ABSTRACT

This Article contextualizes the issues of Immunity and prosecution of international crimes at the African Union (AU) level and how the AU has treated the questions of Immunity and prosecution of Head of States officials for international crimes and the legality or basis of different concerns raised by the African Union in respect of the indictment of some Heads of State in Africa by the ICC. The practice of the AU is examined in line with the cases against the former President of Sudan Omar Al Bashir. Furthermore, the discussion of the topic also addresses the intended measures and responsibilities of a criminal chamber within the African Court of Justice and Human Rights (the Criminal Chamber) with criminal jurisdiction for purposes of prosecuting persons who commit international crimes in Africa. This arises from the refusal by the AU to cooperate with the ICC over the arrest warrant issued against former President of Sudan Omar Al Bashir and other African leaders. The Article argues further that, by African Union refusing to cooperate with the ICC, African States parties to the Rome Statute have breached their obligations and responsibilities under the 1998 Rome Statute. In the course of discussion, the Article examines how the AU intends to address the question of immunity of Heads of State officials by refusing to cooperate with the ICC and by preferring trials of African Heads of States in Africa. Furthermore, the Article examines whether the AU has any legal framework relevant to the prosecution of individuals who commit international crimes, including Head of State officials. It highlights the efforts made by the African Commission on Human and Peoples’ Rights to urge African States to ratify and implement the Rome Statute.

Key Words: Immunity, International Crimes, African Heads of State Officials, African Court on Human and Peoples Right (Court)
INTRODUCTION

General Overview: Immunity of Heads of State in Africa And Cases before ICC: As of early 2011, all the six situations and several accused persons before the ICC have come from Africa.¹ The cases before the ICC are based on the State referrals, referrals by the United Nations Security Council (UNSC) and proprio-motu powers of the Prosecutor to initiate investigations.² Based on reasonable belief that individuals have committed international crimes in Darfur Sudan, Kenya, Liberia, Chad, Uganda, Libya, Ivory Coast, Central African Republic and Democratic Republic of Congo, the Prosecutor of the ICC requested the Pre-Trial Chamber of the ICC to issue arrest warrants for various individuals.³ The situation in Libya was likely to lead to warrants of arrest being issued by the ICC. In his address to the Security Council in May 2011, the Prosecutor of the ICC indicated that he would apply for the issuance of warrants of arrest against Libyan leaders, including Muammar Gaddafi. Indeed, on 16 May 2011, the Prosecutor of the ICC filed an application for the issuance of warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi alleging their criminal responsibility for crimes against humanity committed in Libya since 15th February 2011. The application was filed pursuant to article 58 of the 1998 Rome Statute. As of 23rd May 2011, the ICC had not yet decided on the application. Because investigations were still ongoing in Libya at that time, it was anticipated that more applications and cases could arise from Libya. However, it would be important if the Prosecutor of the ICC investigated other international crimes, particularly grave breaches of the 1949 Geneva Conventions and war crimes, from both sides of the conflict in Libya: rebel forces; government forces; and crimes committed by NATO and other forces operating in Libya.⁴

In the situation in Darfur, Sudan there were five cases being heard by Pre-Trial Chamber I of the ICC. One suspect, at that time Bahr Idriss Abu Garda appeared voluntarily before

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¹ For situations in the ICC, see information on the website of the ICC, at <http://www.icc-cpi.int> (accessed on 27 September 2019).
³ See cases at the ICC website <http://www.icc-cpi.int> (accessed on 27 September 2019).
⁴ Situation in the Libyan Arab Jamahiriya, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, No. ICC-01/11, Public Redacted Version, Pre-Trial Chamber I (Judge Cuno Tarfusser, Presiding Judge, Judge Sylvia Steiner and Judge Sanji Mmasenono Mogageng), 16 May 2011, 1-23, paras 1-68.
Pre-Trial Chamber I of the ICC on 18 May 2009. His appearance followed a summons to appear issued by the Pre-Trial Chamber I of the ICC. The Prosecutor Moreno Ocampo at that time filed an application for the issuance of a warrant of arrest or summons to appear alleging that Abu Garda committed war crimes, particularly attacking the AU Mission in Sudan on 29 September 2007. The rebel force under control and command of Abu Garda attacked the AU peacekeepers resulting to the death of twelve peacekeepers. The Pre-Trial Chamber of the ICC conducted a confirmation hearing in respect of Abu Garda between 19 and 29 October 2009. On 8th February 2010, Pre-Trial Chamber refused to confirm charges against Abu Garda on the ground that the prosecutor Moreno Ocampo failed to prove evidence incriminating him with the crimes. An appeal by the Prosecutor was refused on 23rd April 2010 with the charges being dropped and the Prosecutor's appeal against this being rejected.

The appearance of Abu Garda was later followed by the voluntary appearance on 17th June 2010, by Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, charged with war crimes. This was in compliance with a summons to appear issued by the Pre-Trial Chamber on 27 August 2009.

