the ICC which seeks that they enforce the Bashir warrant, and on the other, the AU which says that they should not enforce it. I will revisit this important issue briefly in the concluding part of my remarks, as it will be a question that will have to be resolved in other situations that might arise for the future. One would probably as part of this see the ICC taking a formal position on this issue. The matter might also give rise to litigation in African courts, where civil society groups might launch judicial challenges seeking to compel the arrest of the respective fugitive should they set foot on the territory of, say, South Africa.

Clearly, as I suggested earlier, the ICC is a new and important institution in the global quest for justice. That said, since the Rome Statute entered into force in 2002, the practice of the ICC has shown that the challenges of giving justice at the international level are many,

49. Andrew Heavens, *AU Chairman Backs Sudan's Bashir Over Court*, Reuters, Sept. 8, 2008, <http://www.reuters.com/assets/print?aid=USL8101824>.

50. See, e.g., *OIC Secretary General Strongly Rejects the ICC Indictment Against Sudan's President*, Newsletter (Organisation of Islamic Cooperation), Mar. 4, 2009, http://www.oic-oci.org/newsletter_print.asp?n_id=150 (expressing his disappointment over the Bashir indictment; warning that it could lead to “dangerous ramifications”; rejecting the “kind of selectivity and double standards applied by the international community” in addressing international crimes and appealing to the Security Council to “suspend the move by the ICC in the interest of the ongoing peace efforts in the Sudan”); *Arab Leaders Back “Wanted” Bashir*, BBC News (Mar. 30, 2009), <http://news.bbc.co.uk/2/hi/7971624.stm> (reporting on Arab League’s expressed support of Al Bashir at its annual summit).

real, and political. The Court is perhaps overloaded by hyper expectations of what it can realistically achieve. Yet, it has not been insulated from the harsh political realities of the Westphalian state-centric world in which it must function. The legal texts in the Rome Statute reflected a compromise, in fact, and in many cases, those were uneasy compromises where law was held hostage to the national interests of powerful states. States essentially set up the ICC judges for challenges that could have been avoided, if sovereignty was given a backseat to justice instead of the other way around. From the AU perspective, the results are less than satisfactory because we now have a court that is perceived as not only imperial, but also as lacking clarity in its statute, and sometimes, as downright obstructionist.

The question, then, is as follows: should we worry about the current perception of the ICC in Africa? I say yes, for at least three primary reasons. The first is quite practical: essentially, this is where the Court's work is coming from and, in my mind, where it will likely come from for a while due to a combination of factors, including the nature and number of African conflicts and lack of legal systems willing and capable to prosecute international crimes. In other words, I would say, in the spirit of businesses everywhere in the world, that the ICC should not alienate its primary customer. Otherwise, it can't hope to get repeat business – here, in the form of future self-referrals to the court. This is, after all, the best kind of business – the kind that you do not have to work or advertise for, and that you get thanks to the good service you are known to provide. In this case, the service is to the African states and the victims whose desire to seek justice is what the ICC tries to fulfill.

Second, the reality is that as powerful as it may sound, the ICC does not have a police force or standing ICC army or UN blue berets that it could call on to enforce its decisions. It is rather like a giant without arms. I am referring, of course, to the regime of state cooperation as a *sine qua non* to the execution of the mandate of these kinds of international institutions. If state cooperation is lacking, then we are all in trouble as the mandate would be difficult if not impossible to achieve. This is not an exaggeration, as a look at the experiences of the ad hoc criminal tribunals will confirm for us. We will also be unlikely to achieve our noble goal: that is, to provide justice for victims of crimes in Africa when their countries are inactive and/or unwilling or unable to act.

Last, but not least, we should worry about the perceptions of the Court in Africa because we are purporting to give justice for victims of crimes that shock all of humanity. At the end of the day, however, we know that some victims are closer to the crimes than the rest of us.

These are the direct victims of the atrocities who bear, more than all of us, the brunt of conflicts and mayhem that dog their societies. This, to my mind, gives them greater claim over what must be done in a given situation. Although, needless to say, in some instances the international community comes in to play a constructive above the bar role when we help break old patterns of mistrust and animosity by simply making the decision as to what should be done to resolve a longstanding feud. Those communities might need that help sometimes, and the fresh perspective offered by outsiders. We also want to talk to the perpetrators in atrocity situations, by hopefully deterring them both generally and specifically from committing further crimes.

