THE ROLE OF THE ICC IN AFRICA AND THE INHERENT TENSION UNDER INTERNATIONAL CRIMINAL LAW

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ABSTRACT

Africa has recently become embroiled in issues arising from the International Criminal Court (ICC). The African Union (AU) has also expressed concern about how the court is targeting African leaders and believes that the court is infringing on African states' immunity and sovereignty. As a result, this paper seeks to expand on the ICC's position and why its relationship with African leaders may remain strained in the future.

Over centuries, the world has been at war with itself, and as a result, individuals and states have been accused of international crimes; these wars have given rise to international criminal tribunals to prosecute these individuals or government representatives, as the case may be. The roles of these tribunals and other courts will be discussed in this paper, as well as their contributions to the formation of the ICC in its complexities and, most importantly, its relationship with African countries.

The International Criminal Court was established in 2002 as the first of its kind, with the mission of trying individuals accused of international crimes such as genocide, war crimes, crimes against humanity, and crimes of aggression. Since its inception, the court has been at odds with the African Union, prompting some African countries to withdraw their signatures as members of the court.

Some other African countries that are still signatories have threatened to withdraw as well, seeing the world's first permanent international court as an attack on the continent. Many African and non-African scholars have therefore wondered how the court's relationship with

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Africa could be developed and how the ICC could be embraced by all as the true dispenser of justice.

This paper would look at some data through primary sources like online reports, legal documents and, other literature that have dealt with the subject matter; critically x-raying the position of the AU and African countries in the context of justice and the ICC.

This study will expose the negative reaction of African leaders that oppose the actions of the ICC with claims that the court has been politicized and designed to victimize African politicians. However, it is important to point out that some African politicians have used the court to haunt their political rivals, while few are of the opinion that it genuinely protects victims and punishes offenders of human rights.

***Keywords*:** Africa, Government, Human rights, Immunity, Impunity, International crimes, Justice, Sovereignty

INTRODUCTION

One of the newest branches of international law is international criminal law, under this law, the idea is to combat international criminality and some scholars believe that beyond just that, it also covers the aspects of international accountability and criminal justice. It could, therefore, be correct to say that this branch of international law is out to define rules guiding international criminal justice and rules that can control the principles and procedures involved in the prosecution and punishing of international crime offenders.

Categorized into substantive and procedural law, international criminal law as a branch of international law helps in a better understanding of international court decisions; the general sources of international law are prevalent under international criminal law.

International criminal law has the backing of international law under the ratione materiae which deals with jurisdiction regarding the kind of case and the kind of settlement to be applied and also ratione personae which simply implies "by reason of his person" - courts authority to bring a person into trial.[i] The legality and mandate of international courts and tribunals' decisions

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based on international criminal law are explained in "Article 38 of the Statute of the International Court of Justice." This article's content includes:

1. “The court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

The Rome Statute, which founded the ICC, established it as a permanent court with the legal authority to pursue people for international crimes regardless of their political background or clout. The ICC was initially well received in Africa, but the relationship between the court and African countries began to deteriorate not long after its inception, with various African countries being accused by the court of being involved in one or more international crimes; at this point, the international community began to witness a new paradigm in the relationship, as the AU pointed fingers at the international court for victimization.[ii]

The Amitav Acharya Norm model was utilized to interpret the various degrees and stages of the AU-strained ICC's relationship. The ICC has opened more cases in Africa than anywhere else in the world since its inception, according to international legal experts, in countries they consider to be major offenders of human rights abuses; some of these countries, according to the court, include The Gambia, Burundi, Sudan, and Kenya.[iii] These countries today have come to become some of the strong oppositions to the International Criminal Court. It is crucial to note that some African countries have continually stood behind the ICC, opining that the

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continent needs the court for political stability and accountability while the continent develops its own regional international court.

The continent has begun the process of establishing its own international criminal court, but the project's rapid progress has been hampered by a lack of suitable funding. Another reason, according to some experts, is that some AU members are hesitant to see this court come to fulfillment. If Africa does not want to continue to be pulled into legal disputes by the ICC, it must take the establishment of this court extremely seriously. Africa must decide whether to establish its own court or rely on the ICC to prosecute suspected criminals, as the latter looks to be the only option now available.

BUILD UP TO THE CREATION OF THE ICC

The end of the Cold War marked the beginning of a new matrix in international law, especially international criminal law. It was the United Nations International Law Commission responsible for drafting a treaty that would later help establish a permanent criminal court in place of the extraordinary court that was previously used. The idea was approved by the UN General Assembly, paving the way for the creation of the ICC.