The Darfur situation led to the indictments of the two senior State officials of Sudan, a former Head of State (Omar Al Bashir), and Ahmad Harun, a Minister of State for the Interior of the Government of Sudan, and former Minister of State for Humanitarian Affairs. In respect of former President Bashir, a charge of genocide was included in the application for a warrant of arrest by the Prosecutor but the Pre-Trial Chamber did not confirm it. The Prosecutor appealed the decision of the Pre-Trial Chamber on the question of genocide.

5 Prosecutor v Garda, Case No. ICC-02/05-02/09, Summons to Appear for Bahr Idriss Abu Garda (Public), 7 May 2009, Pre-Trial Chamber, 1-10.
8 Prosecutor v Nourain and Jamus, Case No. ICC-02/05-03/09, Pre-Trial Chamber I, Second Decision on the Prosecutor’s Application under Article 58; 27 August 2009, paras 1-35; Prosecutor v Nourain, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Abdallah Banda Abakaer Nourain, 27 August 2009, paras 1-20; Prosecutor v Jamus, Case No. ICC-02/05-03/09, Confidential Summons to Appear for Saleh Mohammed Jerbo Jamus, 27 August 2009, paras 1-20.
The Appeals Chamber of the ICC rendered its decision reversing the decision of the Pre-Trial Chamber, and ordering it to reconsider the genocide charge de novo.

Consequently, regarding the situation in Uganda which was referred by the Government of Uganda to the Prosecutor Moreno Ocampo of the ICC in December 2003, five warrants of arrest were issued against five top leaders of the Lord’s Resistance Army (LRA), a rebel force which operates in northern Uganda. The case was heard by Pre-Trial Chamber II of the ICC and the rebel leaders, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya were indicted and charged with crimes against humanity and war crimes.

In the Situation in the Democratic Republic of Congo, which was referred by the Government of the DRC in 2002, four cases were heard by different chambers of the ICC. Thomas Lubango among the four suspects was sentenced to 14 years imprisonment by the ICC on 10 of July 2012.

The Situation in the Central African Republic, which was referred by the Government of the Central African Republic in 2003, there was one person charged with war crimes and crimes against humanity. That person is Jean-Pierre Bemba Gombo, former Vice-President and Senator of the DRC, and President of the Movement for the Liberation of Congo (Mouvement pour la Libération du Congo ‘MLC’ rebel forces which fought not only in the DRC, but also in the Central African Republic between 2002 and 2003. On 8th June 2018, the Appeal Chamber of the International Criminal Court decided, by majority, to acquit Jean Pierre Bemba Gombo from the charges of war crimes and crimes against humanity due to lack of enough evidence.

10 For a discussion on the three situations in Uganda, DRC and Sudan, see generally, E Greppi, ‘Inability to investigate and prosecute under Article 17’ in Politi and Gioia (2008) 63-70.
11 See, Situation in Uganda, Prosecutor v Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, Pre-Trial Chamber II, 27 September 2005, paras 1-53; Prosecutor v Otti, Case No. ICC-02/04-01/05, Warrant of Arrest for Vincent Otti, 8 July 2005, Pre-Trial Chamber II, paras 1-53; Prosecutor v Odhiambo, Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo, Pre-Trial Chamber II, 8 July 2005, paras 1-43; Prosecutor v Ongwen, Case No.ICC-02/04-01/05, Warrant of Arrest for Dominic Ongwen, Pre-Trial Chamber II, 8 July 2005, paras 1-41; Prosecutor v Lukwiya, Case No. ICC-02/04-01/05, Warrant of Arrest for Raska Lukwiya, Pre-Trial Chamber II, 8 July 20 05, paras 1-41.
12 Reuters, Congo warlord jailed for 14 years in landmark case (10 July 2012)"[2]" Accessed 10 July 2012.
On 31 March 2010, Pre-Trial Chamber II of the ICC issued a decision authorizing the Prosecutor to begin investigation into the Situation in Kenya pursuant to article 15 of the Rome Statute.\textsuperscript{14} Such authorization was based on the fact that the Chamber had reasonable ground to believe that crimes against humanity were committed in Kenya during the post-election conflict in late 2007, early 2008. On 15\textsuperscript{th} December 2010, the Prosecutor of the ICC filed an application for the issuance\textsuperscript{15} of summonses to appear for six individuals, including Kenyan senior State officials. These were Henry Kiprono Kosgey, William Samoei Ruto, Joshua Arap Sang, all members of the political party called the Orange Democratic Movement (ODM).\textsuperscript{16} The other persons were Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, all State officials and members of a political party called the Party of National Unity (PNU).\textsuperscript{17}

The Prosecutor submitted that there were reasonable grounds to believe that all these suspects committed crimes against humanity within the jurisdiction of the ICC and therefore that the court should issue summonses for the said persons to appear. On 8\textsuperscript{th} March 2011, the Pre-Trial Chamber issued its decision on the Prosecutor’s application for the issuance of summonses to appear for the suspects.\textsuperscript{18} The suspects entered their initial appearances on 7 and 8 April 2011 and the ICC made confirmation on the charges in September 2011 against them. Following the ICC Prosecutor’s application for the issuance of summonses to appear for the Kenyan State officials, Kenya approached the AU asking it to request the United Nations Security Council (UNSC) to defer the investigations and prosecution.