In other words, at the level of both principle and of deterrence, we have a duty to not only act on behalf of but also to listen to Africans. But not just their conservative feet dragging governments, also their civil societies which are generally more progressive in order to ascertain their views on how we can help. The outcomes of criminal processes that do not take those views into consideration cannot be called credible justice. Nor is it justice when we substitute our own conceptions of justice for their own, or if we determine their priorities for them, rather than consult with them to determine how to move forward. After all, the decisions we, “the international community,” make affect Africans themselves more directly than anyone else.

I will now turn to the final and central element of my argument, which is that, despite the currently rocky relationship, which I believe will evolve over time, both Africa and the ICC have much to gain from each other. This is the win-win that I mentioned earlier.

IV. ACCOUNTABILITY FOR INTERNATIONAL CRIMES AND THE LOGIC OF MUTUAL GAIN AND MUTUAL VULNERABILITY

My argument here entails two distinct but mutually reinforcing aspects embedded in the Rome Statute and the AU's Constitutive Act, as well as the AU Peace and Security Protocol. In the first place, these instruments conceive of the *prevention of international crimes as a fundamental objective*. This is evident from even a cursory reading of their respective preambles. This is a laudable but highly ambitious goal, since for as long as we have conflict, we will regrettably have international crimes. Conflicts have not been wiped off the face of the earth, nor therefore, will international crimes – at least until we can achieve Kant's perpetual peace.

Second, where the Court's and Africa's efforts fail to prevent criminal activity and international offences are in fact committed, the substantive provisions of both the Rome Statute and the AU's Constitutive Act provide for the punishment of the key perpetrators

of such crimes. In other words, under both, accountability is an imperative; impunity not an option.

The two (AU and ICC) regimes are therefore conjoined by the shared belief that prosecution of international offences would not only help prevent crimes, as ambitious as that objective maybe, but that it will also likely deter others from committing such offences in the future. Against this backdrop, it seems rather obvious that collaboration would offer Africa and the ICC mutual gain and that there would be lost opportunities and a “mutual vulnerability” should they fail to do so.

Let us examine this, first, from the perspective of the Court and, then, from the perspective of Africa.

A. *The “Win-Win” for the International Criminal Court*

In my view, collaboration between the ICC and African countries to battle impunity would help a new court struggling to find its feet and place in the world, and on the other hand, is a blessing for a continent in search of a sustainable peace after centuries of violence and turmoil.⁵¹ With its current six investigations in Africa, the Court will gain significant benefits if it successfully prosecutes its maiden cases in fair trials meeting the highest standards of international justice. In this way it would prove itself as a functional and effective court of law.

The importance of this to the ICC cannot be overemphasized. This is particularly so considering that, as one commentator noted back in 2008, it spent over \$600 million dollars in just over six years in operation, and had at that time only four accused in its custody while eight of its twelve arrest warrants remained outstanding.⁵² After legendary difficulties over disclosure, its first case, the Lubanga trial finally got underway in early 2009.⁵³ In this context, the Court is now at a crucial developmental stage: it must achieve completion of its seminal first case, and through that, demonstrate it can achieve tangible judicial results. The benefits of such success for its work and reputation would be immense.

First, fair and independent trials will boost state confidence in the ICC as a new institution and would even, perhaps, generate more referrals and ratifications from other countries in Africa and elsewhere. Crucially, if it shows independence and effectiveness, the Court will likely reassure the skeptical but powerful holdout states, such as the

51. See, e.g., Charles Chernor Jalloh, *Regionalizing Criminal Law?*, 9 INT'L CRIM. L. REV. 445 (2009).

52. Ciampi, *supra* note 45, at 892.

53. Heikelina Verriijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409 (2008) (discussing the stay of proceedings in the Lubanga case and the disclosure debacle).

U.S., China and India, who between themselves constitute well over half of the world's population, that it can discharge its mandate effectively and thereby merits their formal support through party status.⁵⁴

Second, as various recitals of the Rome Statute preamble confirm, the ICC was intended to address atrocities that “deeply shock the conscience of humanity” based on the recognition “that such grave crimes threaten the peace, security and well-being of the world.”⁵⁵ Indeed states resolved that the “most serious crimes of concern to the international community as a whole” must not go unpunished.⁵⁶ They also affirmed that responsibility for prosecuting such crimes requires that measures be taken at the national level.⁵⁷