UN General Assembly Resolution 44 was ratified at the 44th session in 1989, calling for the establishment of an International Criminal Court to prosecute persons and states convicted of international drug trafficking and other international crimes. At the 11th meeting of the UN Committee on Crime Prevention and Control in 1990, the Committee proposed the establishment of an International Criminal Court, which would have the responsibility of arresting and prosecuting the perpetrators of international crimes using universal jurisdiction. The crimes highlighted at the time were crimes of grievance consequences like genocide, crimes against humanity, war crimes, drugs and arms trafficking among a few other international crimes that violate human rights.[iv]

The International Law Commission for the next nine years has left the creation of this international court in your hands. During the deliberations, there were several key members who expressed concern about the composition and complexity of the court and how the court would function as an arbiter of international justice without any interference. However, the

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need to establish such a court was essential and, among other interested parties, jurists continued to promote it. In 1990, the International Law Commission recognized many of the concerns of these important stakeholders, stating: "It has now emerged that international crime has achieved such wide dimensions that it can endanger the very existence of States and seriously disturb international peaceful relations."[v]

Many UN member states generally agreed with the idea of a permanent international criminal court, but opinions differed on the architecture and scope of the court's jurisdiction. African states, both individual states and regional blocs, have also been vociferous in support of the establishment of the court and have shown seriousness throughout the discussion process leading to the establishment of the court.

The idea of establishing a court has received early acclaim given its benefits and purpose, and more importantly, how it contributes to global peace and security. In its opening reports, the International Law Commission highlighted the benefits of membership in court and pledged to design it in a way that has uniform legal application and is neutral and free of any kind of subjectivity in their judgments.[vi]

The uniformity and objective application of the law will be described in detail in their report one year later, as important for a viable and sustainable international order. In its 1992 report on the question of international criminal jurisdiction, members also argued that an international criminal court would be an international arbitrator of justice in cases where they believe that justice cannot be done through domestic courts.[vii]

The Commission stated that any cases of crimes against humanity were not punished at the national level because they were perceived as lacking the ability to manage the cases or the damage caused by the suspects. This causes some members to have some jurisdiction and interests at the national / state level when the international court falls into a similar dilemma and the state itself is prosecuted and is about to be prosecuted by the international court. I thought there was a possibility.[viii]

The ICC was envisaged to be that tie breaker in situations where states fail to adjudicate crimes related to human rights violations; and in the report of the Working Group, the following were delivered "…the task of constructing an international order, an order in which the values which

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underlie the relevant rules of international law are respected and made effective, must begin somewhere."[ix]

The drive for global peace and security was strong in the desire to establish an international criminal court to deal with international crimes and bring offenders to book; it was therefore logical to bring such a court to fruition. And as explicitly put by the Working Group "Unless responsibility can be laid at the door of those who decide to commit heinous crimes of an international character, the suppression of those crimes will be that much more difficult." This statement involves two key components: (1) that an international criminal court would serve to enhance respect for and the efficacy of international law, and (2) that international legal responsibility from an international criminal court would contribute to quashing those crimes.

THE ROME STATUTE OF THE ICC AND ITS JURISDICTION

On the final day for the signing of the Rome Statute which was December 31, 2000, the ICC already recorded 139 signatories while 27 had already ratified the Statute with their national legislatures.[x] By April 11, 2002, the court had obtained the required number of states ratifying the law and had formally commenced its legal proceedings as an international court. Before the International Criminal Court was formed on July 1, 2002, a total of 66 states ratified Roman law. It can therefore be said that this court was established as a fundamental agreement with Roman law.[xi]

The Statute is divided into 13 sections with 128 Articles that govern the Court's functions, jurisdiction, the composition and administration of the Court, the trial process, and international cooperation and judicial assistance the Court provides to states.[xii] To date, 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them, 33 are the African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from States. Per article 112 of the Rome Statute, the Assembly of States Parties meets at the seat of Court in The Hague or at the United Nations Headquarters in New York once a year and, when circumstances so require, may hold special sessions.[xiii]

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Each state party has a representative in the Legislative Assembly who may have options and advisors; Rome law further states that each state party has one vote, although all efforts will be made to reach a decision by consensus. States that are not parties to the Roman law may participate in the work of the Assembly as observers without the right to vote. The President, the Prosecutor, and the Registrar or their representatives may also, as appropriate, take part in the meetings of the Assembly.

The ICC is the world's premier permanent International Criminal Court that is set out to try individuals for international crimes. The Court is special in its design because it was established by a treaty. It investigates and prosecutes individuals, not states charged with heinous crimes that are of concern to the international community.[xiv] The court's aim is to provide justice for victims of grave crimes, promote the rule of law, protect human rights, and promote global peace and security by joining the global fight to end impunity through international criminal justice. It has as one of its primary objectives, the need to ensure that heinous crimes do not go unpunished.