\textsuperscript{18} Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber, 8 March 2011; Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011. The suspects entered their initial appearances on 7 and 8 April 2011.
in Kenya. In its decision on the implementation of the decisions on the ICC, the AU supported and endorsed Kenya’s request for a deferral of investigations and prosecutions regarding crimes against humanity committed in Kenya during the post-election violence in 2008.\(^\text{19}\) It should be understood clearly that a request for the deferral of investigation and prosecution under article 16 of the 1998 Rome Statute does not do away with subsequent prosecution. However, it is wrong for the AU to endorse the request by Kenya for a deferral of investigation and prosecution. Kenya failed to prosecute persons responsible for crimes against humanity at its national courts. To request for a deferral of prosecution is not in any event going to be in line with complementarity principle for Kenya.

The major point which is raising a lot of contentious issues is that by the mere fact that the large number of the accused persons before the ICC came from Africa, gave rise to a negative attitude by the African Union against the ICC. Except Botswana and Uganda, the rest of the AU member States categorically took a position that the ICC targets Africans, and Heads of State officials in particular, leaving other persons from other States to walk scot-free, the reasons for The heart of the disagreement being on immunity and procedural matters and the failure of the Court to broaden its membership. In 2016, several African countries indicted their intention to withdraw from the International Criminal Court (ICC). This tide was reversed, however, after South Africa and the Gambia withdrew their notifications to the United Nations, which they later on withdrew, Burundi is the latest country to withdraw from the ICC.\(^\text{20}\)

As observed, the AU has decided not to cooperate with the ICC in respect of the warrant of arrest for former Head of State Omar Al Bashir of Sudan. While this declaration may hold

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\(^{19}\) See, Decision on the Implementation of the Decisions on the International Criminal Court, Doc.EX.CL/639 (XVIII), Assembly/AU/Dec.334(XVI), para 6. Sixteenth Ordinary Session, 30-31 January 2011, Addis Ababa. However, one must note that some Kenyan authorities do not want to accept that Kenya requested the deferral of the investigations. For example, Vice President of Kenya, Kalonzo Musyoka is reported to have said in the Kenyan Daily Nation that Kenya had not requested any such deferral. See, ‘Leaders trade barbs over Ocampo six trials at burial’, Daily Nation, 20 March 2011.

\(^{20}\) Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Pre-Trial Chamber, 8 March 2011; Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11-01, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011. The suspects entered their initial appearances on 7 and 8 April 2011.
substance at least politically, it does not hold any legal validity under International law. There is no legal basis to allege that the ICC has targeted Africans. At this point, it is necessary to discuss and examine whether the AU has any legal or institutional framework to prosecute crimes that are also within the jurisdiction of the ICC.

**DEFINITION OF KEY TERMS**

**Immunity:** The term “Immunity” is defined as the ability of a State official to escape prosecution for crimes for which he/she would otherwise be held accountable. 21 *Black’s Law Dictionary* defines the word Immunity as “Any exemption from a duty, liability, or service of process especially, such an exemption is normally granted to the public official.” 22

**African Court on Human and Peoples Rights:** The African Court on Human and Peoples Rights (the court) is a continental court established by the African Countries to ensure the protection of human and people’s rights in Africa. It complements and reinforces the functions of the African Commission on Human and Peoples Rights. The court is established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights (The Protocol). 23

**Prosecution:** This term is regarded as an act of carrying on a legal action against a person accused of a crime in court. In this scenario the cases which falls under the jurisdiction of the International Criminal Court are prosecuted by Fatou Bensouda who is the prosecutor of the International Criminal Court. In Africa Heads of States who have committed international crimes have been prosecuted before international courts. Not all States have enacted laws that punish international crimes in Africa, hence prosecuting Heads of States who have committed International crimes within the domestic perspective it has been hard. 24

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21 *R v Bow Street Metropolitan Stipendry Magistrate and Others*, *ex parte Pinochet Ugarte* [1998] 3 WLR 1465. Judge Philips defined Immunity as the ability of a State official to escape prosecution for crimes for which he/she would otherwise be held accountable.

22 *Blacks law dictionary* (1999) (7th ed.) pg 752


International Crimes: International Crimes are regarded as the most serious crimes which have raised concerns to the community. The core crimes which falls under international crimes are genocide, war-crimes, crimes against humanity and aggression. (they are sometimes referred to as atrocity crimes) International crimes have been prosecuted by a range of international and national Courts including the International Criminal Court, which was established by the Rome Statute in 1998 and based in the Hague, it has the jurisdiction as per Article 5 of the Rome Statute to prosecute them.25

PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA AND THE AFRICAN UNION LEGAL FRAMEWORK

Operational Mechanisms: The African Union (AU), which replaced the former Organization of the African Unity (OAU), was formed in 2000 through the Constitutive Act of the African Union (the Constitutive Act of the AU). The Constitutive Act of the AU was adopted by the then OAU Assembly of Heads of State and Governments in Lomé, Togo, at the 36th ordinary session of the Assembly from 10-11th July 2000. The Constitutive Act of the AU contains key principles that reject impunity in Africa. Such principles are reflected in article 4 of the Constitutive Act of the AU.26 Amongst them, is the principle that allows the AU to have the right to intervene in a member State pursuant to a decision of the Assembly of Heads of State and Government of the Union in respect of grave circumstances, namely: ‘war crimes, genocide and crimes against humanity.’27 The AU has the duty to respect for the sanctity of human life, condemnation and rejection of impunity28 and to respect democratic principles, human rights, rule of law and good governance.29 It should be recalled that the AU was meant to curb inter alia, the endemic problems of armed conflicts in Africa, and hence the essence of such principles. Events of the genocide in Rwanda in 1994 practically played a role in