Thus, crucially and unlike the ad hoc Yugoslav and Rwanda tribunals, the Court only possesses secondary jurisdiction vis-à-vis the primary jurisdiction of states. This is entrenched through the Article 17 complementarity principle.⁵⁸ The underlying logic of that principle is that the permanent court must supplement, not supplant, the work of national jurisdictions; hence, it can only exercise jurisdiction when states prove to be inactive and/or unwilling or unable to prosecute. In this way, complementarity enables the ICC to give effect to states' collective determination “to put an end to impunity” for the perpetrators of international crimes and “thus to *contribute to the prevention of such crimes*.”⁵⁹

As Prosecutor Moreno-Ocampo observed, the consequence of complementarity means that a high number of cases before the Court would not measure its efficiency.⁶⁰ On the contrary, the absence of trials before the Court, as a consequence of the regular functioning of national institutions, would be a major success. This is the so-called positive complementarity, which so far, has been all the talk but with which there has been very limited action.

From the Court's perspective, it has a significant advantage when African countries conduct fair and effective national prosecutions. That will allow it to in turn focus on the high ranking accused deemed to be “most responsible” or “bearing greatest responsibility” for international crimes in other parts of the world. Under this model, the ICC and African states could carve a division of labor whereby the

54. See David Scheffer *et al.*, *The End of Exceptionalism in War Crimes: The International Criminal Court and America's Credibility in the World*, HARVARD INT'L R.J.V. (Nov. 21, 2007), <http://hir.harvard.edu/the-end-of-exceptionalism-in-war-crimes>.

55. Rome Statute Preamble.

56. *Id.*

57. *Id.*

58. Rome Statute art. 17(1)(a).

59. Rome Statute Preamble (emphasis added).

60. ICC Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* at 4 (Sept. 2003).

affected countries undertake prosecution of lower and middle ranking suspects while leaving ranking perpetrators, the ostensible “big fish,” to international investigation and prosecution.

This is the mandate and also stated goal of the Prosecutor who has affirmed that he will only pursue those holding leadership positions, but nevertheless warned about an “impunity gap” if national authorities fail to deploy other means to bring lower tier suspects to justice.⁶¹

Third, it will obviously be less costly for the Court if African countries can prosecute their own alleged *genocidaires* and war criminals. This is particularly important given the substantial funds required to hold trials thousands of miles away from the crime base in a faraway European city (The Hague). This issue is more important than might first appear, even for the relatively well-endowed ICC. In this regard, the experience of the Special Court for Sierra Leone, which had a more volatile funding structure, suffices to illustrate the kinds of challenges awaiting the ICC when it is fully engaged. One needs merely to recall the impact on the SCSL of the controversial decision to change the venue of the trial of former Liberian President Charles Taylor from the seat of that tribunal in Freetown to The Hague.⁶²

Perhaps more importantly, besides saving funds that could then be diverted to compensate victims of international crimes under the unique ICC Trust Fund for Victims, *in situ* prosecutions will give Africans a better chance to witness their tormentors being brought to justice. Based on the lessons from the first generation UN tribunals, this is now widely acknowledged to be an important goal for international criminal justice.

From an ICC perspective, this may help resolve growing complaints about the extent of national participation in its processes because of a geographic divorce between, on the one hand, the accused, the crime and victim base and, on the other, the formal seat of the court and trials in The Hague.

Finally, encouraging national prosecution would be a pragmatic decision by the Court, one that would enhance efficiency given its inability to address every meritorious situation. As any reasonable lawyer who has worked in the tribunals can tell you, it is immediately apparent that capable states, rather than international institutions, are the best placed to address international crimes from a criminal process point of view. The witnesses, the evidence, the crime scene are all better and more efficiently accessible to national authorities. The interna-

61. *Id.* at 3.

62. See generally Charles Chernor Jalloh, *Special Court for Sierra Leone Dismisses Taylor Motion for Change of Venue*, (June 15, 2006) <http://www.asil.org/insights060615.cfm> (discussing the denial of Taylor’s motion for change of venue).

tional option is there, and must be available, but only as a backup option.

B. *The “Win-Win” for Africa*

With a strong, impartial and effective ICC, Africa is likely to be an even bigger beneficiary of a solid relationship with it.

First, at the regional level, African governments can better achieve the broader good governance and rule of law objectives outlined in the AU’s constitutive instruments, especially the ambitious and proactive conflict prevention and management system anticipated by the Peace and Security Protocol.⁶³ This will enhance the ability of the region to continue blazing the trail in implementing the responsibility to protect. Again that doctrine, of so-called humanitarian intervention, will achieve greater traction in the future. And, Africa, will be contributing to the world community by road testing how the principle can be applied in practice, where the rubber hits the road.