The ICC has no retroactive jurisdiction, what it entails is that it has jurisdiction over crimes committed on or after July 1 2002. The International Criminal Court also has jurisdiction in situations where crimes committed were by a State Party national, or in the territory of the State Party, or in a State that has acquired the jurisdiction of the ICC. It also has jurisdiction when crimes are referred to the court prosecutor by the UN Security Council pursuant to a resolution adopted under Chapter VII of the UN Charter.[xv]

The Rome Statute of the ICC grants jurisdiction over four international crimes and these are: genocide, crimes against humanity, war crimes, and crime of aggression, the last of which was adopted in an amendment to the Rome Statute in 2010.[xvi] The Rome Statute categorizes crime of genocide as any act committed with the intent to destroy, in whole or part, a national, ethnical, racial or religious group.[xvii] When members of a group or ethnic extraction are killed, this is also categorized as genocide; committing heinous crimes against a people which harms their lives and calculated to cause them any form of destruction in whole or in part, imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group.[xviii] Crimes against humanity entails harmful breach of human rights

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committed as part of a widespread, large-scale or institutionalized attack aimed against any civilian population, with knowledge of the attack.[xix]

Crimes against humanity include murder, rape, imprisonment, enforced disappearance, genocide, slavery and violence against women and children, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, violence, racism and deportation.[xx]

War crimes as ascribed in the Rome Statute have to do with serious violation of the Geneva Convention of 12 August 1949. According to this Convention these are: the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; inhumane treatment including biological experiments, unlawful deportation or transfer or confinement; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.[xxi]

Last, according to the Rome Statute, crime of aggression has to do with the use of armed force by a State against the sovereignty, integrity or independence of another State or in any other manner inconsistent with the Charter of the UN.[xxii]

Crime of aggression means the planning, preparation, initiation or execution, by a government official to meticulously exercise the 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 UN.[xxiii]

These acts include attack by the armed forces of a State on the land, sea and air forces, or marine or air fleets of another State and blockade of the coasts and ports of a State by the armed forces of another State.[xxiv] By cauterization, this crime was adopted at the Review Conference of the Rome Statute which took place in the Ugandan capital of Kampala in 2010. At the end of the conference, States Parties agreed on the definition and interpretation of crime of aggression, ratify, and vote on the amendment to grant the Court jurisdiction over the crime.[xxv]

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AFRICAN PARTICIPATION IN THE CREATION OF THE ROME STATUTE OF THE ICC

African countries and the ICC built their relationship from the onset and looked like promising partners, going forward. Most of the African countries at the time saw the court as a respite and a solution to Africa is many human rights violations. African Heads of States played vital roles in establishing the court.[xxvi]

These African countries put in a lot during the negotiation phase of the Rome Statute which eventually led to the creation of the ICC. [xxvii] Their dream was to see a court dedicated to the prosecution of grievous international crime offenders such as genocide, crimes against humanity, war crimes and crimes of aggression. In other words, it could be said that Africa made it possible for the ICC to see the light of the day and what this demonstrates is that the people of the continent appreciate the importance of such a court, and know the benefits it could bring to the region when issues of serious human rights abuses arise.[xxviii]

The role the African States and politicians played in the establishment of the ICC cannot be underplayed, the zeal that was showed by the various States and the AU was tremendous, not equally forgetting the role the African Civil Societies played during that period to actualize the ICC in 2002.[xxix] These African countries sacrificed a lot to bring the court to fruition and were in the forefront of pushing agendas to create the ICC and even took the bold move just before the Diplomatic Conference in Rome 1998, to cooperate and together support the court after it was established. Regional blocs such as the Southern African Development Community (SADC) organized conferences, workshops, and other ICC related activities to agree on a common goal of the Court.[xxx]

The story of the ICC and SADC is quite an interesting one to highlight at this point; SADC took it upon itself to push for the creation of this court by having several conferences to discuss it. First, it convened in Pretoria, South Africa in September 1997 and again in June 1999 to discuss the basic principles of consensus that they wanted to be included in the creation the ICC.[xxxi]

Before the meeting that took place in Pretoria, representatives of the governments of Lesotho, Malawi, Swaziland, Tanzania, and South Africa took part in a discussion concerning the

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creation of the Court when the International Law Commission (ILC) presented a draft statue to the UN General Assembly in 1993.[xxxii] SADC Member States later decided to come together and have a common stance to make their negotiations meaningful.[xxxiii]

The major actors representing SADC included legal experts, academics and non-governmental agencies of the participating states proposed the following basic principles or Common Statement as the basis of their negotiations for the formation of the ICC. SADC states agreed:[xxxiv]

- To affirm their support for the early establishment of an international criminal court.

- The ICC should be effective, independent, and impartial and should operate within the highest standards of international justice. Also, the composition of the Court should reflect equitable geographical representation.

- The Court should be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective. Moreover, States should not attempt to shield the accused from justice.

- To affirm that human rights must be fully respected in all aspects of the ICC Statute, particularly those relating to the rights of the accused and the right to a fair trial.

AFRICA AND THE ICC

This paper is designed to find out answers to the questions posed regarding the lack of confidence of African States in the efficacy of the ICC to deliver justice and stand by the ideals that guided its creation. There have been some internal and external issues that have led to the current unpleasant relationship between the ICC and the African States; and the issue that bothers most legal experts is that of the referrals by the UN Security Council to the court which many believe has been unfair.[xxxv]

Those referrals irk African politicians, who feel that the crimes that are within the purview of the ICC are committed only by the African States, which they argue is incorrect. The international crimes that are heinous and pose a threat to global peace and security are

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happening outside the continent, yet, the United Nations Security Council is not looking into them and making any referrals to the court, rather, it's strictly focused on events happening within the African region.[xxxvi] This has made many African politicians view the ICC differently. They see it as selective justice of some sort and a complete diversion of what the court should be doing.