26 Relevant parts of art 4 of the Constitutive Act of the AU provide that: ‘The Union shall function in accordance with the following principles: (h) the right of the Union to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes; genocide and crimes against humanity; (o) respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.’
27 Ibid 28 Art 4(h).
28 Ibid Art 4(o).
29 Ibid Art 4(m).
providing the background to relevant provisions in the Constitutive Act of the AU on ‘rejection of impunity’ and allowing the AU to ‘intervene’ in a member State of the Union in case of ‘grave circumstances’ of genocide, war crimes and crimes against humanity.

**Short Falls In The Operational Mechanism of African Union Legal Framework:** Apart from the provisions of article 4(h) of the Constitutive Act of the AU, the AU does not seem to have an express mandate to prosecute individuals who commit international crimes in Africa, particularly at regional level. Perhaps a possible way is for the AU to rely on moral or political grounds to ask one of its member States to prosecute perpetrators of international crimes (particularly Head of State officials) as Senegal did for Habré on behalf of the AU. It is difficult to infer that ‘intervention’ as envisaged under article 4(h) of the Constitutive Act of the AU would include ‘prosecution’ of perpetrators of international crimes in Africa. It is contended that the word ‘intervene’ as put in article 4(h) was meant to apply to military intervention (use of force) and not judicial intervention as such. Except for article 4(o) of the Constitutive Act of the AU, no other provisions reject impunity, and by analogy, immunity for international crimes. Despite the rejection of impunity, it is not entirely and specifically provided in the Constitutive Act of the AU whether really an African State official can be prosecuted for international crimes and therefore that, in grave circumstances of genocide, war crimes and crimes against humanity, Head of State official may not claim immunity from prosecution for such crimes in Africa. However, based on customary and conventional international law, it may be argued that such Heads of States officials cannot benefit from immunity for International Crimes.

Although the Constitutive Act of the African Union contains provisions that reject impunity for international crimes committed in African States, it nevertheless does not have an express provision outlawing immunity of Heads of States officials from prosecution for such crimes. Thus, at African regional level, there is currently no instrument which calls for prosecution of individuals who commit International Crimes in Africa.

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30 Arts 4(h), 4(m) and 4(o) of the Constitutive Act of AU 2000
and rejects immunity of Heads of State officials in general.\footnote{However, regarding corruption (which is not an international crime as per this study), there is the African Union Convention on Preventing and Combating Corruption, adopted in Maputo on 11 July 2003, entered into force on 5 August 2006. Art 3(5) of this Convention provides for total rejection of impunity in respect of corruption.} However, one may argue that since the Constitutive Act of the AU rejects impunity and by necessary inference refers to human rights, it follows that in the general sense, it can be said to have rejected immunity for international crimes. It is important to understand that in 2005 the African Commission on Human and Peoples’ Rights (the African Commission) adopted a resolution in which it urged African States to end impunity in Africa, and to domesticate and implement the Rome Statute.\footnote{Resolution on Ending Impunity and on the Domestication and Implementation of the Rome Statute of the International Court (2005). The resolution is reprinted in C Heyns and M Killander (eds.), (2007) Compendium of key human rights documents of the African Union, 323-324.} In this resolution, the African Commission recalled its Resolution on the Ratification of the Treaty on the International Criminal Court (the Rome Statute) by the African Commission on Human and People’s Rights, which was adopted at Banjul, on 31st October 1998. It also made reference to the Resolution on the Ratification of the Statute of the International Criminal Court by OAU member States, adopted at Pretoria, on 16th May 2002.\footnote{Preamble to Resolution on Ending Impunity and on the Domestication and Implementation of the Rome Statute of th e International Court (2005).} Furthermore, the African Commission noted that international crimes continued to be committed in Africa, while perpetrators were rarely brought to justice. In addition, the Commission it was concerned that some African States that had ratified the 1998 Rome Statute had not incorporated it at national level. In this regard, the African Commission urged member States of the AU ‘to ensure that the perpetrators of crimes under international human rights law and international humanitarian law should not benefit from impunity.’\footnote{Ibid Para 1 of the Resolution} It also called for African States ‘to ratify the Rome Statute and to adopt a national plan of action for the effective implementation of the Rome Statute at the national level.’\footnote{Ibid Para 2 of the Resolution}