Second, the Court can assist African governments to build capacity in the prosecution of serious international crimes within their domestic tribunals. In fact, the Prosecutor has indicated that he will enter into cooperation arrangements with national counterparts to assist in capacity-building, and to ensure local prosecutions of international crimes based on the idea of positive complementarity.⁶⁴ It is hard to assess whether this effort has been prioritized in practice. It is also difficult to see where the ICC will get the resources to carry out these activities which, in many ways, fall outside the edges of its core mandate to prosecute crimes. Still, to the extent that this policy is bolstered by action, say with the support of developed countries through bilateral and multilateral assistance, spin-off effects could be the strengthening of domestic criminal legislation in African countries and, perhaps, the enhancement of national justice systems’ ability to deliver more credible justice. This is the long term effect that can help the Court make a meaningful and sustainable impact in the societies where international crimes are committed.

Third, and perhaps more fundamentally from a concerned African government perspective, an enhanced capacity to claim their first right to prosecute the international crimes within the jurisdiction of the Court may be the best weapon in their arsenal to counter any attempts to encroach on their state sovereignty. In my view, to counter

63. AU Assembly, *AU Peace and Security Protocol*, 1 (Jul. 9, 2002, First Ordinary Session in Durban), available at http://au.int/en/sites/default/files/Protocol_peace_and_security.pdf.

64. ICC Office of the Prosecutor, *International Criminal Court Paper on some policy issues before the Office of the Prosecutor*, 5 (Sept. 2003), http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.

the Prosecutor's alleged overemphasis on situations in the continent, African leaders are better off looking to the future to start building the necessary criminal justice systems that would enable them to fulfill their treaty obligations under the Rome Statute. They could also come together at sub-regional and regional levels to put in place the credible justice institutions to prosecute international crimes on the continent. This could lead to the creation of regional or even sub-regional circuit courts where African states and regional organizations can refer cases. Imagine, for example, what will happen if the Special Court for Sierra Leone facilities were used to try crimes in the West Africa sub-region. Similarly, imagine the tremendous benefits that will be gained if we used the Rwanda Tribunal facilities in Arusha, Tanzania to prosecute international crimes in East and Central Africa. In many ways, the AU and the ICC's objective of encouraging action at the national level to mete out accountability would be better achieved through such concrete steps than making dramatic and unsupported allegations in the media. These tend to make good press; not good policy. At least the type of good policy that is in Africa's best interest.

Fourth, from the perspective of conflict-torn African countries, the benefits of a strong and effective ICC may extend well beyond trials of those most responsible for genocide, crimes against humanity, and war crimes. They now include the ICC's long-awaited jurisdiction *ratione materiae* over the substantive crime of aggression, defined after years of negotiations as "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations."⁶⁵ This could offer a significant benefit in the fight against the scourge of conflict – a matter that we have already seen is of grave concern to Africa.⁶⁶

The context is that in conflicts on the continent nowadays, aggressors appear to come from other African states, acting directly or through proxy rebel groups, instead of others further afield, as was the case historically. A good example of this is the ongoing conflicts in the Great Lakes region in which a number of states in the East and

65. United Nations, AMENDMENTS TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, 6 (June 11, 2010), <http://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf>.

66. See generally Beth Van Schaack, *Negotiating at the Interface of Power and Law: The Crime of Aggression*, 49 COLUM. J. TRANSNAT'L L. 505 (2011) (discussing the politics and evolution of the elements and definition of the crime of aggression) and Claus Kress, Leonie Von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 1179 (2010) (discussing the Kampala compromise and the consensus decision).

Central Africa sub-regions have been implicated.⁶⁷ A similar situation arose in West Africa in relation to the wars in the Mano River Union region: Liberia, Sierra Leone and Guinea; in the Horn of Africa, and also in southern Africa.⁶⁸

These examples suggest that the continent should attach high value to the idea of subjecting the crime of aggression to prosecution. If this contention is correct, the biggest benefit conferred by the Rome Statute on Africa - particularly considering the number of ongoing conflicts on the continent - has only recently arrived. This development does not merely offer advantages to Africa, however. It also benefits the international community as well, whose ultimate aim to save succeeding generations of humanity from the scourge of war was so significant that it was imbibed as the first preambular item in the UN Charter.⁶⁹

In my view, all these factors make this the wrong time for African states to withdraw their mostly enthusiastic support for the ICC. Luckily, the drafters of the Rome Statute left room for dissent via Articles 18 and 19, which pertain to admissibility, so that states wishing to channel their concerns with current prosecutorial practice may do so by filing legal briefs before the judges of the Court in specific cases, as Kenya has recently done.⁷⁰ Alternately, and perhaps more appropriately, they are free to pursue their concerns within the more political framework of the Assembly of States Parties. These are all legitimate channels that African states can invoke while continuing to play within the emerging system of international criminal justice anchored by the Court.