At the moment, there are agitations from the African States to overhaul the ICC and make it less biased and this call according to some scholars is genuine and should be taken seriously as the court cannot function properly without the full support of all its members,[xxxvii] particularly the overwhelming members it has from Africa; even countries with authoritative governments are still backing these governments as against the actions of the ICC, calling the ICC an anti-African criminal court.

The court has been severally accused of being a political tool of the strong and powerful countries rather than a neutral arbiter of international justice as contained in the Rome Statute. As it appears at the moment, the ICC has not taken the concerns of the African leadership seriously and is yet to effectively and appropriately allay address these concerns. African politicians are convinced that the ICC is a biased institution and solely setup to target Africa and its leadership.

One of the biggest steps taken by the AU in regards to the ICC was at the summit in Addis Ababa, Ethiopia, where the resolution read that no serving African head of state should be forced to appear before an international criminal court and that the petition that the ICC should cease to try the Kenyan President, Uhuru Kenyatta. So, far, the AU has been the loudest voice for Africans but not many African countries have truly thought of the possibility of withdrawing from the ICC.[xxxviii]

Some African leaders are of the opinion that the ICC means well not only the big players but also for all other members and an easy case to cite is the response of the government of Botswana to the rhetoric of the AU; Botswana believes that Africa needs the court and it is not a wise decision to withdraw, urging African countries to uphold their pledge under the Rome Statute.[xxxix] Former UN Secretary-General, the late Koffi Annan also reiterated the stance of Botswana by asking African countries to put faith in the ICC and that the continent is better with it than without it.

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The position of the AU is that it does not feel comfortable with the imposition of applications to combat international crimes against humanity in Africa, despite the obvious connection the two organizations have when it comes to fighting these serious crimes. The ICC is an international court and therefore should be neutral in its decisions and judgments, the AU on the other hand is a political institution that should consider the place of impunity in governance and design a method to address it without being confrontational in reaching an outcome.[xl]

There is the need to reconcile the AU and the ICC and efforts have been made in the past to address this. One of them being the decision to of the ICC to make the former Gambian Justice Minister, Fatou Bensouda the chief prosecutor of the court, but this did not work out as the Gambia has equally decided to exit the international court.[xli]

The international community is hoping that the AU, African leaders and, the ICC would resolve their impasse for the sake of global peace and security. One of the suggestions is that states should be allowed to investigate and prosecute crimes within their jurisdictions, and the AU can aid in such legal activities particularly when a state is dealing with an individual that has fled his country to another seek refuge and protection in another African country.[xlii] The AU can assist in repatriating these individual, so they can face justice where the actual crimes were committed.

The international court has repeatedly said that its essential that the AU and African countries maintain a great degree of sovereignty and judicial control over crimes committed within their borders, rather than referring them to the ICC which will ensure that "justice is not just be delivered in the international space but administered and provided at the national level" [and that "victims would not need to be taken far away but closer to the legal proceedings."[xliii]

In Liberia after the civil war, the world witnessed a clear example of how this formula could work. The main culprit in that crisis, Charles Taylor was tried with the approval of Liberia under the Special Court of Sierra Leone located in The Hague, for his role in aiding and perpetrating war crimes.[xliv] Many years after the independence of all African countries, the region is yet to develop its own local judicial system to handle cases of this nature and that explains why these cases continue to be referred to the international court.

The example of Liberia and those of Sudan and Kenya show that there are huge gaps with the dispensing of justice within the African continent. It does not say well of the region that the

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international court has to be called in all the time to resolve human rights crimes that occur within the continent. This according to some scholars is a failure on the part of the AU and African politicians to design a functional justice system for itself.

It is expected, therefore, that the AU would push its members to take that bold step to institutionalize a legal system that suits its peculiarities; a legal system that can address the African problems with the workable African solutions. A system that can boldly without bias try leaders accused of impunity so that the ICC would not have to be called upon all the time.[xlv] This has several dimensions, and a critical one is the fact that it will help protect the sovereignty of African states and eliminate any concern of foreign interference that could harm democracy and the rule of law within the region.

AFRICAN STATES ATTEMPT AT ATTACKING THE ICC

The AU summit that took place in Addis Ababa, Ethiopia on January 31, 2017, was very fundamental in the relationship between the ICC and the African States. In a non-binding decision, agreed to a plan for Africa's collective withdrawal from the ICC.[xlvi]

There have been calls and plans for the establishment for the African criminal court, but there have been no concrete timeline or plan of action towards an actual date, but stakeholders continue to press for the fortification of this judicial body to take care of human rights violations within the region and reduce the influence of the ICC on member states of the AU. The initial withdrawal of countries like South Africa, Burundi has further exacerbated this call[xlvii] and many observers are of the view that sooner rather than later, this dream will be actualized.