Recognizing the fact that some African States had entered into bilateral immunity agreements with USA, the African Commission urged African States ‘to withdraw from article 98 Bilateral Immunity Agreements and refrain from engaging in acts that would weaken the effectiveness of the Court in line with their international obligations.’\footnote{Ibid Para 3 of the Resolution} Finally, it
encouraged ‘the Assembly of Heads of State and Government of the African Union to urge its member States to condemn and reject impunity.’ From the preceding, one observes that the African Commission had made efforts to ensure that African States ratified the Rome Statute in order to end impunity for international crimes. However, it is common that resolutions of the African Commission are non-binding as such. In particular, the resolution at issue was merely to encourage States but not to create obligation on African States to reject impunity or repress international crimes. Given this observation, there is a need to look at the binding treaties on this matter. It has been observed earlier that there is no African regional treaty to punish international crimes. Short of any regional legal framework on the prosecution of international crimes in Africa, one must rely on the sub-regional legal instruments. In Africa, the only express sub-regional mechanism that calls for prosecution of individuals who commit international crimes, and rejects immunity of Heads of States and State officials is the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, which was signed by the International Conference on the Great Lakes Region, on 29th November 2006.

THE AFRICAN UNION CONCERNS OVER PROSECUTION OF SERVING AFRICAN HEADS OF STATES OFFICIALS BY THE ICC

Following the issuance of an arrest warrant for the former Head of State, President Omar Al-Bashir of Sudan by the ICC, there has emerged in Africa, sentiments on the prosecution of African Heads of State officials. Apart from Africa, the Council of the League of Arab States had also issued a decision condemning the decision of the Pre-Trial Chamber of the ICC on the former President of Sudan Omar Al Bashir. On its part, the AU which initially appeared to be amongst the greatest supporters of the ICC, now changed its position and relationship with the ICC and embarked on the move not to cooperate with the ICC on the Omar Al Bashir’s warrant of arrest despite the arrest

37 Ibid Para 5 of the Resolution
38 See, Decision adopted by the Council of the League of Arab States meeting at Ministerial Level in Cairo, Egypt, on 4 March 2009.
warrants circulated by the ICC to States parties to the 1998 Rome Statute, including African States. The AU raised concerns reflecting that the ICC is an imperialist tool of Western powers and that it has only targeted and is discriminatory against Africans. The former Chairperson of the AU Commission, Jean Peng once echoed the views of the AU regarding the warrant of arrest issued against the former Head of State of Sudan Omar Al Bashir in which he complained that the ICC is discriminating against Africa. He said:

*We have to find a way for these entities [the protagonists in Sudan] to work together and not go back to war...This is what we are doing but Ocampo doesn’t care. He just wants to catch Bashir. Let him go and catch him...We are not against the ICC...But we need to examine their manner of operating. There are double standards. There seems to be some bullying against Africa.*

Similarly, the Rwandan current Head of State, Paul Kagame raised concerns that the ICC is a new form of imperialism intending to undermine Africans and other powerless States. The argument that the ICC is an imperialist Western tool is also advanced by some African scholars; Professor Mahmood Mamdani argues that the ICC is a manifestation of the modern western colonialism. To Professor Mamdani, the ICC is ‘rapidly turning into a western Court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn’t oppose, like those of Uganda and Rwanda in eastern DRC, effectively conferring impunity on them.’

Furthermore, it has been argued by the AU that the focus by the ICC on Africa undermines peace processes in Africans States. It is also the view of the AU that by refusing to authorise deferrals of the investigations and prosecutions in Kenya and Sudan, the Security Council (SC) has ignored calls by the AU for peace in Sudan and Kenya. The other concern is that the Security Council has played double standards against African States by referring the situation in Darfur, Sudan to the ICC. The argument goes further that the Security Council failed to refer the situation in Gaza, Palestine, as recommended by the Goldstone Report following an inquiry on the crimes committed by


Israel soldiers in Gaza in 2009. Similarly, the Security Council also failed to take measures to refer the conflict in Iraq, Afghanistan, North Korea, Syria, Iran to the ICC for further investigation and possible prosecution.

However, the Prosecutor of the ICC seems to be considering the situations in Gaza, Iran, Syria and Georgia. The other concern raised by the AU and some individuals in Africa is that the ICC decided to proceed against a serving Head of State of Sudan at that time Mr. Omar Bashir while Sudan is not a State party to the Rome Statute. This argument seems to lean on articles 98 and 27 of the 1998 Rome Statute. Apparently, this argument would seem to also base on State sovereignty. During his time as Chairman of the AU, Bingu wa Mutharika (the former President of Malawi) pointed out clearly the issues of immunity of a Head of States official and State sovereignty regarding former President Bashir of Sudan. He said, “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 (sic). May be there are other ways of addressing this problem.”

The merits and demerits of these grounds of objection or concerns by the AU will be considered later. However, before dealing with the objections, it is important that one sets the background on the AU decisions not to cooperate with the ICC.

On 5th March 2009, the Peace and Security Council of the African Union at its 175th meeting at Addis Ababa, Ethiopia, adopted a position on the decision of the Pre-Trial Chamber I of the ICC to issue an arrest warrant against the former Head of State of the

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42 See, ‘Human Rights in Palestine and other Occupied Arab Territories’ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, Human Rights Council, Twelfth Session, Agenda Item 7, 25 September 2009, 1-452, paras 1-1979 and annexures. However, one must note that after the report was submitted to the UN, Richard Goldstone retracted from his findings, which makes it difficult to confirm whether military commanders and State officials from Israel should be held responsible for the crimes committed in Gaza.