Finally, in my view, Africa can and should use the Court to continue spotlighting its anti-impunity initiatives and its responsibility to protect agenda, an agenda placed into even starker relief given the rapidly evolving situation in Libya, of which both the Security Council and the ICC are now actively seized. This is especially important given the fleeting attention span of a Security Council seemingly overwhelmed with global hot spots in a less peaceful than expected post-Cold War world. With an engaged ICC, the continent could more eas-

67. See generally 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, 958 (2010) (discussing the role of states and their impact on the International Criminal Court).

68. *Peace and Security: How can the EU Support Regional Approaches*, (May 2010) [http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/2E3602BC89335DD7C125786A0030A931/\\$FILE/West%20Africa%20Seminar%20-%20ECDPM%20Background%20note%20-%20Peace%20and%20Security%20FINAL.pdf](http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/2E3602BC89335DD7C125786A0030A931/$FILE/West%20Africa%20Seminar%20-%20ECDPM%20Background%20note%20-%20Peace%20and%20Security%20FINAL.pdf).

69. U.N. Charter Preamble.

70. *Rome Statute of the International Criminal Court*, Art. 18 and 19 (Feb. 26, 2012) <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>.

ily generate the necessary international interest and assistance in resolving its human security problems.

As the tragic example of Rwanda's genocide showed in 1994, Africa cannot take for granted that security concerns within its own backyard are necessarily a top priority for the UN and the international community – even when those matters fall squarely within the contours of the Security Council responsibility for the maintenance of international peace and security contained in Article 39 of the UN Charter.⁷¹

Given the larger global context, African leaders, who would complain at once if the international community did not pay attention to crises exercising the continent, will risk losing credibility if, now that they have its attention at the level of the Court and, for that matter the UN, they protest about too much interest in the myriad challenges confronting the continent. What will they do, in another decade, when the ICC turns its attention to other regions of the world? Will they then come back and complain that Africa is being ignored? Such a complaint will be met with hostility and will perhaps be ignored. The result will be that it would be too late for African victims to rely on the Court for justice which their governments at home are sometimes unable or unwilling to render. This, of course, is not to suggest that AU states do not have any valid concerns about the impact of current ICC activities in Darfur and elsewhere on the continent in which they remain heavily invested. It is only to say that they can and should proceed more carefully while seeking to achieve their objectives, like any other region of the world.

V. CONCLUSION

The Africa-ICC relationship currently appears to be confronted with some major challenges. However, because of the dynamism of international relations, that relationship will continue to evolve. In this regard, a number of tentative observations may be offered keeping in mind that the relationship is still in its infancy.

To start with, it seems clear that the embattled continent has some strong and legitimate concerns about how international prosecutions may fit into its broader peacemaking and peace-building objectives. In relation to the Sudan situation which has ignited substantial controversy, the AU has reiterated that it is not opposed to prosecutions, but that it is concerned about the timing of prosecutions. In this unprecedented area, some measure of controversy is perhaps to be expected and inevitable.

71. U.N. Charter art. 39, par. 1.

Still, Africa's apprehension about the timing of prosecutions vis-à-vis its peacemaking attempts should not be discarded lightly by the ICC Prosecutor, other organs of the Court, or the rest of the international community. The reason is that its effect on further loss of life and human rights violations may extend well beyond the realm of the legal to the humanitarian, political and economic. And, as the affected region, there is nothing to say that Africa should not have a greater say in determining its own affairs. However, any such determinations must be made in a context where African states accept responsibility for ensuring that justice will be rendered in the specific situations where justice might otherwise be sacrificed to promote the interests of those in power. That, too, is untenable and unacceptable as the victims of crimes in Africa deserve that some justice is meted out to those who committed crimes against them.