The Gambia withdrew as well only for the current President, Adama Barrow to rescind that decision in a letter that was addressed to the UN where he stated his country's full commitment to the Rome Statute, human rights protection and, the International Court.[xlviii]

South Africa was initially blocked by the High Court sitting in its country from withdrawing from the ICC, but the country has since then also rescinded its decision to withdraw from the ICC. These initial withdrawals then make one wonder why such an action was taken in the first instance and what occasioned the change of mind. But one thing is obvious, African countries

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are not contended with the operations of the ICC and continue to ask for reforms to make them feel more comfortable as members.

Burundi's National Assembly voted to withdraw from the ICC on October 12, 2016, earlier that year, the ICC had started a preliminary examination into Burundian political violence alleged to have occurred between 2015 and 2016.[xlix] Disagreeing with this move, the government of Burundi attacked the ICC and questioned its involvement, claiming that it would sour negative forces and their supporters to commit additional crimes.[l] For the government of Burundi, the issue was not that of the allegations labelled against it in regards to human rights abuses, but that the court was an imperialist one and should not be tolerated in Africa. Labelling the ICC an "instrument" used for the purposes of destabilizing the world's poor nations, the government accused the Court of pursuing "a regime change agenda, masterminded by Western powers."[li]

The government of Burundi in its press release insinuated that it had been fighting terrorists groups that have been causing political havoc within the borders of the country and that those are not political enemies but enemies of the people of Burundi. The government believes that's these groups are being funded and aided by certain individuals and organization from the West The Burundian government further claimed that these western organizations were not only supporting terrorist groups against it, but that they were equally using is financial clout to influence the Court in its case selection.[lii]

According to the government, this judicial design has ended up breeding a court that is "an instrument of political pressure on the Governments of poor countries or a means of destabilizing them." [liii] Therefore, to the government of Burundi, the court's investigations of African politicians like what is obtainable in the Burundi case have been "under the impulse of the great powers."[liv] The decision of Burundi to Join the ICC was to fight impunity and was determined to put all its resources into the fight. But from recent events, the government of Burundi believes that the ICC's intrusion violates the Rome Statute's complementarity principle and amounts to "a serious and flagrant violation of sovereignty and national security."[lv]

The government further stated that a few global power are utilizing the reach of the court to compel and enforce the principles of international law down upon the government and people

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of Burundi and that the government has refused to submit to the Court's jurisdiction in an effort to protect its sovereignty; calling the global powers hypocrites that prey on weaker nations.[lvi]

A week after the decision of Burundi, South Africa made a similar move and begins the process of withdrawing from the International Court.[lvii] Just like in the case of Burundi, the South African government criticized the Court for targeting African politicians and causing Africans to "continue to unjustifiably bear the brunt of the decisions of the ICC," making a strong reference to the Sudanese case as the most recent example; insinuating that the court was strictly out to force regime change in Sudan.[lviii]

In the case of South Africa and what the government perceives as imperialist control, the criticism was harsher than that of Burundi, the government went as far as reminding the ICC of South Africa's role and importance in Africa and why it is not a country to be kicked about using judicial shenanigans. Under Article 89(1) of the Rome Statute, States parties are required to adhere to the ICC's arrest warrants, irrespective of who the court wants to arrest and this includes a serving head of state who one would expect should be protected by diplomatic immunity.[lix]

When in June 2015, the former Sudanese President Omar al-Bashir visited South Africa for an AU summit and left without arrest. The government of South Africa in its defense stated that the failure of his government to arrest Bashir can be seen in the AU treaty obligations, presumably the head of state immunities, as a legal obstacle to handing over heads of state like Omar al-Bashir.[lx] The government of South Africa went ahead to engage with the ICC to discuss the matter, as well as to propose amendments to the Rome Statute so as to find a solution to the Statute's consulting and cooperation requirements for members, again presumably in relation to head of state immunities.[lxi]

Also during this period, the government of South Africa was in talks with many other African leaders to see how fast the region can work towards realizing its own human rights court and court for international crimes.[lxii]South African courts, at the time of the visit of Bashir were unsatisfied with the reasons cited by the government for failing to apprehend Bashir. Having issued an emergency court order in 2015 for Bashir's arrest at the Johannesburg Summit, the High Court in 2016 reiterated the unconstitutionality of the government's failure to arrest

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Bashir, calling out the government as disgraceful and irresponsible, and that further prompted the court to stand firm against South Africa's withdrawal bid from the ICC.[lxiii]

The government of South Africa in its defense for filling for withdrawal claimed that one of its primary duties was to promote peace and stability in the region and its obligation under customary law was to uphold that as well. South Africa's Diplomatic Immunities and Privileges Act of 2001 extends diplomatic immunities and privileges to heads of state, among other highly placed politicians.

According to the official report of the government of South Africa, it was reported that the Rome Statute's requirement to arrest indicted serving heads of state impeded South Africa's ability to engage in international relations with other countries, especially those countries undergoing civil unrests; and in the light of that, the country's diplomatic responsibilities forced the withdrawal from the ICC.