43 Quoted in M du Plessis (2010) The International Criminal Court that Africa wants, Monograph No 172, 18
Republic of Sudan, Omar Al Bashir. While recalling its Communiqué as well as the AU Assembly decision, the Peace and Security Council of the African Union expressed ‘deep concern over the decision that was taken by the Pre-Trial Chamber of the ICC on 4 March 2009, to issue an arrest warrant against the former President of the Republic of Sudan, Mr. Omar Hassan Al-Bashir, for war crimes and crimes against humanity, and the far reaching consequences of this decision.’ The Peace and Security Council of the AU noted with regrets that the ICC decision came at a critical juncture in the process of promoting lasting peace and reconciliation in Sudan, and underlined that the search for justice should be pursued in a way that does not impede or jeopardise the promotion of peace in Sudan.

The Council reaffirmed the ‘AU’s conviction that the processes initiated by the ICC and the decision of its Pre-Trial Chamber had potential to seriously undermine the then on-going efforts to address the many pressing peace and security challenges facing Sudan and could lead to further suffering for the people of the Sudan and greater destabilization of the country and the region.’ Again, in its decision, the Peace and Security Council of the AU deeply regretted that despite the request made by the AU to the United Nations Security Council to defer prosecution of President Omar Al Bashir of Sudan under article 16 of the 1998 Rome Statute, the UN Security Council had failed to consider such a request. It thus appealed once again to the UN Security Council to assume its responsibilities by deferring the process initiated by the ICC against President Omar Al Bashir of Sudan.

The UN Security Council did not agree to the AU’s request, and only noted such a request. Although the AU may have a collective voice on the arrest warrant against Omar Al Bashir, it must be noted that the AU is not a party to the Rome Statute as a collective body. Instead, only some individual African States are parties to the Rome Statute. This

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46 See, Decision Assembly/AU/Dec.221 (XII), adopted by the Assembly of the AU at its 12th Ordinary Session held in Addis Ababa, Ethiopia from 1 to 3 February 2009.
47 See, Communiqué of the 175th meeting of the Peace and Security Council of the African Union, 5 March 2009, paras 1 and 2.
48 Ibid Para 2 of the Constitutive Act 2000
49 Para 4 of The Constitutive Act 2000
50 Ibid Para 5
51 Ibid Para 6.
could be the reason for the UN Security Council’s rejection to the request by the AU. It is argued further that the request by the AU did not demonstrate a clear case of a threat to International peace and security to merit a deferral by the Security Council. The issue of the former President Omar Al Bashir’s prosecution cannot be solved by simply requesting a deferral. Even if the matter were to be deferred, it would still mean that former President Omar Al Bashir could be tried at some other future time. Relying on the decision by the Peace and Security Council of the AU, the African Union’s position is expressly stated in its decision of the AU Assembly on the ICC adopted on 3 July 2009 at Sirte, Libya. But, before this decision, the AU Assembly had adopted another decision on the application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan. In its decision, the AU expressed its deep concern at the indictment made by the Prosecutor of the ICC Moreno Ocampo against President Omar Al Bashir of Sudan. The AU warned that, in view of the ‘delicate nature of the peace processes’ underway at the time in Sudan, the approval by the Pre-Trial Chamber of the ICC on the application for the issuance of arrest warrant against President Omar Al Bashir would at that time ‘seriously undermine the ongoing efforts’ aimed at facilitating peace in Darfur. The AU Assembly went ahead and requested the Commission of the African Union to discuss the issue of the indictments against African leaders. Specifically, the Commission was required to do the following:

To convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements.

52 See, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Decision Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya, para 3 (‘The Assembly….Endorses the Communiqué issued by the Peace and Security Council (PSC) of the African Union (AU) at its 142nd meeting, held on 21 July 2008, and Urges the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, and as requested by the PSC at its above mentioned meeting, to defer the process initiated by the ICC’).
53 Decision on the Application by the ICC Prosecutor for the indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya.
54 Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221 (XII), adopted on 3 July 2009, Sirte, Libya.
56 Ibid Para 2.
57 Ibid Para 5
In addition, reacting to the UN Security Council’s position, the AU took a new perspective regarding the prosecution of former President of Sudan Omar Al Bashir by stating: [The AU Assembly] decides that in view of the fact that the request by the African Union has never been acted upon, the AU member States shall not cooperate pursuant to the provisions of Article 98 of the 1998 Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Bashir.\(^58\)

The AU decisions on non-cooperation with the ICC indicated on how African States were unwilling to cooperate with the ICC. This indicates clearly that the AU opposition to the ICC prosecutions poses a problem to prosecuting African individuals, including Heads of States officials responsible for international crimes. With particular reference to the arrest warrant issued against former Head of State of Sudan Omar Al Bashir, through analyzation of different sources it revealed that there are practical challenges in prosecuting Heads of State especially the incumbent ones.\(^59\) However, as the preceding examples indicate, the AU decisions not to cooperate with the ICC on the arrest warrant issued against former President Omar Al Bashir are not free from criticism.