In any case, given that the ICC appears to be stretched thinner than ever, some delay arising from the Sudan situation may not be a bad thing after all as it could, among other things, permit it to "regroup" and to muster further support from states, in Africa and elsewhere, and to (re)focus its energies and resources.

In the long term, it should be recalled that African governments have urged the Sudanese authorities to take concrete steps to improve human rights conditions on the ground, all the while pressing for a comprehensive peace agreement between the warring sides.⁷² They have gone even further to deploy thousands of peacekeepers in the country, thereby showing that they are willing to put their money where their mouths are.⁷³ These are important steps that we must recognize, and provided African states act in a manner consistent with the obligations that they have undertaken under the Rome Statute, they should be encouraged. They are all important considerations that must be weighed by the ICC and the international community, though the full implications of the Bashir arrest warrant remain unclear at this stage.

From the perspective of the Court, it is clear that it has a mandate to prosecute, as a court of last resort, international crimes committed within national jurisdictions that are unwilling or incapable to do so. To some extent and understandably, its work has so far focused on this aspect. Nevertheless, the Prosecutor must now start attending to the much harder task of engaging the prevention of further commission of

72. See generally Itai Madamombe, *Darfur crises challenges Africa: A Complex Conflict Brings Mixed Responses* (Jan. 2005), <http://www.un.org/ecosocdev/geninfo/afrec/vol18no4/184sudan.htm> (discussing the responses of the different African states to the Darfur conflict).

73. *Id.*

international crimes, a core rationale of prosecutions – as reflected in the preamble of the Rome Statute.⁷⁴

The prevention mandate is particularly important for the future success of the nascent Court as an international institution since, as Moreno-Ocampo himself acknowledged, the number of cases prosecuted should not ultimately be the benchmark for gauging its success.⁷⁵ In this regard, it is probably time for his office to shore up its programs to build national capacity to confront impunity, in line with the complementarity principle. It is also probably time for countries around the world that are able to do so to step up and assist the Court in this noble mission.

When added to a serious outreach program in Africa, this will help to address the misinformation and distortions about the work of the ICC in a continent with low levels of literacy. Engaging directly and aggressively with African civil society will also help the Court to build bridges with the local populations. This has not yet happened at the level that it ought to. Yet, it would make the ICC's achievement of its legitimacy and justice goals on the continent more likely.

At a more basic level, since my argument is about mutual gain and mutual vulnerability for both Africa and the ICC, the relationship between the Prosecutor and his African partners in the fight against impunity should not be allowed to stray, or worse, become antagonistic – as appears to be the case currently. The danger is that there may have already been a chilling effect to the Bashir warrant because the AU requested that all 30 African States Parties to the Rome Statute convene at its headquarters in Addis Ababa, Ethiopia in June 2009.⁷⁶ That is where the AU encouraged African states to “exchange views on the work of the ICC in relation to Africa, in particular in the light of the process initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.”⁷⁷ Even more worrying, in the period leading up to it, was anecdotal evidence suggesting that some African countries were contemplating a mass walkout from the Rome Statute altogether.

Fortunately, it appears that a number of factors converged to help avert the threatened withdrawals. Among these was that some Afri-

74. Rome Statute, Preamble at ¶5.

75. ICC Office of the Prosecutor, *supra* note 60, at 4.

76. CICC Secretariat, Press Release from Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=newsdetail&news=3390> (last visited Feb. 28, 2012).

77. AU Assembly, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan, ¶ 5, Assembly/AU/Dec.221 (XII) (Feb 3, 2009 Twelfth Ordinary Session in Addis Ababa, Ethiopia).

can States warned against such withdrawals.⁷⁸ NGOs and civil society also organized around the issue, calling on African States to recommit themselves to the Rome Statute.⁷⁹ They also emphasized that it is in Africa's best interest to continue participating in the work of the Court. Ultimately, African leaders appeared to have gotten the message that there is little for them to gain by withdrawing from the Rome treaty. That is certainly correct.