Just a few days after the government of South Africa pressed for its withdrawal from the court, the government of The Gambia took a similar initiative. It was precisely on October 25, 2016, that the representative of the government of The Gambia, Sheriff Bojang, highlighted his country's withdrawal reasons by pointing primarily to the Court's selective prosecution of African leaders; in the words of the Gambian spokesman, the ICC is a tool "for the persecution of Africans and especially their leaders" and an institution that has turned a blind eye to Western crimes."[lxiv]

The report of the government of The Gambia pointed an accusing finger to at least thirty Western countries that had committed "severe war crimes against independent sovereign states and their citizens" but had gone without any interrogation by the Court. Reiterating the same imperialist motives as earlier heard from the governments of Burundi and South Africa,[lxv] the government of The Gambia described the court as the "International Caucasian Court" and accused it of being up simply to humiliate African leaders.

Leading up to their withdrawal, President Jammeh in a 2015 meeting with Chief Prosecutor Bensouda be held accounting for its failure to investigate into what he described as a serious crime involving the EU in its handling of African immigrants that had led to the death of so many young African men and women.[lxvi] Just like in the previous cases of Burundi and South Africa, The Gambia is of the same sentiment that the ICC is just another institution designed

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to target Africa and promote Western dominance in the region.[lxvii] This moved was however stopped by the incumbent President of The Gambia, but one thing that is worthy of mentioning is that African politicians still view the court as a western tool for the continued domination of Africa.

AU'S CRITICISM AND OPPOSITION TO THE ICC

The African States and the ICC started off as great partners and friends with great enthusiasm of having an international criminal court that would protect human rights violation around the world and in particular in Africa, but all that hope began to fade in 2007 when the African States began accusing the court of victimization and biases.[lxviii] The AU which has 55 members at the moment is opposed to the ICC and has encouraged its members to cease to comply with directives from the court.[lxix] The position of the AU on the matter is simple and, that is "non-cooperation" and this has caused legal experts to suggest that the ICC might potentially lose its largest regional bloc.[lxx]

The future of the court now hangs in the balance according to some scholars and this is largely because of the ongoing impasse between it and its African members. The AU remains critical of the way and manner the court treats African leaders and questions the credibility and neutrality of the court; particularly during the Kenya and Sudan cases. The arrest warrant issued on the former Sudanese President, Omar al-Bashir in 2009 further exacerbated the tension.[lxxi] The case against Bashir was a referral by the UN Security Council that claimed that the violence in Darfur had taken the lives of about 200,000 civilians and displaced about 2.3 million others. The court was of the view that Bashir should be arrested for war crimes, crimes against humanity and genocide. Bashir became the first serving head of state to be indicted by the court, leading to apprehension within some quarters in the African region. In the response of the AU on the matter, it was reported that the organization felt that Africa was being targeted by major powers and the referral was unfair since it undermined the ongoing peace process aimed at facilitating an early resolution of the conflict in Darfur.[lxxii]

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At the 13th Ordinary session of the AU meeting of African State Parties to the Rome Statute of the ICC on 3 July, 2009 in Addis Ababa, Ethiopia, the leadership of the organization urged members to cease cooperating with the ICC and them to start the process of withdrawal.

It specifically cited the Sudan case and called all members to disregard the court's directive to arrest the President.[lxxiii]

The AU asked the UN Security Council to defer the court's legal proceedings on Omar al-Bashir for another 12 months by citing Article 16 of the Rome Statute of the ICC.[lxxiv] The President of Kenya and some members of his cabinet were also indicted by the court in 2011 in the wake of post-election skirmishes of 2007-2009.[lxxv] The ICC had charged Uhuru Kenyatta and his Vice-president William Ruto of sponsoring hoodlums that perpetrated the post-election violence in which about 1,200 civilians were killed, along with 3,000 rapes, 350,000 incidents of forceful removals, 3,561 incidents of grievous bodily injuries, 117,216 incidents of destruction of properties and 41,000 cases of destruction of houses.[lxxvi]

The ICC prosecutor initiated investigations on his own accord (proprio muto power of the prosecutor) since the domestic legal courts could not prosecute the alleged violators.[lxxvii] The AU insisted that the Kenyan legal issue should be referred back to the national legal institution. The organization repeatedly stated that the case brought by the court against the President of Kenya and his vice be deferred until when they both leave offices.[lxxviii] The court dismissed this request and this prompted the decision of the AU to call on all its members to withdraw their membership from the court.

In January 2012, at the 18th Ordinary Session of Assembly of the AU heads of state and governments meeting in Addis Ababa Ethiopia, the AU reaffirmed its decision to urge all members not to cooperate with the ICC and called on all members not to abide by their decision or face disciplinary actions from the union.[lxxix] There was a request for the withdrawal of ICC backing and non-cooperation with the legal institution as their request to defer both cases was turned down.