African Non-Governmental Organisations (NGO) raised concerns over the decision of the AU on the former President Omar Al Bashir, reminding African States of their obligations under the Rome Statute, to which some are States parties.\(^60\) The Statement issued by representatives of African Civil Society Organisations (CSO) called upon African States parties to the Rome Statute ‘to reaffirm their commitment to end impunity for serious International crimes and uphold the values of accountability, protection of human rights and the rule of law, as espoused in the AU’s Constitutive Act.’\(^61\) African States parties to the Rome Statute were also called upon to ‘reaffirm [their] commitment to uphold (…) international and

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\(^{58}\)Ibid Para 10.

\(^{59}\)A letter dated 8 July 2009 from the Minister of Foreign Affairs and International Cooperation of the Republic of Botswana to Justice Sany-Hyun Song, President of the ICC.


domestic obligations stemming from [their] decision to ratify the Rome Statute of the ICC.'\textsuperscript{62} The AU contended that arresting and possibly prosecuting former President of Sudan Omar Al Bashir ‘would disrupt the peace process in Darfur.'\textsuperscript{63} The AU signaled its concerns that former President Omar Al Bashir was needed for the peace process in Darfur, and some authorities in Africa made allegations that the ICC is a creation of the Western powers or allies. It would appear that Africa had expressed its concerns that the ICC is largely portrayed as ‘imperialist’ imposition by powerful Western nations. But, it must be noted that the African Civil Society Organisations (CSO) and members of the legal profession have diametrically argued that ‘this is a misleading and unproductive approach to the Court, and which illustrates the urgent need to raise awareness about International criminal justice and how the ICC works throughout Africa.'\textsuperscript{64} The AU also seems to argue that arresting or prosecuting some African State officials for international crimes interferes with sovereignty of African States, However, it is important to know from the authorities at the ICC on this issue of selecting or targeting only Africans. The former President of the ICC, Judge Sang-Hyun Song, dismissed the claim which was raised of being political. Judge Song strongly argued, “And those who do not know that the ICC has sought none of the four situations currently before it could be forgiven for thinking that the Court has intended to have particular focus on Africa. Where facts are well understood, the Court enjoys broad support. But where they are not, there can arise efforts to exercise political influence on the Court.”\textsuperscript{65}

Despite the above defensive Statement by the former President Judge Song of the ICC, the real issue is why the Prosecutor of the ICC has not indicted any of the leaders from western powers such as USA, Russia, United State, North Korea, UK, France or Israel for their alleged crimes in Iraq, Afghanistan, Iran and Palestine, or in Libya (during the war in Libya in 2011). Despite the authoritative reports, such as the one by Judge Richard

\textsuperscript{62} Ibid Statement by Representatives of African Civil Society and the Legal Profession pg 3
\textsuperscript{63} Paras 2 and 3.
Goldstone submitted to the UN with recommendations that the Prosecutor of the ICC should initiate legal investigation in respect of the international crimes committed by Israel State officials and military commanders in Palestine. Arguably, the Prosecutor of the ICC can invoke his investigatory powers as he did for the Kenyan situation under article 15 of the Rome Statute in investigating crimes committed in Palestine, Iran and Iraq. However, the only obstacle is that States such as Israel and USA (unlike UK) are not parties to the Rome Statute. Nevertheless, should the UN Security Council act under its Chapter VII powers as per the Charter of the United Nations and refer the Iraq and Palestine situations to the ICC, the Prosecutor would be mandated. However this assertion can easily be defeated by the Veto powers from both the UK and USA, States that authorized their armed forces to invade Iraq and thereby committing international crimes.

As to Israel, it could be difficult for the UN Security Council to pass a resolution authorizing the ICC Prosecutor to investigate crimes committed in Palestine. This is so because Israel is an ally to both the USA and UK, and therefore that, any such proposal in the Security Council is likely be vetoed by UK and USA. The above part has demonstrated the real concerns raised by the AU regarding the operations and indictment processes which have been raised by the Prosecutor of the ICC towards African leaders. The following part presents criticism and challenges against the AU concerns based on international law principles.

A Critique On the African Union Concerns Towards International Law Principles: This Article maintains that African States must not deviate from what they had voluntarily subscribed to in the establishment of the ICC. It would be fair to argue that African States, including Sudan had participated in the initial processes leading to the creation of

67 For a critical understanding on Africa’s contribution to the creation of the ICC, see, SBO Guto, ‘Africa’s contradictory roles and participation in the international criminal justice system’ in Ankumah and Kwakwa (2005) 17-2 7.
the ICC. Even though it has not ratified it, hence not a State party to the Statute. It will be recalled that African States collectively in regional and sub-regional organisations had supported the establishment of the ICC. Besides, it is argued that the Darfur situation in Sudan was referred to the ICC by the United Nations Security Council. Further, thirty four African States are parties to the Rome Statute which means that such States are duty bound to cooperate with the ICC and the AU position not to cooperate with the ICC violates international law obligations arising from the 1998 Rome Statute. Additionally, it is argued that the African States parties to the Rome Statute are obliged to cooperate and punish persons responsible for international crimes. This translates into cooperating in the arrest and prosecution of perpetrators of international crimes, including assisting the ICC in this regard. Furthermore, it is argued that the AU’s sentiment that only Africans are targeted by the ICC is countered by the fact that some African personalities occupy positions at the ICC and that African States may have failed to use the complementarity principle. One must be mindful that although African States had ideally supported the establishment of the ICC, it is true that this does not mean they had accepted to be singled out by the ICC in its operation.