Subsequently, at the Assembly of Heads of State summit in Sirte, Libya in early July 2009, African leaders, most of whom were dissatisfied that progress had not been achieved on their request for the Security Council to defer to the Sudan investigations by the ICC, decided that all AU Member States should refuse to cooperate with the Court by not enforcing the Bashir arrest warrant.⁸⁰ This was surprising as it was not limited to just the 31 African States Parties to the Rome Statute. The decision, which has been very controversial, has been criticized by many in the human rights community.⁸¹ Since then, the AU decision has been reiterated by various additional decisions adopted by the African leadership, including as recently as Kampala on July 25, 2010.⁸²

Whether or not the decision sits well, if at all, with states' obligations under the Rome Statute is far from clear, especially Part 9 of the statute, which places an obligation on states to assist the court in whatever way it requests.⁸³ This is a duty that they owe to the Court in order to help make its work effective. It is a duty that African states must take seriously, and where there is a doubt, they should err on the

78. See generally Eunice Rugene, *Kenya lawmakers vote to pullout of International Criminal Court*, <http://www.monitor.co.ug/News/World/-/688340/1078072/-/10hdbv/-/index.html> (last visited Feb. 28, 2012).

79. See e.g., Ismail Musa Ladu, *Uganda: NGOs Lobby for States Commitment Ahead of ICC Meet*, THE MONITOR (May 21, 2010), <http://allafrica.com/stories/201005270736.html>.

80. See AU Assembly, *Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.245 (XIII), at 2, ¶10, Doc. Assembly/AU/13 (XIII) (July 3, 2009 13th Ordinary Session of the Assembly in Sirte) (requesting AU Member States not to cooperate with the ICC arrest warrant for Bashir); see also *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest (Mar. 4, 2009) (ICC Pre-Trial Chamber issued a warrant for the arrest of Omar Al Bashir).

81. See generally, Mary Kimani, *Pursuit of justice or Western plot? International indictments stir angry debate in Africa*, AFRICAN RENEWAL, Oct. 2009, at 12-15, <http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/ar-23no3-en-web.pdf> (noting "After the AU announced that it would not cooperate with the ICC, more than 130 civil society groups from 30 African countries called on their governments to rethink their position.").

82. AU Assembly, *Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.296(XV), at 1, ¶ 5, Doc. Assembly/AU/10(XV) (July 27, 2010, 15th Ordinary Session of the Assembly in Kampala).

83. Rome Statute, part 9, art. 86, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

side of caution and assist the tribunal to fulfill its objectives as states parties that are invested in its success. Of course, the matter remains difficult, and as with many things in life, the final answer is not as straightforward as initially appears.

What is clear at this stage is that there are important unresolved questions about whether or not immunities continue to accrue to the Sudanese leader in the face of the ICC arrest warrant vis-à-vis the obligations of other (including third) states to arrest him and customary immunity law.⁸⁴ Two answers have been offered. One is that immunities do not apply because they have been extinguished by the Security Council referral which was based on Chapter VII.⁸⁵ The second, and seemingly better view, is that the Security Council – like States – cannot do more than trigger investigations.⁸⁶ Thus, immunities will continue to apply until President Bashir is no longer in office, except if the UN body explicitly removed immunity and imposed an obligation on all states to cooperate with the tribunal, something that the March 2005 referral resolution did not do. We can, of course, envisage some pronouncements from the Court on this issue in the future. If that were to occur, we might reasonably expect for the judges to hold that there is an obligation on the part of states to cooperate with the ICC even if the Council did not explicitly remove Bashir's immunity. Such decisions would have to be backed up with solid legal reasoning to show African states and other countries why the ICC position is the correct one as a matter of law.

Amidst these legal complexities, and as challenging as it is to predict how the ICC will handle the Sudanese, and now Libyan, hot potatoes handed to it by the Security Council, there is still a hopeful sign. A recent decision by the AU Assembly seems to indicate that the AU may channel its disagreements about current prosecutorial practice and other concerns about the Court within, instead of outside, the fledgling international justice system.⁸⁷ This appears to be some, albeit faint, light at the end of a seemingly dark tunnel. It should be welcomed by all of us working for justice for international crimes.

84. See generally, Dapo Akande, *The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution*, Oxford Transitional Justice Research Working Paper Series 87 (2008), available at http://www.fljs.org/uploads/documents/Justice_in_Africa.pdf; see also Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333 (2009); but see Paola Gaeta, *Does President Al Bashir Enjoy Immunity from Arrest?*, 7 INT'L CRIM. JUST. 315 (2009).

85. Akande, *supra* note 84, at 2.

86. Jalloh, *supra* note 51, at 484.

87. See AU Assembly, *Decision on the Implementation of Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Assembly/AU/Dec.213(XII), at 1, Doc. Assembly/AU/3(XII) (Feb. 1-3, 2009, 13th Ordinary Session of the Assembly in Sirte), available at <http://au.int/en/decisions/assembly>.