The defense of the AU was explicit as it insists that serving heads of states and their officials should enjoy immunity from prosecution by the ICC. The top hierarchy of the AU was also skeptical of the way and manner the court had been treating African politicians, calling such treatments "politicization and misuse of indictment against African politicians".[lxxx]

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In the words of the AU representative, the ICC now function as an anti-Africa court and set out to misrepresent Africa before the international community. He stated that the court sole attention on Africa was undermining the efforts of African leaders rather than helping these leaders solve the problems.[lxxxi] The argument of the union is that by pressurizing African leaders, the ICC is trying to compromise the sovereignty of African states and the peace and stability that the people of the region enjoy. The AU has therefore resolved that no charges from the ICC shall continue or proceed before the court or any international tribunal against any serving African head of state or any top government official acting under the directives of the government.

The AU further advised all member states that wish to refer any case to the ICC to first bring it to the union for clarification and approval. The AU also criticized the ICC for using Africa is the world's lab for trying out new international law. The EU was particularly mentioned by the Au for spearheading this agenda.[lxxxii]

The ICC has also been called out as a neo-imperialist by the AU and a tool that illegitimately targets African politicians. The AU has queried the court process and its operation in Africa and believes that it is a travesty. The AU insists that the lack of cases outside of Africa at the court has raised suspicion about the credibility of the ICC. In summary, the AU strongly believes the ICC is a hegemonic instrument of western powers that is targeting or discriminating against African politicians.[lxxxiii]

IS AFRICA'S CASE AGAINST THE ICC LEGITIMATE?

There are some cases of referrals to the ICC made by African leaders and some of them are those of cases from Uganda, the Democratic Republic of Congo and the Central African Republic. The government of Mali has also referred a domestic case to the court.[lxxxiv] But the UN Security Council referred the situations in Sudan and Libya based on advice from the UN Commission of Inquiry and against the background that Sudan had not made serious efforts to effect meaningful prosecution of the perpetrators of human rights violations in Darfur. The Kenyan situation was initiated by external sources but the argument is that the action taken was based on information received from African sources, principally from former UN Secretary-

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General late Kofi Annan, who was the head of the panel to resolve the post-electoral violence.[lxxxv]

Also, the case involving Ivory Coast was also initiated by the Office of the Prosecutor, but as always the case, proprio motu prosecution calls for a Pre-Trial Chamber confirmation on the grounds of the evidence and deference to the relevant state's willingness to prosecute. There is the need to ensure that the allegations have merits after the preliminary hearing and the court would then issue a warrant confirming the alleged charges, unless in a situation where it was clearly stated that there was reasonable basis to establish that an accused politician is criminally responsible for the offences.[lxxxvi] Other instances are those of Bahar Idriss Abu Garda (Sudan) and Callixte Mbarushimana (DRC). And the ICC did not confirm the charges on Joseph Arap Sang of Kenya.

As it is understood the confirmation hearing asks that the Prosecutor establishes substantial grounds that an accused politician or government representative committed the alleged offense. This waterproof standard makes sure that the allegations are verifiable and also ensures that this does not take away the one legal fact that all accused remain innocent and that the office of the Prosecutor has the legal burden to prove their offenses, a required higher than previously used in pre-trial proceedings.[lxxxvii]

The court acquittal of Mathieu Chui goes to show that the Court proceeds on the evidence brought before it; and also in the case of Chui, the ICC found that the Prosecutor had failed to prove beyond reasonable doubt the charges of crimes against humanity and war crime as well.[lxxxviii]This action from the court brought unpleasant reactions from observers who believe that the victims deserved justice but could not get it. The court also in the first instance refused to confirm the allegations against Laurent Gbagbo, former President of Ivory Coast but later did.[lxxxix]

The Court claimed that, while there was insufficient evidence to confirm those allegations levied against the former President, the evidence available looked were vague and leaves the Chamber with no choice but just the option of declining to confirm the charges'. Therefore, the ICC postponed the case to allow the Prosecutor to collect further evidence.

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Which way out for Africa and the ICC:

The job of the domestic courts is to protect citizens from human rights violations and to preserve the sovereignty of a state by carrying out such an assignment, every state meticulously guides its sovereignty and that explains why the prosecution of individuals at the supranational level remains a teething and controversial issue. This explains why some legal scholars believe that courts within the African continent possess very limited legal powers and always find themselves at loggerheads with other regional bodies.[xc]

The Rome Statute envisaged this possible conflict between sovereign states and the ICC and addressed it through its supranational criminal adjudication which recognizes the primacy of the domestic legal system.[xci] Legal experts have suggested that to work in harmony, African leaders need to commit to prosecuting international crimes within their jurisdiction i.e. in their domestic courts rather than waiting for the ICC to get involved and start a tussle with then after.