THE DUTY TOWARDS AFRICAN STATES TO PROSECUTE AND PUNISH INTERNATIONAL CRIMES

It should be understood that African States have an international obligation to prosecute and punish perpetrators of international crimes. Such obligation stems from the Rome Statute of the ICC. Sudan had signed the Rome Statute of the ICC on 8 September 2000. But, on 27 August 2008, a few days after the indictment of President Bashir of Sudan, the Government of Sudan, through its Minister for Foreign Affairs, Deng Alor Koul, notified the Secretary-General of the United Nations that it does not intend ‘to become a party to the Rome Statute’, and therefore that it ‘has no legal obligation arising from its signature on 8 September 2000.’ Available at the UN treaties depository, <http://treaties.un.org> (accessed on 15 August 2019).

69 Sudan signed the Rome Statute of the ICC on 8 September 2000. But, on 27 August 2008, a few days after the indictment of President Bashir of Sudan, the Government of Sudan, through its Minister for Foreign Affairs, Deng Alor Koul, notified the Secretary-General of the United Nations that it does not intend ‘to become a party to the Rome Statute’, and therefore that it ‘has no legal obligation arising from its signature on 8 September 2000.’ Available at the UN treaties depository, <http://treaties.un.org> (accessed on 15 August 2019).
Statute,\textsuperscript{70} Customary International law and other international law treaties.\textsuperscript{71} However, critics may argue that the 1998 Rome Statute does not contain an express universal jurisdiction provisions. Nonetheless, it is an international law obligation for States to either prosecute or punish international crimes\textsuperscript{72} (\textit{aut dedere aut judicare}).\textsuperscript{73} This is what is known as the duty to prosecute or punish individuals who commit international crimes. It must be recalled that such obligation has attained the status of \textit{jus cogens} under Customary International law. This is an obligation \textit{erga omnes}.\textsuperscript{74} Hence, African States have an international law obligation to cooperate with the ICC in arresting Heads of State who have committed international crimes to be prosecuted by the Court, yet it is important to note that African States should not perceive that their Heads of States and leaders are being targeted by the ICC as such.

CONCLUSION

In this Article, it has been shown that there is generally no legal mechanism on the African continent that addresses the question of prosecution of international crimes and immunity of Head of States officials at regional level. This is despite the 2005 resolution by the African Commission on Human and Peoples’ Rights to end impunity in Africa and implement the 1998 Rome Statute. However, the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (of the Great Lakes Region)\textsuperscript{75} is the only sub-regional mechanism that exists, and renders a very useful example for Africa which the AU should imitate.

\textsuperscript{70} The Preamble to the Rome Statute States that: ‘[…] Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’


\textsuperscript{74} See, Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (Bosnia Herzegovina v Serbia and Montenegro), ICJ Reports (2007), paras 439-450.

\textsuperscript{75} Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination (of the Great Lakes Region) of 2006
In summary, arguments presented by the AU against the ICC are based on imperialism, selective justice of targeting only Africa, peace processes, that the United Nations Security Council has ignored the calls for deferrals, that the Security Council has acted with double standards, and finally that, the issue of immunity attaching to Sudanese or Kenyan Heads of States officials arise in the cases before the ICC. All these arguments are credible in some way. It is true that at least geographically, the only cases and accused persons before the ICC as of 2011 come from Africa. It is also true that the case against former President Omar Al Bashir of Sudan raises immunity concerns. True is also the fact that the SC has not yet referred situations such as those in Russia, Syria, Iran, USA, North Korea and UK to the ICC. There is serious concern that even if proposals were to be tabled before the Security Council for such referrals, there is imminent danger of the exercise of veto powers by States like US and UK, which are responsible for the crimes committed in Iraq and Afghanistan. While the preceding arguments are valid, this Article opposes them, Legally, arguments against cooperation with the ICC are flawed in law because some African States are parties to the Rome Statute. Besides, by refusing to cooperate with the ICC over prosecution of former President Omar Al Bashir, African States violated their obligations in respect of cooperation in the arrest and surrender of suspects to the ICC, the Constitutive Act of the AU as well as Customary International law. The AU has not proved that Kenya and Sudan can effectively commence domestic criminal prosecutions in order that the Security Council may defer such situations. Moreover, deferrals do not necessarily do away with prosecutions before the ICC; they are only temporal suspension of prosecutions or investigations. This means that if national authorities do not act genuinely, the ICC can allow investigations and prosecutions. It is not clear whether by refusing to cooperate with the ICC over former President Omar Al Bashir, the AU protects immunity of African Head of States officials for international crimes, or it rejects impunity as per article 4(h), 4(m) and 4(o) of the Constitutive Act of the African Union. There is need for the AU member States, especially those which are parties to the Rome Statute, to support the ICC as per the Rome Statute, particularly under article 87(6) thereof.

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