Meanwhile, in Sudan specifically, the establishment of an independent High-Level Panel on Darfur is the most practical step adopted by the AU to deal with this lingering puzzle. The High-Level Panel, led by former South African President Thabo Mbeki,⁸⁸ was precipitated by the challenges that emerged from the ICC's indictment of President Bashir.⁸⁹ The Panel was mandated among others to: "examine. . . how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing on the other, could be effectively and comprehensively addressed. . . ."⁹⁰

As you may know, the Mbeki High-Level Panel submitted its report in October 2009.⁹¹ It recommended a hybrid court be established for Darfur.⁹² It also underscored the interdependence between peace and justice, and between justice and peace.⁹³ It eschewed the one-size fits all model.⁹⁴ The recommendations of the High-Level Panel will "contribute to shaping the AU's response to the twin dilemmas of justice and peace" in Sudan.⁹⁵ This assumes that they will be implemented. I certainly hope so. In turn, whatever they and we do about the Sudan, including the ICC's involvement there, will give us a sense of what will happen in the relationship between Africa and the ICC over the next five to ten years.

Unfortunately, in recent developments, the AU has notched up the rhetoric against the ICC. In addition to reiterating that it will not cooperate with the Court or have its member states do so in respect of the Bashir warrant, it has also signaled that it will take further action by calling on all its states to speak with one voice.⁹⁶

For its part, the ICC and, in particular, its Prosecutor has proven unwilling to show flexibility about the application of their mandate. For example, under Article 53 of the Rome Statute, the Prosecutor

88. African Union High-Level Panel of Darfur, *Darfur: The Quest for Peace, Justice and Reconciliation*, PSC/AHG/2(CCVII), at i, (Oct. 29, 2009), available at [http://www.darfurpanel.org/resources/AUPD+Report+on+Darfur+\\$28Eng+\\$29+October+26+09.pdf](http://www.darfurpanel.org/resources/AUPD+Report+on+Darfur+$28Eng+$29+October+26+09.pdf).

89. *See id.*

90. *Id.*

91. *Id.*

92. *See id.* at 87-88. (noting "[t]he recommendations cover . . . the role of UNAMID and the African Union in consolidating peace in Darfur).

93. *See id.* (noting "[t]he recommendations cover . . . the role of UNAMID and the African Union in consolidating peace in Darfur).

94. *See id.*

95. A. Sarjoh Bah, Senior Fellow, N.Y. Univ. Ctr. on Int'l Cooperation, *The African Union and the Darfur Crisis: Regional Peacemaking in an era of International Justice*, Presentation to New York City Bar Association's Committee on African Affairs, at 4 (Oct. 5, 2006) (transcript available at http://www.cic.nyu.edu/peacekeeping/docs/bah_NY%20Bar.pdf).

96. AU Assembly, *Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.270(XIV), at 1, ¶ 6, Doc. Assembly/AU/8(XIV)(Feb. 2, 2010, 14th Ordinary Session of the Assembly in Addis Ababa, Ethiopia).

could suspend his investigations for one year by applying to the Pre-Trial Chamber, asserting thereto that the interests of justice, which arguably includes the interest of peace, demand this.⁹⁷ But Ocampo has insisted that he will not do so and that his job is to be a lawyer; and that it is only for the Security Council to assess political imperatives.⁹⁸ In other words, the measure of discretion granted textually to the Prosecutor is ironically been given up by him in favor of passing the decision on to another organ such as the United Nations. That is most unfortunate, as it in many ways, weakens the position of the prosecutorial organ which thereby loses more control over such decisions.

In the end, we are left with a scenario where both sides have dug their heels and refused to budge. This is unfortunate, since lost in all of these debates, are the concerns of the hundreds of thousands of victims of atrocities in Darfur. It is my sincere hope that we will move past the current impasse, and move past it soon. For the victims of crimes in Darfur deserve no less.

97. See Rome Statute, art. 53, July 17, 1998, 2187 U.N.T.S. 90.

98. See Interview with Luis Moreno-Ocampo, Prosecutor, International Criminal Court (ICC), (July 7, 2007) *available at* <http://www.un.org/apps/news/story.asp?NewsID=23120&Cr=criminal&Cr1=court>. (Ocampo noted that, “[p]eace negotiations can be long and complicated. But I can’t be involved in their aspects[,] . . . [t]he Security Council has noted that lasting peace requires justice and it’s my role to help in that. My duty is to end impunity and to contribute to the prevention of future crimes”).