African will continue to prosecute political leaders as victims will continue to demand justice and as contained in article 1 and article 17 of the Rome Statute, states are to take charge of international crimes committed within their borders and by their citizens. The purpose of the ICC is to complement national jurisdictions that are unable or not legally capable to prosecute international crimes.[xcii]

According to the Rome Statute states the principle of complementarity states that it does not intend the ICC to take the legal position of a domestic prosecutor; however, this application as explained by the court has been criticized by some scholars who believe that contrary to the initial statements endorsing the policy of proactive complementarity, the Prosecutor has moved away from the principle, channelling its efforts elsewhere instead on direct prosecution of international crimes.[xciii]

These scholars posit that the ICC should instead be involved in a more proactive complementarity and enjoin members to prosecute international crimes; they further submit that the prosecutor encourages and at times even assist domestic courts in prosecuting international crimes themselves.

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There are benefits to this legal relationship but equally have damaging risks to it because the state might at some point feel uncomfortable when the court begins to get involved beyond what the government can tolerate. The court, therefore, would have to approach the affairs of the state with utmost caution and remain vigilant at all times to avoid overstepping the bounds. Some scholars suggest that the ICC should seek the services of experts in the area of capacity building to accommodate non-state actors and NGOs when and where necessary.[xciv]

But one important proposal being put forward by legal experts across the continent is the need for the leaders to develop an African legal framework and capacity to try international crimes within the region which would help eliminate this bickering between the ICC and the AU. Africa can do away with any international court or tribunal but only when it has successfully established one it would call its own.

CONCLUSION

The crux of the issue is that only African countries have been indicted before the ICC, which has sparked a slew of conspiracy theories as to why this is the case. According to some observers, the court has presented substantial evidence to support the claims leveled against these African leaders. Some cases have also been subjected to a full judicial review before being presented to the court. The fact that some of these instances are self-referrals by states and that prosecutorial claims have been scrutinized leads some scholars to assume that the African case has been exaggerated by the states.

The AU's position on the ICC is clearly guided by political intentions; it has to do first with politics before international law or any proof of international crime within the legal realm. But it is also clear that the AU's actions toward the ICC and its engagement in international criminal justice and geopolitical stance would eventually lead to some form of conflict; the issue of sovereignty and respect for domestic judicial systems overwhelms the issue of international criminal justice and geopolitical stance.

It is safe to say that other regions of the world have been spared the trouble of international criminal prosecution, but some legal scholars are of the opinion that the ICC might get into much more trouble if it decides to spread its wings across the entire regions at the same time;

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the ambition that a single court can bring justice to the whole world all at once is an uphill task no doubt; particularly when the presumed offenders are high-level politicians and in some cases serving heads of state.

Independent states continue to protect their sovereignty irrespective of their region or continent, so the reaction of African leaders and the AU should not be perceived as unique. The current relationship between the ICC and African states is a clear demonstration that the concept of creating a single permanent international criminal court to act as the principal and overriding court and arbiter of international criminal crimes would face challenges from states.

The argument of some scholars is that this position of the court is why the major superpowers did not sign up to the Rome Statute and even the US that initially signed up has since withdrawn its membership, just two years after signing up to it. Some of the major players in the international community that are not members are China, India, Iraq, Libya, Yemen, Qatar, and Israel.

The issue between the ICC and the AU is clearly a political one and therefore, the idea of using international law to bring an end to impunity is now relegated to the background as politics prevails. But one thing is critical, the misfortune of the victims of international crimes continues to force the debate for the relevance of a criminal court; the issue, therefore, is how to reconcile accountability with neutrality as African states continue to criticize the court for victimization and biased trial of its politicians.

One point worth mentioning is that the African Union has long been committed to combating impunity, as seen by many of its legal documents and arguments against the ICC; this suggests that the fight against human rights violations is not new to the region. Human rights violations are a universal concept, and politics has not been able to prevent them. As a result, it is plausible to assume that the African Union's response to the ICC is linked to the indictment of former Sudanese President Omar al-Bashir and other key African leaders. The court can do a better job in Africa by demonstrating its sincerity and balancing its allegations and indictments across the board, rather than focusing solely on Africa; this, of course, would help create a balance and give African leaders the necessary confidence that the ICC is not another neo-colonial tool to keep the region in any form of subjugation.

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To continue to function and sustain its relevance, the ICC requires the backing of African states. The ICC must not be afraid of the AU's critiques and must be willing to work with the union to find a solution to the problem. As mentioned earlier, one possible and workable solution is for the ICC to work in complementarity with African domestic courts in strengthening their local laws and building the legal capacity to try international crimes within various domestic jurisdictions.

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[xci] Maxine Rubin Maxine Rubin is a PhD candidate at the University of Cape Town's Department of Political Studies. Her research examines the relationship between African states and the International Criminal Court. She was awarded the Next Generati. "Points of Tension between African States and the International Criminal Court." *Kujenga Amani*, 27 Aug. 2019, kujenga-amani.ssrc.org/2019/08/27/points-of-tension-between-african-states-and-the-international-criminal-court/.
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[xciii] Ibid.
[xciv] The relationship between the states and ICC needs to improve for the sake of global peace and security and the court cannot avoid to ignore this fact, a destabilized Africa is a big problem for the international community and that explains why the world is feeling uneasy as this rancor brews without proactive solutions to address the issues raised by these African leaders.

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